NORTH CAROLINA REPORTS

VOLUME 372

SUPREME COURT OF NORTH CAROLINA

1 FEBRUARY 2019

16 AUGUST 2019

RALEIGH
2020

CITE THIS VOLUME

372 N.C.

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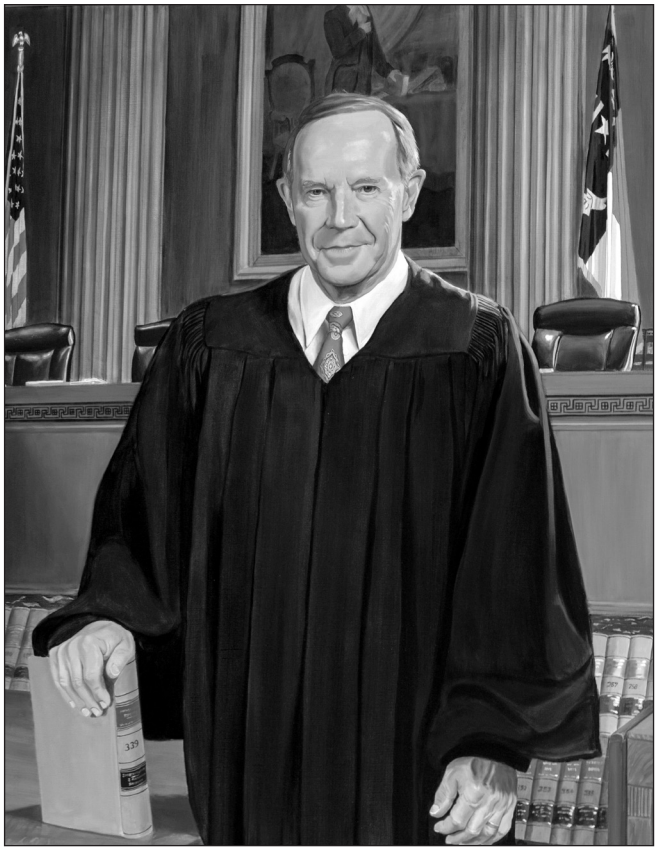
IN MEMORIAM



CHIEF JUSTICE I. BEVERLY LAKE, JR.

CHIEF JUSTICE

1 JANUARY 2001 – 31 JANUARY 2006

ASSOCIATE JUSTICE

5 FEBRUARY 1992 – 10 JANUARY 1993

3 JANUARY 1995 – 31 DECEMBER 2000

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

MARK D. MARTIN[1]
CHERI BEASLEY[2]

Associate Justices

PAUL MARTIN NEWBY
ROBIN E. HUDSON
SAMUEL J. ERVIN, IV
MICHAEL R. MORGAN
ANITA EARLS[3]
MARK DAVIS[4]

Former Chief Justices

RHODA B. BILLINGS
JAMES G. EXUM, JR.
BURLEY B. MITCHELL, JR.
HENRY E. FRYE
I. BEVERLY LAKE, JR.[5]
SARAH PARKER

Former Justices

ROBERT R. BROWNING
J. PHIL CARLTON
WILLIS P. WHICHARD
JAMES A. WYNN, JR.
FRANKLIN E. FREEMAN, JR.
G. K. BUTTERFIELD, JR.
ROBERT F. ORR
GEORGE L. WAINWRIGHT, JR.
EDWARD THOMAS BRADY
PATRICIA TIMMONS-GOODSON
ROBERT N. HUNTER, JR.
ROBERT H. EDMUNDS, JR.
BARBARA A. JACKSON[6]

Clerk

AMY L. FUNDERBURK

Librarian

THOMAS P. DAVIS

[1]Resigned 28 February 2019. [2]Sworn in 1 March 2019. [3]Sworn in 3 January 2019. [4]Sworn in 25 March 2019. [5]Died 12 September 2019.
[6]Term ended 31 December 2018.

ADMINISTRATIVE OFFICE OF THE COURTS

Director

MARION R. WARREN[7]

Interim Director

MCKINLEY WOOTEN[8]

Assistant Director

DAVID F. HOKE

OFFICE OF APPELLATE DIVISION REPORTER

HARRY JAMES HUTCHESON

JENNIFER C. PETERSON

ALYSSA M. CHEN

[7]Resigned 28 February 2019. [8]Appointed 28 February 2019.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
	J. Carlton Cole	Hertford
2	Wayland Sermons	Washington
3A	Marvin K. Blount, III	Greenville
	Jeffery B. Foster	Greenville
6A	Alma L. Hinton	Roanoke Rapids
6B	Cy A. Grant, Sr.	Ahoskie
7A	Quentin T. Sumner	Rocky Mount
7BC	Walter H. Godwin, Jr.	Tarboro
	Lamont Wiggins	Rocky Mount
9	John Dunlow	Oxford
	Cindy Sturges	Louisburg
14	Orlando F. Hudson, Jr.	Durham
	James E. Hardin, Jr.	Hillsborough
	Michael O'Foghludha	Durham
	Josephine Kerr Davis	Durham
	Second Division	
3B	John E. Nobles, Jr.	Morehead City
	Joshua W. Wiley	New Bern
	Paul M. Quinn	Atlantic Beach
4	Charles H. Henry	Jacksonville
	Henry L. Stevens	Warsaw
5	Phyllis M. Gorham	Wilmington
	R. Kent Harrell	Burgaw
	Frank Jones	Wilmington
8A	Imelda J. Pate	Kinston
8B	William W. Bland	Goldsboro
13A	Douglas B. Sasser	Whiteville
13B	Ola M. Lewis[1]	Southport
16B	Robert F. Floyd, Jr.	Fairmont
	James Gregory Bell	Lumberton
	Third Division	
10	Paul C. Ridgeway	Raleigh
	G. Bryan Collins, Jr.	Raleigh
	A. Graham Shirley	Raleigh
	Rebecca W. Holt	Raleigh
	Vinston M. Rozier	Raleigh
	Keith O. Gregory	Raleigh

DISTRICT	JUDGES	ADDRESS
11A	C. Winston Gilchrist	Lillington
11B	Thomas H. Lock	Smithfield
12	James F. Ammons, Jr.	Fayetteville
	Claire Hill	Fayetteville
	Gale M. Adams	Fayetteville
	Mary Ann Tally	Fayetteville
15A	D. Thomas Lambeth	Burlington
	Andy Hanford	Graham
16A	Tanya T. Wallace[2]	Rockingham
	Stephan R. Futrell[3]	Rockingham
	Dawn Layton[4]	Rockingham
19B	Vance Bradford Long	Asheboro
	James P. Hill	Asheboro
19D	James M. Webb	Southern Pines
	Michael A. Stone[5]	Laurinburg
20A	Kevin M. Bridges	Oakboro
20B	Christopher W. Bragg[6]	Monroe
	Jeffery K. Carpenter[7]	Wadesboro
	N. Hunt Gwyn[8]	Monroe
	Fourth Division	
15B	Carl R. Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill
17A	Edwin Graves Wilson, Jr.	Eden
	Stanley L. Allen	Sandy Ridge
17B	Angela B. Puckett	Westfield
18	John O. Craig, III	High Point
	R. Stuart Albright	Greensboro
	Susan Bray	Greensboro
	William Wood	Greensboro
	Lora C. Cubbage	Greensboro
19A	Martin B. McGee	Concord
19C	Anna Mills Wagoner	Salisbury
21	L. Todd Burke	Winston-Salem
	David L. Hall	Winston-Salem
	Eric C. Morgan	Kernersville
	Richard S. Gottlieb	Winston-Salem
22A	Joseph Crosswhite	Statesville
	Julia Lynn Gullett	Statesville
22B	Mark E. Klass	Lexington
	Lori Hamilton	Mocksville
23	Michael Duncan	Wilkesboro
	Fifth Division	
24	Gary Gavenus	Burnsville
	R. Gregory Horne	Boone
25A	Robert C. Ervin	Morganton
	Daniel A. Kuehnert	Morganton
25B	Nathaniel J. Poovey	Newton
	Gregory R. Hayes	Hickory

DISTRICT	JUDGES	ADDRESS
26	W. Robert Bell	Charlotte
	Eric L. Levinson[9]	Charlotte
	Hugh Lewis[10]	Charlotte
	Lisa C. Bell	Charlotte
	Carla Archie	Charlotte
	Karen Eady-Williams	Charlotte
	Donnie Hoover	Charlotte
	Louis A. Trosch	Charlotte
	George Bell	Charlotte
27A	Jesse B. Caldwell, III	Gastonia
	David Phillips	Gastonia
27B	Forrest Donald Bridges	Shelby
	W. Todd Pomeroy	Lincolnton
28	Alan Z. Thornburg	Asheville
	Marvin Pope	Asheville
29A	J. Thomas Davis	Forest City
29B	Peter B. Knight	Hendersonville
30A	William H. Coward	Highlands
30B	Bradley B. Letts	Hazelwood

SPECIAL JUDGES

Louis A. Bledsoe, III	Charlotte
Athena Brooks	Fletcher
J. Stanley Carmical	Lumberton
Adam M. Conrad[11]	Charlotte
Craig Croom	Raleigh
Beecher R. Gray[12]	Durham
Andrew Heath	Raleigh
Gregory P. McGuire	Raleigh
Michael L. Robinson	Winston-Salem
Casey M. Viser	Charlotte
Steven R. Warren[13]	Asheville

EMERGENCY JUDGES

Benjamin G. Alford	New Bern
Sharon T. Barrett	Asheville
Michael E. Beale	Rockingham
Christopher W. Bragg[14]	Monroe
Allen Cobb[15]	Wilmington
Yvonne M. Evans	Charlotte
Henry W. Hight, Jr.[16]	Henderson
Jack Hooks[17]	Whiteville
Jeffrey P. Hunt[18]	Brevard
Robert F. Johnson	Burlington
Paul L. Jones	Kinston
Timothy S. Kincaid	Newton
W. David Lee	Monroe

JUDGES	ADDRESS
Eric L. Levinson[19]	Charlotte
Hugh Lewis[20]	Charlotte
A. Moses Massey	Mount Airy
Jerry Cash Martin	Pilot Mountain
J. Douglas McCullough[21]	Raleigh
James W. Morgan	Shelby
Calvin Murphy	Charlotte
J. Richard Parker	Manteo
William R. Pittman	Raleigh
Mark Powell[22]	Hendersonville
Ronald E. Spivey	Winston-Salem
Kenneth C. Titus[23]	Durham
Joseph E. Turner	Greensboro
Tanya T. Wallace[24]	Rockingham

RETIRED/RECALLED JUDGES

W. Douglas Albright	Greensboro
Beverly T. Beal	Lenoir
Anthony M. Brannon	Durham
Frank R. Brown[25]	Tarboro
Stafford G. Bullock	Raleigh
H. William Constangy	Charlotte
C. Preston Cornelius	Mooresville
Lindsay R. Davis	Greensboro
Richard L. Doughton	Sparta
B. Craig Ellis	Laurinburg
Larry G. Ford	Salisbury
James L. Gale	Greensboro
Beecher R. Gray[26]	Durham
Zoro J. Guice, Jr.	Hendersonville
Thomas D. Haigwood	Greenville
Robert H. Hobgood	Louisburg
Clarence E. Horton, Jr.	Kannapolis
Robert D. Lewis[27]	Asheville
Howard E. Manning, Jr.	Raleigh
Julius A. Rousseau, Jr.[28]	Wilkesboro
Thomas W. Seay	Spencer
John W. Smith	Raleigh
W. Erwin Spainhour	Concord
James C. Spencer	Burlington
Ronald L. Stephens	Belville
Ralph A. Walker, Jr.	Raleigh
William Z. Wood, Jr.	Lewisville

[1]Died 29 December 2019. [2]Retired 31 July 2019. [3]Became Senior Resident Judge 1 August 2019. [4]Sworn in 16 August 2019. [5]Sworn in 1 January 2019. [6]Retired 31 July 2019. [7]Became Senior Resident Judge 1 August 2019. [8]Sworn in 29 August 2019. [9]Retired 31 December 2018. [10]Retired 31 December 2018. [11]Sworn in 23 December 2016. [12]Resigned 25 April 2019. [13]Sworn in 20 May 2019. [14]Sworn in 2 December 2019. [15]Sworn in 19 April 2017. [16]Sworn in 9 April 2019. [17]Sworn in 31 May 2013. [18]Sworn in 2 April 2019. [19]Sworn in 2 December 2019. [20]Sworn in 25 June 2019. [21]Sworn in 1 May 2017. [22]Sworn in 29 May 2019. [23]Resigned 11 June 2018. [24]Sworn in 4 November 2019. [25]Died 13 December 2019. [26]Sworn in 1 May 2019. [27]Died 4 January 2018. [28]Died 3 October 2019.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	Edgar L. Barnes (Chief)	Manteo
	Amber Davis	Wanchese
	Eula E. Reid	Elizabeth City
	Robert P. Trivette	Kitty Hawk
	Meader W. Harris, III	Edenton
2	Regina Rogers Parker (Chief)	Williamston
	Christopher B. McLendon	Williamston
	Darrell B. Cayton, Jr.	Washington
	Keith B. Mason	Washington
3A	G. Galen Braddy (Chief)	Grimesland
	Brian DeSoto	Greenville
	Lee F. Teague	Greenville
	Wendy S. Hazelton	Greenville
	Daniel H. Entzminger	Greenville
3B	L. Walter Mills (Chief)	New Bern
	Karen A. Alexander	New Bern
	Peter Mack, Jr.	New Bern
	W. David McFadyen, III	New Bern
	Clinton Rowe	New Bern
	Bob R. Cherry[1]	Beaufort
4	Paul A. Hardison[2]	Jacksonville
	William M. Cameron, III[3]	Richlands
	Sarah Cowen Seaton (Chief)[4]	Jacksonville
	Carol Jones Wilson	Kenansville
	James L. Moore	Jacksonville
	William B. Sutton	Clinton
	Michael C. Surles	Jacksonville
	Timothy W. Smith[5]	Kenansville
	Christopher J. Welch[6]	Jacksonville
5	J. H. Corpening, II (Chief)	Wilmington
	James H. Faison, III	Wilmington
	Sandra A. Ray	Wilmington
	Richard Russell Davis	Wilmington
	Melinda Haynie Crouch	Wrightsville Beach
	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson	Wilmington
	Lindsey L. McKee	Wilmington
6	Brenda G. Branch (Chief)	Roanoke Rapids
	W. Turner Stephenson, III	Roanoke Rapids
	Teresa R. Freeman	Roanoke Rapids
	Vershenia B. Moody	Windsor
7	William Charles Farris (Chief)	Wilson
	John M. Britt	Tarboro
	Pell C. Cooper	Rocky Mount
	John J. Covolo[7]	Rocky Mount
	Anthony W. Brown	Spring Hope
	Wayne S. Boyette	Tarboro
	Elizabeth Freshwater Smith	Wilson
	Joseph E. Brown, III[8]	Wilson

DISTRICT	JUDGES	ADDRESS
8	Elizabeth A. Heath (Chief)	Kinston
	Charles P. Gaylor, III	Goldsboro
	Ericka Y. James	Goldsboro
	Curtis Stackhouse	Goldsboro
	Annette W. Turik	Kinston
	Jonathon Sergeant	Kinston
9	John W. Davis (Chief)	Louisburg
	Amanda Stevenson	Oxford
	John H. Stultz, III	Roxboro
	Adam S. Keith	Louisburg
	Caroline S. Burnette	Henderson
	Benjamin S. Hunter	Louisburg
	Sarah K. Burnette	Oxford
10	Robert Blackwell Rader (Chief)	Raleigh
	Monica M. Bousman	Garner
	Debra Ann Smith Sasser	Raleigh
	Kris D. Bailey	Cary
	Lori G. Christian	Raleigh
	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Anna Elena Worley	Raleigh
	Ned Wilson Mangum	Raleigh
	Margaret Eagles	Raleigh
	Michael J. Denning	Raleigh
	Louis B. Meyer, III	Raleigh
	Daniel J. Nagle	Raleigh
	Vartan A. Davidian	Raleigh
	Jefferson G. Griffin	Raleigh
	Sam S. Hamadani	Raleigh
	Ashleigh P. Dunston	Raleigh
	J. Brian Ratledge	Raleigh
	David K. Baker, Sr.[9]	Raleigh
11	Jacquelyn L. Lee (Chief)	Smithfield
	Jimmy L. Love, Jr.	Sanford
	O Henry Willis, Jr.	Dunn
	Addie M. Harris-Rawls	Clayton
	Resson O. Faircloth, II	Erwin
	Robert W. Bryant, Jr.[10]	Selma
	Paul A. Holcombe	Smithfield
	Caron H. Stewart	Smithfield
	Mary H. Wells	Smithfield
	Joy A. Jones	Smithfield
	Jerry F. Wood	Selma
	Jason H. Coats	Smithfield
12	Robert J. Stiehl, III (Chief)	Fayetteville
	Edward A. Pone	Parkton
	David H. Hasty	Fayetteville
	Toni S. King	Fayetteville
	Lou Oliveria	Fayetteville
	Cheri Siler-Mack	Fayetteville
	Stephen C. Stokes	Fayetteville
	April M. Smith	Fayetteville

DISTRICT	JUDGES	ADDRESS
	Tiffany M. Whitfield	Fayetteville
	Caitlin Evans	Fayetteville
13	Scott Ussery (Chief)	Elizabethtown
	William F. Fairley	Southport
	Pauline Hankins	Tabor City
	Willie Fred Gore	Whiteville
	Jason C. Disbrow	Southport
	C. Ashley Gore	Whiteville
14	Patricia D. Evans (Chief)	Durham
	Brian C. Wilks	Durham
	Doretta Walker	Durham
	Shamieka L. Rhinehart	Durham
	Amanda L. Maris	Durham
	Clayton Jones	Durham
	Dave Hall	Durham
15A	Bradley Reid Allen, Sr. (Chief)	Burlington
	Kathryn W. Overby	Burlington
	Steven H. Messick	Burlington
	Larry D. Brown	Graham
15B	Joseph M. Buckner (Chief)	Chapel Hill
	Beverly A. Scarlett	Durham
	James T. Bryan	Hillsborough
	Samantha Cabe	Chapel Hill
	Sherri T. Murrell	Chapel Hill
16A	Amanda L. Wilson (Chief)	Rockingham
	Regina M. Joe	Raeford
	Christopher W. Rhue	Laurinburg
	Sophie G. Crawford	Wadesboro
	Chevonne R. Wallace	Rockingham
16B	Judith Milsap Daniels (Chief)	Lumberton
	William J. Moore	Maxton
	Dale G. Desse	Maxton
	Brooke L. Clark	Lumberton
	Angelica C. McIntyre	Lumberton
	Vanessa E. Burton[11]	Lumberton
17A	James A. Grogan (Chief)	Reidsville
	Chris Freeman	Wentworth
	Christine F. Strader	Reidsville
	Erica S. Brandon	Wentworth
17B	William F. Southern III (Chief)	King
	Spencer Gray Key, Jr.	Elkin
	Marion M. Boone	Dobson
	Gretchen H. Kirkman	Mt. Airy
	Thomas B. Langan	King
18	H. Thomas Jarrell, Jr.[12]	High Point
	Theresa H. Vincent (Chief)[13]	Summerfield
	Susan R. Burch	High Point
	Kimberly Michelle Fletcher	Greensboro
	Angela C. Foster	Greensboro
	Betty J. Brown	Greensboro
	Angela B. Fox	Greensboro
	Tabatha Holliday	Greensboro
	David Sherrill	Greensboro

DISTRICT	JUDGES	ADDRESS
	Jonathan G. Kreider	Greensboro
	Mark Cummings	Greensboro
	Tonia A. Cutchin	Greensboro
	William B. Davis	Greensboro
	Marcus Shields	Greensboro
	Larry L. Archie	Greensboro
	Brian K. Tomlin[14]	Greensboro
	Marc R. Tyrek[15]	High Point
19A	Christy E. Wilhelm (Chief)	Concord
	Brent Cloninger	Mount Pleasant
	Nathaniel E. Knust	Concord
	Juanita Boger-Allen	Concord
	Steve Grossman	Concord
19B	Lee W. Gavin (Chief)	Asheboro
	Scott C. Etheridge	Asheboro
	Robert M. Wilkins	Asheboro
	Sarah N. Lanier	Asheboro
	J. Brooke Schmidly	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
	Beth Spencer Dixon	Salisbury
	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
	James Randolph	Salisbury
19D	Donald W. Creed, Jr. (Chief)	Asheboro
	Regina M. Joe	Raeford
	Warren McSweeney	Carthage
	Tiffany Bartholomew	Raeford
20A	William Tucker (Chief)	Albemarle
	John R. Nance	Albemarle
	Thai Vang	Montgomery
20B	N. Hunt Gwyn[16]	Monroe
	William F. Helms, III (Chief)[17]	Matthews
	Joseph J. Williams	Monroe
	Stephen V. Higdon	Monroe
	Erin S. Hucks	Monroe
21	Lisa V. L. Menefee (Chief)	Winston-Salem
	Victoria Lane Roemer	Winston-Salem
	Laurie L. Hutchins	Winston-Salem
	Lawrence J. Fine	Clemmons
	Denise S. Hartsfield	Winston-Salem
	George Bedsworth	Winston-Salem
	Camille D. Banks-Payne	Winston-Salem
	David Sipprell	Winston-Salem
	Gordon A. Miller	Winston-Salem
	Theodore Kazakos	Winston-Salem
	Carrie F. Vickery	Winston-Salem
22A	L. Dale Graham (Chief)	Taylorsville
	Deborah Brown	Mooresville
	Edward L. Hendrick, IV	Taylorsville
	Christine Underwood	Olin
	Carole A. Hicks	Statesville
22B	Wayne L. Michael (Chief)	Lexington
	Jimmy L. Myers	Advance

DISTRICT	JUDGES	ADDRESS
	April C. Wood	Lexington
	Mary C. Paul	Thomasville
	Carlton Terry	Advance
	Carlos Jané	Lexington
23	David V. Byrd (Chief)	Wilkesboro
	Jeanie Reavis Houston	Yadkinville
	William Finley Brooks	Wilkesboro
	Robert Crumpton	Wilkesboro
24	Theodore Wright McEntire (Chief)	Spruce Pine
	Hal Gene Harrison	Spruce Pine
	Rebecca E. Eggers-Gryder	Boone
	Larry B. Leake	Marshall
25	Buford A. Cherry (Chief)	Hickory
	Sherrie Wilson Elliott	Newton
	Amy Sigmon Walker	Newton
	Robert A. Mullinax, Jr.	Newton
	Mark L. Killian	Hickory
	Clifton H. Smith	Hickory
	David W. Aycock	Hickory
	Wesley W. Barkley	Newton
	Richard S. Holloway	Lenoir
26	Regan A. Miller (Chief)	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Christy Townley Mann	Charlotte
	Ronald C. Chapman[18]	Charlotte
	Paige B. McThenia	Charlotte
	Kimberly Y. Best-Staton	Charlotte
	Elizabeth Thornton Trosch	Charlotte
	Jena P. Culler	Charlotte
	Tyyawdi M. Hands	Charlotte
	Sean Smith	Charlotte
	Matt Osman	Charlotte
	Gary Henderson	Charlotte
	David Strickland	Charlotte
	Aretha V. Blake	Charlotte
	Tracy H. Hewett	Charlotte
	Faith Fickling	Charlotte
	Roy H. Wiggins	Charlotte
	Karen D. McCallum	Charlotte
	Michael J. Standing	Charlotte
	Paulina N. Havelka	Charlotte
	Jonathon R. Marvel[19]	Charlotte
27A	John K. Greenlee (Chief)	Gastonia
	Angela G. Hoyle	Belmont
	James A. Jackson	Gastonia
	Michael K. Lands	Gastonia
	Richard Abernethy	Gastonia
	Pennie M. Thrower	Gastonia
	Craig R. Collins	Gastonia
27B	Larry James Wilson (Chief)	Shelby
	K. Dean Black	Denver
	Meredith A. Shuford	Lincolnton
	Jeanette R. Reeves	Shelby

DISTRICT	JUDGES	ADDRESS
	Justin K. Brackett	Shelby
	Micah J. Sanderson	Denver
28	J. Calvin Hill (Chief)	Asheville
	Patricia Kaufmann Young	Asheville
	Julie M. Kepple	Asheville
	Andrea Dray	Asheville
	Ward D. Scott	Asheville
	Edwin D. Clontz	Candler
	Susan Marie Dotson-Smith	Asheville
29A	C. Randy Pool[20]	Marion
	Robert K. Martelle (Chief)[21]	Rutherfordton
	Laura Anne Powell	Rutherfordton
	Ellen Shelley	Marion
29B	Thomas M. Brittain, Jr. (Chief)	Mills River
	Emily Cowan	Hendersonville
	Charles W. McKeller	Brevard
	Kimberly Gsperson-Justice[22]	Hendersonville
30	Richard K. Walker (Chief)	Hayesville
	Monica Hayes Leslie	Waynesville
	Donna Forga	Clyde
	Roy Wijewickrama	Waynesville
	Kristina L. Earwood	Waynesville
	Tessa S. Sellers	Murphy

EMERGENCY JUDGES

Sherry Fowler Alloway	Greensboro
C. Christopher Bean	Edenton
Rebecca W. Blackmore	Wilmington
Joseph A. Blick	Greenville
Robert M. Brady	Lenoir
David B. Brantley[23]	Goldsboro
Jacqueline L. Brewer	Apex
William M. Cameron[24]	Richlands
John B. Carter, Jr.	Lumberton
H. Thomas Church[25]	Statesville
Thomas G. Foster, Jr.	Pleasant Green
David K. Fox[26]	Hendersonville
Nancy E. Gordon	Durham
William G. Hamby[27]	Kannapolis
Joyce A. Hamilton	Raleigh
P. Gwynnett Hilburn	Greenville
James T. Hill[28]	Durham
Richlyn D. Holt	Waynesville
Shelly S. Holt	Wilmington
F. Warren Hughes	Burnsville
A. Elizabeth Keever	Fayetteville
David A. Leech	Greenville
Harold Paul McCoy, Jr.	Halifax
Lawrence McSwain	Greensboro
Charles M. Neaves	Elkin

JUDGES	ADDRESS
Thomas R.J. Newbern	Aulander
Ali B. Paksoy[29]	Shelby
Dennis J. Redwing	Gastonia
Anne B. Salisbury	Cary
Joseph E. Setzer, Jr.	Franklinton
William G. Stewart	Wilson
Robert D. Stubbs	Clayton
Jerry Waddell	Bryson City
Fredrick B. Wilkins, Jr.	Reidsville

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Sarah P. Bailey	Rocky Mount
J. Henry Banks[30]	Henderson
Jacqueline L. Brewer	Apex
Samuel Cathey	Charlotte
Ronald L. Chapman[31]	Charlotte
Albert A. Corbett, Jr.	Smithfield
Chester C. Davis[32]	Winston-Salem
Linda Falls[33]	Durham
Daniel Fredrick Finch	Oxford
Louis F. Foy, Jr.	Pollocksville
James R. Fullwood	Raleigh
Mark E. Galloway[34]	Roxboro
Samuel G. Grimes	Washington
Jane V. Harper	Charlotte
Joseph J. Harper[35]	Tarboro
John H. Horne, Jr.	Laurinburg
William K. Hunter	High Point
Jerry A. Jolly	Tabor City
William C. Lawton	Raleigh
William L. Long	Chapel Hill
James E. Martin	Greenville
Fritz Y. Mercer, Jr.	Summerfield
J. Bruce Morton[36]	Greensboro
Nancy C. Phillips	Elizabethtown
Jan H. Samet	Greensboro
J. Larry Senter	Raleigh
Margaret L. Sharpe	Greensboro
R. Dale Stubbs	Clayton
Leonard W. Thagard	Clinton
Charles M. Vincent	Greenville
J. Kent Washburn[37]	Burlington

[1]Sworn in 12 April 2019. [2]Retired 30 November 2019. [3]Retired 30 June 2019. [4]Became Chief District Court Judge 1 December 2019. [5]Sworn in 30 May 2019. [6]Sworn in 31 August 2019. [7]Died 28 April 2019. [8]Sworn in 28 August 2019. [9]Sworn in 7 June 2019. [10]Retired 29 March 2019. [11]Sworn in 30 April 2019. [12]Died 3 August 2019. [13]Became Chief District Court Judge 13 August 2019. [14]Sworn in 29 March 2019. [15]Sworn in 27 December 2019. [16]Resigned 28 August 2019. [17]Became Chief District Court Judge 29 August 2019. [18]Retired 30 June 2019. [19]Sworn in 10 October 2019. [20]Retired 8 November 2019. [21]Became Chief District Court Judge 9 November 2019. [22]Sworn in 5 May 2019. [23]Sworn in 11 March 2019. [24]Sworn in 29 October 2019. [25]Sworn in 28 May 2019. [26]Resigned 8 May 2018. [27]Sworn in 6 November 2019 and resigned 19 December 2019. [28]Sworn in 21 June 2019. [29]Sworn in 13 March 2019. [30]Became Retired/Recalled Emergency Judge 1 February 2017. [31]Became Retired/Recalled Emergency Judge 1 July 2019. [32]Resigned 20 December 2017. [33]Became Retired/Recalled Emergency Judge 1 July 2015. [34]Became Retired/Recalled Emergency Judge 1 October 2019. [35]Resigned 11 December 2019. [36]Resigned 11 May 2017. [37]Resigned 18 November 2016.

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20	Matt Scott	Lumberton
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26	Kevin P. Tully	Charlotte
27A	Stuart C. Higdon	Gastonia
28	M. LeAnn Melton	Asheville
29A	Laura A. Powell	Rutherfordton
29B	Beth W. Stang	Brevard

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

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

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Avery Ray Barber..... Raleigh
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Joonu-Noel Andrews Coste ..... Garner
Tyler Jake Crawford ..... Lynchburg, VA
Ryan James Crofts ..... Simpsonville, SC
Cameron Ashley Crump ..... Charlotte
Trisha Melinda Crutchfield ..... Drexel
Shelby Charlene Culver ..... Alpharetta, GA
Lindsay Frazier Cutler ..... Candler
Dan Patrick Cypert Summers ..... Chapel Hill

Khari Liston Cyrus ..... Burlington
Evan Randall Dancy ..... Durham
Kaleigh Rhea Darty ..... Statesville
Gregory Stanford Davis ..... Wake Forest
Mitchell Gene Davis ..... Charlotte
Elliott James Deaderick ..... Charlotte
Samuel Martin Dearstyne ..... Charlotte
Katherine Ann Delaura ..... Wilmington
Joseph Christopher Demartin ..... Raleigh
Noelle Kathleen Demeny ..... Durham
Chelsea Larie Demoss ..... Durham
Michelle Christine Dewkett ..... Raleigh
Sheri Marie Dickson ..... Apex
Ashley Victoria Dimuzio ..... Winston-Salem
Derek James Dittmar ..... Raleigh
Aubry Alfonso Dix ..... Boone
Emily Caroline Dixon ..... Durham
Jeffrey Leon Dobson ..... Fuquay-Varina
Anne Lippitt Doherty ..... Charlotte
William Joseph Dolinger ..... Charlotte
Alexia Dominguez ..... Holly Springs
Casey Douglas Donahoe ..... Raleigh
Brittany Mel Dorman ..... Winston-Salem
Kelsey Nicole Dorton ..... Dayton, OH
Joseph Macdonald Dougherty II ..... Winston-Salem
Jasmine Nicole Downing ..... Tarboro
John Blake Drewry ..... Courtland, VA
Katelyn Louise Dryden ..... Liberty
Addison Walker Dufour ..... Charlotte
Hayden Alexander Duncan ..... Raleigh
Chandra Joy Duncan ..... Charlotte
Christy Cochran Dunn ..... Raleigh
Natasha Marie Durkee ..... Miami, FL
Graeme Forrest Earle ..... Davidson
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Lance Harlow Edmonds ..... Charlotte
Pamela Faith Entrikin ..... York, SC
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Anne Marie Fristoe ..... Raleigh
Kaitlyn Elizabeth Fudge ..... Oxford
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Skylar Jaclyn Gallagher ..... Raleigh
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Matille Clark Gibbons ..... Charlotte
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Geoffrey Alexander Frederick Gilbert ..... Delray Beach, FL
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Jerrod Thomas Godwin ..... Raleigh
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Jonathan Samuel Goldstein ..... Santa Monica, CA
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Samuel Roberson Gray ..... Wendell
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Adam Forester Griffin ..... Arlington, VA
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Lisa Maria Noda Grigley ..... Greensboro
Mathew Ryan Groseclose ..... Chapel Hill
Jaron Tyler Gurney ..... Trinity
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Karli Brianne Guyther ..... Birmingham, AL
Alexandria B. Gwynn ..... Durham
Joseph Patrick Hackney ..... Durham
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Adam Christopher Hartmann ..... Matthews
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Caden William Hayes ..... Mooresville
Colin Gregory Hayton ..... Winston-Salem
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Michael John Hirthler ..... Raleigh
Ellys Simone Holding ..... Durham
Abigail Mechell Holloway ..... Durham
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Janon Maria Holmes - Washington ..... Durham
Nathaniel William Honaker ..... Raleigh
Corri Ann Hopkins ..... Winston-Salem
Whitney Leigh Hosey ..... Garner
Andrew Stephen House ..... Durham
Erich Milton Howard ..... Raleigh
Tia Janeé Hudgins ..... Rocky Mount
Melanie Anne Huffines ..... Garner
Kyle Andrew Huggins ..... Charlotte
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South Alexander Moore ..... Memphis, TN
William Austin Moore ..... Charlotte
Iris Daisy Beatris Morales ..... Graham
Meghan Katherine Moran ..... Durham
Shannon Luke Morgan ..... Hartford, CT
Michael Glenn Morrison II ..... Jacksonville
Jana Morrison ..... Charlotte
Keir Dullea Morton Manley ..... Raleigh
Laura Lynn Morway ..... Youngstown, OH
John William Moss ..... Cary
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Joseph Raber Mouer ..... Asheville
Jaquelinne Murillo Figueroa ..... Raleigh
Geoffrey William Murphy ..... Greensboro
Rashawnda Trenise Murphy ..... Durham
Shawn Alan Namet ..... Winston-Salem
Alexis Taylor Narducci ..... Charlotte
Joseph Austin Natt ..... Charlotte
Isaac Killian Neill ..... Charlotte
Erica Capron Nesmith ..... Durham
Jill Alexandria Neville ..... Roanoke Rapids

Josey Lee-Ann Newman ..... New Bern
James Miller Nichols ..... Cary
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Olabisi Ayodele Ofunniyin ..... Charlotte
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Mary Laura Penney ..... Raleigh
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Tara Myrl Polston ..... Raleigh
Joi Sanyika Ponder ..... Durham
Samantha Lynn Pope ..... Clinton
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Jackson Connelly Pridgen ..... Charlotte
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Phillip John Pullen ..... Chesapeake, VA
Alexandra Nicole Puszczynski ..... Cary
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Walter Thomas Ramsey Jr. ..... Hillsborough
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Cameron Victoria Reed ..... Durham
Mary Katherine Reed ..... Charlotte, MO
Evan Robert Reid ..... Charlotte
William Barton Reingold Jr. ..... Winston-Salem
Stephanie Renzelman ..... Hudson
Rosa Maria Reyes Moreno ..... Raleigh
Braxton Humberto Reyna ..... Liberty

Michael Zachary Reyna ..... Charlotte
Jake Gordon Rifkin ..... Charlotte
John Brendan Riordan ..... Charlotte
Gary Oneil Ripley ..... Winston-Salem
Michael Thomas Roberson ..... Durham
Carlin Georgia Robertson ..... Raleigh
Luis Alberto Giancarlo Rodriguez Pozos ..... Pineville
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Sarah Mokhtar Rozek ..... Greensboro
Molly Anita Rubin ..... Pennington, NJ
Courtney Nelson Rudolph ..... Virginia Beach, VA
Kayla Ives Russell ..... Roanoke, VA
Alexander George Ruzzier ..... Chapel Hill
John Pressly Wilson Safrit ..... Chapel Hill
Candelario De Jesus Saldana Briseno ..... Charlotte
Reghan Deans Schmidt ..... Wilson
Monica Jaclyn Schuring ..... Columbia, SC
Mitchell Daniel Schwab ..... Raleigh
Patrick Joseph Scott ..... Raleigh
Brooke Nichole Scott ..... Apex
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April Seggerman ..... Weaverville
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Jonathan Sami Shbeeb ..... Charlotte
Xiaolu Sheng ..... Apex
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Glayverth Garcia Silva ..... Richmond, VA
Thalita Borba Silva ..... Richmond, VA
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Jane Alexandra Small ..... Raleigh
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Andrew Louis Smith ..... Durham
Ernest Leon Smith ..... Durham
Zachary Weston Smith ..... Raleigh
Ayeshinaye Itihyma Holt Smith ..... Wendell
Enisha Samona Smith ..... Charlotte
Joanna Marie Smith ..... Morrisville
Emily Elizabeth Sorge ..... Greensboro

Matthew David Sparks ..... Raleigh
Tyler Hood Speers ..... Durham
Garrett Anderson Steadman ..... Pittsboro
Eric Greenlee Steber ..... Cary
Jenna Marie Steiner ..... Winston-Salem
Chase Hamilton Stevens ..... Edenton
Emily Anne Stewart ..... Charlotte
Joshua Mcphail Stroud ..... Durham
Elle Marie Stuart ..... Washington, DC
Frances Jean Sullivan ..... Kernersville
Bryan Michael Sumner ..... Raleigh
Taylor Jade Sweet ..... Mooresville
Jillian Marie Swett ..... Charlotte
Heather Nicole Tabor ..... Durham
Edward Anthony Tarantino ..... Mooresville
Miranda Erin Tarlton ..... Raleigh
Steven Dwight Taylor ..... Goldsboro
Kristin Estelle Taylor ..... Durham
Tatiana Marie Terry ..... Raleigh
Luke Graham Thomas ..... Belmont
Grace Heath Thomas ..... Vero Beach, FL
Morgan Renee Thomas ..... Louisburg
Sarah Caroline Thomas ..... Wilson
Florence Cheryl Nwaa Thompson ..... Purcellville, VA
Holly Nicole Thompson ..... Durham
Emma Kimbrough Tisdale ..... Norfolk, VA
Michael Steven Todd ..... Charlotte
Tyson F. Toles ..... Apex
Lauren Marie Ghianni Toole ..... Raleigh
Samantha Erin Tracy ..... Saint Simons Island, GA
Robert Wesley Thayer Tucci ..... Raleigh
Edwin Lake Turnage ..... Greenville, SC
Joseph Brent Turner ..... Chapel Hill
Anna Claire Turpin ..... Raleigh
Ashley Urquijo ..... Cary
Jaqueline Elizabeth Vaughan-Jones ..... Mocksville
Juliana Vergara Duque ..... Winston-Salem
Wesleigh Caroline Vick ..... Chapel Hill
Dmitry Boris Vinogradsky ..... Kernersville
Aaron Douglas Vodicka ..... Apex
Gregory Michael Volk ..... Charlotte
Nicholas James Voss ..... Palmyra, NY
Alexa Marie Voss ..... Charlotte
Thomas Scott Walker ..... Winston-Salem
William Otis Walker IV ..... Greensboro
Hannah Marie Wallace ..... Fuquay-Varina
Robert Andrew Walsh ..... Charlotte
Daniel Ward ..... Chapel Hill
Sarah Rebekah Warren ..... Raleigh
Angela Marie Watkins ..... Monroe

Elizabeth Joan Watkins ..... Charlotte
Briana Bonnie Way ..... Raleigh
Warren Ross Weatherspoon ..... Cary
Brian Nicholas Webb ..... Mooresville
Taylor Brooke Webb ..... Pinetops
Elizabeth Anne Weisner ..... Charlotte
Alexis Taylor Weiss ..... Charlotte
Matthew Michael Welch ..... Denver
Justine Parry Welch ..... Denver
Katherine Elizabeth Wenner ..... Lewis Center, OH
Paul William West ..... Holly Springs
Sean Robert Whelehan ..... Charlotte
Everette Garrison White ..... Concord
Rosalind Gale White ..... Fayetteville
Graham Foster Whittington ..... Durham
Alstongabrielle Xaneta Wilkins ..... Newport News, VA
Caitlin Irene Willen ..... Charlotte
Tyler Wade Williams ..... Wilmington
Kelly Jo Williamson ..... Apex
Tyler Alexander Willis ..... Raleigh
Kimberly Marie Willis ..... Greenville
Tallah Lorain Wilson ..... Raleigh
Nevin Wisnoski ..... Asheville
Rebecca Rae Wolfe ..... Dallas, TX
Katarina Wong ..... Durham
Edward Benton Woodall ..... Four Oaks
Brian Austin Wooten ..... Winston-Salem
Karlee Nicole Wroblewski ..... Charlotte
Chu En Wu ..... Pinehurst
Hannah Brooke Wyatt ..... Thomasville
Thomas Joseph Zamadics ..... Raleigh
Jonathan Michael Zator ..... Chapel Hill
Leighton Zhong ..... Orlando, FL
Ariella Michelle Zulman ..... Charlotte

The following persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners in 2019 and have been issued a certificate by the Board.

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Stephen K. Allinger Jr. ..... Applied from the State of New York
Scott Noel Alperin ..... Applied from the State of Virginia
Richard Alan Alsobrook ..... Applied from the State of Tennessee
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Megan Annitto ..... Applied from the State of New Jersey
Christopher Atkinson ..... Applied from the State of Georgia
Kimberly Fitzgerald Austin ..... Applied from the State of Virginia
David Alexander Avila ..... Applied from the State of New York
Kelly Barnard-Carroll ..... Applied from the State of New York

David George Beraka ..... Applied from the District of Columbia
Kathryn Warren Bina ..... Applied from the State of Georgia
Jerry Douglas Blakemore ..... Applied from the State of Illinois
John Peyton McGuire Boyd Jr. ..... Applied from the State of Virginia
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Tricia Maria Brauer ..... Applied from the State of Illinois
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Sean Richard Collier ..... Applied from the State of New Jersey
Adriana Contartese ..... Applied from the State of Massachusetts
Kristina Noelle Cook ..... Applied from the State of Oregon
Isaac Andres Cordero ..... Applied from the State of Texas
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Jeffrey DiChiara ..... Applied from the State of New Jersey
Travis Fredrick Ellis ..... Applied from the State of Illinois
Jill April Evert ..... Applied from the State of Georgia
Dana Mark Facemyer ..... Applied from the State of Utah
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Bruce Patrick Heffner ..... Applied from the State of Texas
Geoffrey Hemphill ..... Applied from the State of Virginia
Erika Lynn Henderson ..... Applied from the District of Columbia

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DylanBenjamin Hix ..... Applied from the District of Columbia
Diana Ni Hunter ..... Applied from the State of New York
Jon Parker Ihrie .....Applied from the State of Michigan
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Melissa Marie Jaskolka ..... Applied from the State of Ohio
Andrew Kennon Jennings..... Applied from the State of New York
Jack Edward Jirak .....Applied from the State of Georgia
Andrew Kaul Jorgensen ..... Applied from the State of Pennsylvania
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Stephen G. Kabalka ..... Applied from the State of Tennessee
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Roshna Balasubramanian Keen .....Applied from the State of Illinois
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Benjamin Klein..... Applied from the State of New York
David James Knoespel ..... Applied from the State of Virginia
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Kelly Lynn Kopyt..... Applied from the State of Massachusetts
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Steven Matthew LaSota .....Applied from the State of Georgia
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Elizabeth Caldwell Lewis..... Applied from the State of Colorado
Brian James Livedalen ..... Applied from the State of Virginia
Kevin Lee Locklin ..... Applied from the State of Virginia
Joseph A. Mahoney..... Applied from the State of Missouri
Michael Patrick Maloney ..... Applied from the State of New York
John Marriott Markwalter .....Applied from the State of Georgia
Lauren Martin..... Applied from the State of New York
Gary Martoccio .....Applied from the State of Illinois
Parthiban Arul Nazerane Mathavan ..... Applied from the State of Connecticut
Will Jared Matthews .....Applied from the State of Kentucky
Charles Edward McDaniel II ..... Applied from the State of Tennessee
Jennifer Lynn Meyer..... Applied from the State of Colorado
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John Jackson Miller..... Applied from the State of Missouri
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Jimmy Lawrence Newkirk.....Applied from the State of Georgia
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The following persons were admitted to the North Carolina Bar by transfer by the Board of Law Examiners in 2019 and have been issued a certificate by the Board.

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Samantha Elenor Albrecht ..... Applied from the State of New York
Ryan Patrick Alderson ..... Applied from the State of South Carolina
Mohammedali Akram Alfaori ..... Applied from the State of New York
Meagan Lynn Allen ..... Applied from the State of South Carolina
Christopher Shane Alverson ..... Applied from the State of South Carolina
Sarah Maryam Al-Zoubi ..... Applied from the State of New York

George Edgar Anderson..... Applied from the State of South Carolina
Christopher George Aranguren..... Applied from the State of New York
Yeama Millicent Arrington..... Applied from the State of New York
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Anika Ifetayo Bailey..... Applied from the District of Columbia
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Hamilton Bohanon Barber..... Applied from the State of South Carolina
Giles Detwiler Beal IV..... Applied from the State of New York
Demi Lorant Bostian..... Applied from the State of New York
John Patrick Bradley..... Applied from the State of South Carolina
Tylar Emily Brannon..... Applied from the District of Columbia
Andrew Carl Brooks..... Applied from the State of Virginia
Brittany Alexandra Bryan..... Applied from the State of Alabama
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Jessica Eunkyo Chong..... Applied from the District of Columbia
Kalie Lauren Chumley..... Applied from the District of Columbia
Emanuel Larry Leggett Clark..... Applied from the State of South Carolina
Ethan Benjamin Clark..... Applied from the State of South Carolina
Mikail Orestes Clark..... Applied from the State of West Virginia
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Krystal Yvonne Drew..... Applied from the District of Columbia
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Kyle Andrew England..... Applied from the State of Colorado
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Carla Marie Fassbender..... Applied from the State of Minnesota
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Robert Bunting Fredeking..... Applied from the State of New York
Chad Michael Friesen..... Applied from the State of South Carolina
Charles Wheeler Frost..... Applied from the State of Missouri
Stephen Donald Fuller..... Applied from the State of New Hampshire
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Keith LaShawn Garrett Jr..... Applied from the State of Missouri

James Eric Fraser Giebink ..... Applied from the State of South Carolina
Charly Shane Gilfoil ..... Applied from the District of Columbia
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Shiying Zhu.....Applied from the State of Washington
Patrick Jordan Zichterman..... Applied from the State of Colorado

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF J.A.M.

No. 7PA17-2

Filed 1 February 2019

Child Abuse, Dependency, and Neglect—previous cases of neglect —present risk to child

The Court of Appeals correctly determined that clear and convincing evidence and the trial court's findings of fact supported its conclusion that infant juvenile J.A.M. was neglected pursuant to N.C.G.S. § 7B-101(15). While a previous closed case involving neglect of other children cannot, standing alone, support an adjudication of neglect, the trial court here found other factors indicating a present risk to J.A.M. The Supreme Court also noted the trial court's statement that respondent-mother's "testimony was telling today," emphasizing the trial court's unique position in observing witness testimony first-hand and make credibility determinations.

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. ___, 816 S.E.2d 901 (2018), on remand from this Court, 370 N.C. 464, 809 S.E.2d 579 (2018), affirming an order entered on 30 March 2016 by Judge Louis A. Trosch in District Court, Mecklenburg County. Heard in the Supreme Court on 9 January 2019.

Matthew D. Wunsche, GAL Appellate Counsel, and Caroline P. Mackie for appellee Guardian ad Litem; and Marc S. Gentile,

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

Richard Croutharmel for respondent-appellant mother.

HUDSON, Justice.

The case comes to us based on a dissenting opinion in the Court of Appeals. The sole issue before us is whether the Court of Appeals majority correctly determined that the clear and convincing evidence and the trial court's findings of fact supported its conclusion of law that the juvenile J.A.M. was neglected. Because we conclude that the trial court made sufficient findings of fact based on evidence of conditions at the relevant time to support its conclusion of neglect, we affirm.

Background

J.A.M. was born in January 2016. In late February 2016, Mecklenburg County Department of Social Services, Youth and Family Services (YFS) received a child protective services report making the department aware of J.A.M.'s birth, and YFS immediately opened an investigation. On 29 February, YFS filed a juvenile petition alleging that J.A.M. was not safe in the home because of the histories of both parents.[1]

On 30 March 2016, a hearing regarding J.A.M. took place before Mecklenburg County District Court Judge Louis A. Trosch, who entered a consolidated adjudicatory and dispositional order in J.A.M.'s case based on testimony and exhibits admitted as evidence to the court. The court adjudicated J.A.M. neglected and, in the dispositional phase of the proceeding, ordered reunification efforts with J.A.M.'s mother (respondent-mother) to cease and established that the primary plan of care for J.A.M. would be reunification with her father (respondent-father).[2]

Respondent-mother has a significant history of involvement with YFS extending back to 2007 relating to children born prior to J.A.M.[3] Significant evidence relating to YFS' previous interactions with respondent-mother involving her older children was entered into the record in the adjudication phase of J.A.M.'s case. The evidence before the trial

1. Respondent-father is not a party to this appeal.

2. Only the neglect adjudication—and not the dispositional order—is before us.

3. J.A.M.'s father is not the father of any of respondent-mother's older children.

court tended to show that respondent-mother has a long history of violent relationships with the fathers of her previous six children, during which her children "not only witnessed domestic violence, but were caught in the middle of physical altercations." Furthermore, during this period, she repeatedly declined services from YFS and "continued to deny, minimize and avoid talking about incidences of violence." All of this resulted in her three oldest children first entering the custody of YFS on 24 February 2010.

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

In response to respondent-mother's failure to protect E.G. Jr., as well as her other children, her parental rights to the six children she had at the time were terminated in an order filed on 21 April 2014 by Judge Trosch. The 2014 termination order was based largely on the court's finding that she had "not taken any steps to change the pattern of domestic violence and lack of stability for the children since 2007."

At the 30 March 2016 adjudication hearing for J.A.M., the court received into evidence several exhibits that included the 21 April 2014 order terminating respondent-mother's parental rights to her six older children, a 27 February 2013 adjudication and disposition order regarding five of those children, and a certified copy of the criminal record of

respondent-father showing that he had been convicted twice in 2013 for assault on a female.[4]

In addition to receiving these exhibits into the record, the court also heard testimony from several witnesses. Stephanie West, social work supervisor at Mecklenburg County Child Protective Services, testified that when the department received the report regarding J.A.M., a social worker was assigned to go to the home and perform a safety assessment in light of both parents' prior YFS involvement. Both parents declined to sign the safety assessment. A department representative returned the following day to talk with respondent-mother about setting up a Child Family Team meeting, but she "adamantly stated she was not interested." Ms. West further discussed respondent-mother's viewpoint at the second visit.

> Q. And when she said she was not interested, not interested in what?
>
> A. More services. She was not going to engage in any services. She reported that she had gone through services, she didn't need any services, there were [sic] no current domestic violence going on, and she was -- and that was pretty-much [sic] all she had to say.

Respondent-mother also testified at the hearing and was asked questions on two subjects pertinent to this appeal: (1) her familiarity with respondent-father's domestic violence history, and (2) her understanding of what had led to the termination of her parental rights to her older children.

Respondent-mother stated that she knew the "warning signs" of domestic violence to look for in a relationship. However, she subsequently testified that she was aware that respondent-father had been arrested for assault on a female in a case involving his sister but acknowledged that she had never asked him whether he did, in fact, commit the assault.

Similarly, when asked what she learned from having her parental rights terminated to her six older children, respondent-mother generally

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4. The court also received into evidence an 8 October 2012 order adjudicating neglected and abused another daughter of respondent-father that he had with a different woman. That order states that respondent-father's older daughter, then aged nine months, received a black eye while under her parents' care, "most likely during a DV incident" between them.

admitted to "bad decisions" and "bad choices" in the past, noting that she had since "learned to put my children first, before men."

Nonetheless, respondent-mother subsequently testified further about her prior YFS case:

> Q. Why were your rights terminated?
>
> A. Because when my child came back into -- my kids came back into custody, due to my child being physical injury by his father, [E.G. Sr]. That's --
>
> Q. So your understanding is that your rights to your six other children was -- were terminated because of one child being physically abused?
>
> A. Oh, yes, ma'am. . . . because I had completed all my services and did everything that was asked of me to do, up until my child got hurt by his father.

Regarding her role in that abuse, respondent-mother testified:

> Q. And what role do you think you played in your child getting hurt by that father?
>
> A I was upstairs sleeping.
>
> Q. Okay.
>
> A. I didn't have -- I didn't have a role into what my child being hurt. I didn't play a role in that.
>
> Q. And so basically, do you feel that your rights to the six other children, your rights were unjustly terminated?
>
> A. Yes, ma'am. I do feel that way.

After reviewing the exhibits and hearing the testimony, the trial court concluded that J.A.M. was neglected because:

> Juv[enile] resides in an environment in which both parents have a [history] of domestic violence/assault and each parent had a child enter [YFS] custody that was deemed abused while in the care of each parent. All of juveniles' siblings were adjudicated neglected. *No evidence the parents have remedied the injurious environment they created for their other children.*

(Emphasis added.) In support of its conclusion, the trial court made the following additional findings of fact:

> Clear and convincing evidence juv[enile] is neglected. [Respondent-mother]'s testimony was telling today. Additionally, parents failed to make any substantive progress in their prior cases which resulted in [termination of parental rights] for [respondent-mother] and [Father]'s child was placed in the custody of that child's mother. [Department] attempted to engage parents when it received a referral and both parents declined to work [with Department] and reported not needing any services. [Respondent-mother] testified. [Maternal grandmother] and [Social Work Supervisor] West all testified. Previously [respondent-mother]'s children were returned to her care and ended up back in [YFS'] custody due to the abuse of one of the juveniles and it appeared [respondent-mother] was not demonstrating skills learned [from] service providers. [Father] did not dispute allegations in the petition. [Respondent-mother] has a [history] of dating violent men and [Father] in this case has been found guilty at least twice for assault on a female. [Respondent-mother] acknowledged being aware [Father] had been charged [with] assaulting his sister but [respondent-mother] said she never asked [Father] if he assaulted his sister despite testifying about the "red flags" she learned in DV servs. [Respondent-mother] testified to having a child [with] the man who abused one of her kids. [Department] received a total of 12 referrals regarding the [respondent-mother] and at least 11 referrals pertained to domestic violence. [Court] took into consideration all the exhibits (1-4) submitted by YFS when making its decision. To date, [respondent-mother] failed to acknowledge her role in the [juveniles'] entering custody and her rights subsequently being terminated.

Respondent-mother appealed Judge Trosch's 30 March 2016 order adjudicating J.A.M. a neglected juvenile to the Court of Appeals, which issued a unanimous decision on 20 December 2016 reversing the trial court's neglect adjudication. *See In re J.A.M.*, ___ N.C. App. ___, 795 S.E.2d 262 (2016). The Court of Appeals held that

> [d]ue to the intervening years between the prior cases and the facts before us, we conclude the parents' past histories, coupled only with Respondent-mother's failure to inquire about an alleged incident of prior domestic

> violence by J.A.M.'s father, do not support a legal conclusion that J.A.M. is a neglected juvenile. No evidence supports the trial court's findings of fact. The findings do not support its conclusion that J.A.M. is a neglected juvenile because she lives in an environment injurious to her welfare.

Id. at ___, 795 S.E.2d at 266 (citation omitted). YFS filed a petition for discretionary review with this Court, which we allowed on 8 June 2017. *See In re J.A.M.*, 369 N.C. 750, 799 S.E.2d 617 (2017). We heard argument on the case on 9 January 2018 and filed a per curiam opinion on 2 March 2018, *In re J.A.M.*, 370 N.C. 464, 809 S.E.2d 579 (2018) (*J.A.M. I*). In *J.A.M. I*, we held that the Court of Appeals had misapplied the standard of review and stated that "the trial court's finding was 'supported by clear and convincing competent evidence' and is therefore 'deemed conclusive.' " *Id.* at 466, 809 S.E.2d at 581 (citing *In re N.G.*, 186 N.C. App. 1, 4, 650 S.E.2d 45, 47 (2007), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008)). We reversed the Court of Appeals decision and remanded the case to that court for reconsideration and proper application of the standard of review. *Id.* at 467, 809 S.E.2d at 581.

On remand, the Court of Appeals issued another opinion on 5 June 2018, relying on the guidance we provided in *J.A.M. I*. In its new opinion, a majority of the panel affirmed the trial court's neglect adjudication, concluding that "[t]he cumulative weight of the trial court's findings [is] sufficient to support an adjudication of neglect, and our Court may not reweigh the underlying evidence on appeal." *In re J.A.M.*, ___ N.C. App. ___, ___, 816 S.E.2d 901, 905 (2018). The panel's majority noted that the trial court's findings that respondent-mother

> (1) continued to fail to acknowledge her role in her rights being terminated to her six other children, (2) denied the need for any services for J.A.M.'s case, and (3) became involved with the father, who [had] engaged in domestic violence . . . even though domestic violence was one of the reasons her children were removed from her home, constitute evidence that the trial court could find was predictive of future neglect.

Id. at ___, 816 S.E.2d at 905 (citing *In re N.G.*, 186 N.C. App. at 9-10, 650 S.E.2d at 51). The Court of Appeals dissent maintained that the evidence in the trial record was entirely inadequate to support the court's neglect adjudication. In the dissenter's opinion, "the trial court's order contains no findings of fact [ ] which are supported by any evidence, and certainly

not 'clear and convincing competent evidence,' that J.A.M. is presently at substantial risk of neglect by Respondent-mother." *Id.* at ___, 816 S.E.2d at 907 (Tyson, J., dissenting). On 27 June 2018, respondent-mother entered her notice of appeal based on the dissenting opinion. The parties briefed the issue of whether the competent evidence and the trial court's findings of fact supported its conclusion of law that J.A.M. was neglected. We heard argument for the second time on 9 January 2019.

Analysis

The North Carolina General Statutes set out the grounds upon which a juvenile can be adjudicated "neglected":

> Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; *or who lives in an environment injurious to the juvenile's welfare*; or the custody of whom has been unlawfully transferred under G.S. 14-321.2; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect *or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.*

N.C.G.S. § 7B-101(15) (Supp. 2018) (emphases added). In addition, allegations of neglect must be proved by clear and convincing evidence. *Id.* § 7B-805 (2017).

As we stated in *J.A.M. I*,

> [i]t is well settled that "[i]n a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re N.G.*, 186 N.C. App. 1, 4, 650 S.E.2d 45, 47 (2007) (quoting *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997)), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008); *see also In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984) ("Although the

> question of the *sufficiency* of the evidence to support the findings may be raised on appeal, our appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." (citations omitted)).

370 N.C. at 464-65, 809 S.E.2d at 580. A court may not adjudicate a juvenile neglected solely based upon previous Department of Social Services involvement relating to other children. Rather, in concluding that a juvenile "lives in an environment injurious to the juvenile's welfare," N.C.G.S. § 7B-101(15), the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile. The trial court's findings here did so and thus support the trial court's conclusion of law.

The neglect statute "neither dictates how much weight should be given to a prior neglect adjudication, nor suggests that a prior adjudication is determinative." *In re A.K.*, 360 N.C. 449, 456, 628 S.E.2d 753, 757 (2006) (citation omitted). "Rather, the statute affords the trial judge some discretion in determining the weight to be given such evidence." *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994).

"In order to adjudicate a juvenile neglected, our courts have additionally 'required that there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide "proper care, supervision, or discipline." ' " *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (emphasis added) (quoting *In re Safriet*, 112 N.C.App. 747, 752, 436 S.E.2d 898, 901-02 (1993)). In neglect cases involving newborns, "the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999) (affirming the neglect adjudication of an infant based on the parents' failure to correct circumstances that led to the death of an older sibling before the infant was born).

The Court of Appeals dissenting opinion correctly notes that "[a] prior and closed case with other children . . . *standing alone*, cannot support an adjudication of current or future neglect." *In re J.A.M.*, ___ N.C. App. at ___, 816 S.E.2d at 908 (emphasis added); *see In re N.G.*, 186 N.C. App. at 9, 650 S.E.2d at 51 ("[T]he fact of prior abuse, standing alone, is not sufficient to support an adjudication of neglect."). Instead, we "require[ ] the presence of other factors to suggest that the neglect or

abuse will be repeated." *In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 487, 489, *disc. rev. denied*, 367 N.C. 524, 762 S.E.2d 213 (2014) (citations omitted). Here, the prior orders entered into the record were not the sole basis for the trial court's decision. Rather, the trial court also properly found "the presence of other factors" indicating a present risk to J.A.M. when it reached its conclusion that J.A.M. was neglected as a matter of law.

The Court of Appeals majority identified three findings of fact, all supported by clear and convincing evidence and all of which support a conclusion that J.A.M. presently faced substantial risk in her living environment. Specifically, the trial court found that respondent-mother

> (1) continued to fail to acknowledge her role in her rights being terminated to her six other children, (2) denied the need for any services for J.A.M.'s case, and (3) became involved with the father, who [had] engaged in domestic violence . . . even though domestic violence was one of the reasons her children were removed from her home . . . .

In re J.A.M., ___ N.C. App. at ___, 816 S.E.2d at 905 (majority opinion).

All of these findings were supported by the testimony in the 30 March 2016 hearing. Social Work Supervisor West's unchallenged testimony provided the basis for the finding that respondent-mother had denied the need for services, and respondent-mother's own testimony furnished the basis for the other two findings. Respondent-mother testified that she knew that respondent-father had been charged with assault on a female but did not ask him whether this report was true. This testimony supports the court's finding that she was involved with respondent-father despite her awareness of his history of domestic violence. Respondent-mother also testified that she believed her parental rights to her six older children were terminated because of the actions of E.G. Sr. in seriously injuring E.G. Jr. and that she had no role in the harm that came to their child. This testimony supports the finding that she "fail[ed] to acknowledge her role in" the termination of her rights as to her six older children.

In turn, the trial court's findings of fact also support the court's conclusion of law that J.A.M. was a neglected juvenile, a child who was at risk in that there was "[n]o evidence the parents ha[d] remedied the injurious environment they created for their other children." Combined with the lengthy record from her past cases, the findings that respondent-mother believed she did not need any services from YFS, had opted not to directly confront her romantic partner's prior domestic violence history, and continued to minimize the role her own prior

decisions played in the harm her older children had suffered all support a conclusion that respondent-mother had not made sufficient progress in recognizing domestic violence warning signs, in accurately assessing poor decisions from the past, or in identifying helpful resources. It was proper for the trial court to then reach the conclusion that respondent-mother had not developed the skills necessary to avoid placing J.A.M. in a living situation in which she would suffer harm.

In making its three findings indicating that the present circumstances of J.A.M.'s living environment placed her at a substantial risk of harm, the trial court stated that respondent-mother's "testimony was telling today." While this description would be too vague to support any legal conclusion standing on its own, the statement is noteworthy because it indicates that the trial court made a credibility determination following the testimony and that the court's credibility judgment supported its factual finding that respondent-mother had failed to take responsibility for her role in the termination of her parental rights to her other children. Arguably, there was testimony in the record below that could have supported different factual findings and possibly, even a different conclusion. But an important aspect of the trial court's role as finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence. It is in part because the trial court is uniquely situated to make this credibility determination that appellate courts may not reweigh the underlying evidence presented at trial. This principle certainly applies in a case like this one, in which the same trial court judge had multiple opportunities over a period of time to see and hear the parties involved.

We conclude that the trial court's adjudication that J.A.M. was a neglected juvenile was based on findings of fact which were supported by competent evidence and included present risk factors in addition to an evaluation of past adjudications involving other children. Because the Court of Appeals majority properly applied the appropriate standard of review in affirming the trial court's order, we affirm the decision of the Court of Appeals.

AFFIRMED.

CARLOS PACHAS, BY HIS ATTORNEY IN FACT, JULISSA PACHAS, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES, RESPONDENT

No. 144A18

Filed 1 February 2019

1. Jurisdiction—trial court's authority to enforce its own order —new factual and legal issues

The trial court had jurisdiction under N.C. Rule of Civil Procedure 70 to find new facts and determine whether the N.C. Department of Health and Human Services had disobeyed the trial court's previous order to reinstate petitioner's Medicaid benefits. The Court of Appeals erred by holding that new factual and legal issues deprived the superior court of jurisdiction.

2. Appeal and Error—case relied upon by Court of Appeals —inapposite

In its decision limiting the trial court's jurisdiction to enforce its own order under N.C. Rule of Civil Procedure 70, the Court of Appeals erroneously relied on an inapposite case from the N.C. Supreme Court—a case that involved the law of the case doctrine rather than a motion to enforce a court order.

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

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. ___, 814 S.E.2d 136 (2018), affirming an order entered on 21 April 2017 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 1 October 2018.

Charlotte Center for Legal Advocacy, by Douglas Stuart Sea and Cassidy Estes-Rogers, for petitioner-appellant.

Joshua H. Stein, Attorney General, by Lee J. Miller, Assistant Attorney General, for respondent-appellee.

John R. Rittelmeyer for Disability Rights North Carolina, amicus curiae.

HUDSON, Justice

This case comes to us by way of petitioner's notice of appeal based on a dissenting opinion in the Court of Appeals. We now review "whether the Court of Appeals erred as a matter of law in ruling that the superior court lacked jurisdiction to decide whether its previous order was being violated by a state agency on the grounds that petitioner failed to exhaust administrative remedies before moving to enforce the court's order." Because we conclude that the superior court had jurisdiction to enforce its previous order, we vacate the Court of Appeals' decision. *Pachas v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, ___, 814 S.E.2d 136, 137 (2018). Accordingly, we remand this case to the Court of Appeals to address the merits of respondent's argument that the North Carolina Department of Health and Human Services (DHHS) did not violate the 17 March 2016 order.

I. Factual and Procedural Background

Petitioner Carlos Pachas, a resident of Mecklenburg County, and a Medicaid recipient, was left completely disabled and requiring twenty-four hour care as result of a stroke and a brain tumor in 2014. At the time, petitioner lived with his wife, their two minor children, and his wife's elderly parents. All members of the household were dependent on petitioner for their financial support. In January 2015, he began receiving Social Security Disability benefits, and thereafter applied for re-enrollment in Medicaid.

On 5 May 2015, the Mecklenburg County Department of Social Services (DSS) sent petitioner a notice that his currently ongoing Medicaid benefits would be terminated starting on 1 June 2015, and that he would need to meet a deductible of $6642 during the period of 1 May through 31 October 2015 to regain eligibility for Medicaid benefits. The DSS decision was based on the agency's determination that petitioner, because of his monthly Social Security Disability benefits of $1369 that began in January 2015, exceeded the income limit for an individual to qualify for Medicaid as "Categorically Needy"—the income limit being one hundred percent of the federal poverty level[1]—and that petitioner now qualified for Medicaid as "Medically Needy" under DSS regulations. Under these regulations, "Categorically Needy" Medicaid recipients are not charged a deductible, but "Medically Needy" recipients are.

1. This income limit was established by the Current Operations and Capital Improvements Appropriations Act of 2013, sec. 12H.10.(a)-(b)(1), 2013 N.C. Sess. Laws 2013-360 (Regular Sess.) 995, 1180-81.

Medicaid Eligibility Unit, Div. of Med. Assistance, N.C. Dep't of Health & Human Servs., *Aged Blind and Disabled Medicaid Manual*, MA-2360 ¶ I (Nov. 1, 2011).

Petitioner requested a hearing before DSS concerning the termination of his Medicaid benefits, and the hearing was held on 8 May 2015. On 13 May 2015, DSS sent petitioner a Notice of Decision affirming the termination of his Medicaid benefits. The Notice of Decision instructed petitioner that he could appeal the matter to DHHS. On the same day, petitioner filed a written request to appeal the decision, and the appeal was heard on 16 June. DHHS affirmed DSS's decision requiring Pachas to meet a $6642 deductible in a Notice of Decision dated 10 August 2015.

On 13 August, Pachas as petitioner appealed the unfavorable decision to DHHS, and he submitted his written appeal on 27 August 2015. In his appeal, petitioner maintained that DHHS erred in affirming the DSS decision to discontinue his Medicaid benefits arguing that DSS's method of calculating his income eligibility for Medicaid "violate[s] the plain language of the federal Medicaid statute and controlling North Carolina case law."

First, petitioner argued that DSS's policy violates the plain language of the controlling federal Medicaid statute, 42 U.S.C. § 1396a(m). Petitioner stated that the General Assembly elected to provide Medicaid to aged, blind, and disabled persons with incomes under one hundred percent of the federal poverty level. Petitioner noted that beneficiaries who meet these criteria are considered to be "Categorically Needy," and their eligibility for Medicaid is governed by 42 U.S.C. § 1396a(m). Petitioner then pointed to § 1396a(m)(2)(A), which states that a beneficiary's income level is determined by considering "a family of the size involved." Petitioner contended that this language required DSS to determine whether his monthly income from Social Security Disability payments was more than one hundred percent of the federal poverty line if used not just to support himself, but to support all six members of his family as dependents.

Second, petitioner argued that the North Carolina Court of Appeals' decision in *Martin v. North Carolina Department of Health and Human Services*, 194 N.C. App. 716, 670 S.E.2d 629, *disc. rev. denied*, 363 N.C. 374, 678 S.E.2d 665 (2009), required DSS to determine whether petitioner's income exceeded one hundred percent of the federal poverty guideline if used to support all six members of his family. According to petitioner, *Martin* involved a parallel Medicaid eligibility category,

Medicaid for Qualified Medicare Beneficiaries (MQB-B), which contained the same "family of the size involved" language. Petitioner further noted that the court in *Martin* held that "a family of the size involved" meant "a group consisting of parents and their children; a group of persons who live together and have a shared commitment to a domestic relationship." 194 N.C. App. at 722, 670 S.E.2d at 634. As a result, Pachas argued that *Martin* directed DHHS to consider his entire family when calculating whether his income rose above one hundred percent of the federal poverty level.

Finally, petitioner pointed to a decision of the Superior Court in Mecklenburg County that he viewed as applying the reasoning in *Martin* to "all individuals who receive Medicaid benefits on the basis of disability." *See Cody v. N.C. Dep't of Health & Human Servs.*, No. 13 CVS 19625 (N.C. Super. Ct. Mecklenburg County Mar. 11, 2014). Additionally, petitioner argued that "failure to consider his wife, children and dependent parents as part of his family leads to absurd results and violates the purpose of the Medicaid Act."

In its Final Decision, dated 1 October 2015, DHHS affirmed that petitioner must meet a deductible in order to regain eligibility for Medicaid given that his income exceeded one hundred percent of the federal poverty guideline for a single individual. On 16 October 2015, petitioner sought judicial review of the DHHS Final Decision in the Superior Court in Mecklenburg County. Petitioner requested that the court grant the following relief: (1) reverse the final agency decision and declare DHHS's interpretation of the law illegal; (2) order DHHS to reinstate petitioner's Medicaid benefits without requiring a deductible effective 1 June 2015; and (3) award petitioner costs and a reasonable attorney's fee. In support of this request for relief, petitioner claimed, in pertinent part, that DHHS erred by "concluding that the Medicaid income limit applicable to Petitioner was the limit for a single individual in violation of 42 U.S.C. § 1396a(m), under which the applicable income limit is 100% of the federal poverty line for a 'family of the size involved.' "

On 17 March 2016,[2] the Superior Court in Mecklenburg County signed an order reversing the final decision of DHHS. The superior court reached this determination because it concluded that:

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2. The dissenting judge at the Court of Appeals noted that although the order was entered on 18 March 2016, he was going to refer to the order as the 17 March 2016 order because that was how the parties had been referring to it. *Pachas*, ___ N.C. at ___, 814 S.E.2d at 142 n.6 (Hunter Jr., J., dissenting).

2. The North Carolina General Assembly has elected the option under the federal Medicaid statute, 42 U.S.C. § 1396a(m), to provide Medicaid to aged, blind and disabled persons with incomes under 100% of the federal poverty level. This category of Medicaid is known as categorically needy coverage for the aged, blind and disabled (MABD-CN).

3. The income limit for MABD-CN varies by the number of persons considered by the agency to be in the household unit because the federal poverty line varies by household size.

4. The DHHS Medicaid rule at issue in this case is contained in Section 2260 of the DHHS Adult Medicaid Manual. Under this provision, only the aged, blind or disabled individual is considered to be part of the household unit used for determining the applicable income limit for MABD-CN. The only exceptions in this rule are where the spouse of the individual is also aged, blind or disabled, or where the spouse has income that is deemed available to the aged, blind or disabled individual, in which case the household size is two.

. . . .

6. Pursuant to the challenged DHHS rule, Mecklenburg County DSS determined that Mr. Pachas' Social Security income of $1396 per month was greater than $981 per month, which is the current federal poverty limit for a household size of one person.

. . . .

8. The plain language of the controlling federal statutory provision, 42 U.S.C. § 1396a(m), states that the applicable Medicaid income limit for the MA[BD]-CN category must be based on a "family of the size involved." Because the official poverty line published annually by the federal government varies by family size, the determination of family size determines the applicable income limit under the language of this statute.

9. The Federal Medicare and Medicaid agency has interpreted the language "a family of the size involved" to

include "the applicant, the spouse who is living in the same household, if any, and the number of individuals who are related to the applicant or applicants, who are living in the same household and who are dependent on the applicant or the applicant's spouse for at least one-half of their financial support." 42 C.F.R. § 423.772 (2005).

10. There is no dispute in the record or the briefing that Petitioner is providing over half of the financial support for his wife, their two minor children and his wife's elderly parents, all of whom live with Petitioner.

11. In *Martin v. North Carolina Department of Health and Human Services*, the North Carolina Court of Appeals interpreted the identical phrase, "family of the size involved," applied to similar facts, in reviewing a parallel provision of the federal Medicaid statute for the MQB category of benefits. The Court of Appeals held that the DHHS interpretation of "family of the size involved" for the MQB program violated the federal Medicaid statute and was therefore invalid.

12. Following the *Martin* decision, DHHS updated its Medicaid state plan and manual provisions to clarify that MQB eligibility must be based upon "family size" which includes "the [applicant/beneficiary], the spouse if there is one, and any dependent children under age 18 living in the home." However, DHHS did not change its rule as to the MABD-CN category.

13. The provisions of the Federal Medicaid statute at issue in *Martin* and in this case contain precisely the same language regarding both the determination of family size and the countable income for Medicaid beneficiaries.

14. DHHS conceded at oral argument that prior to the *Martin* ruling, the same methodology for determining eligibility was used for both the MA[BD]-CN and MQB programs.

(second alteration in original). While reversing the DHHS final decision on these grounds, the superior court ordered, in pertinent part, that DHHS "promptly reinstate Medicaid benefits to Petitioner effective

June 1, 2015 and [ ] continue providing Medicaid to Petitioner until determined ineligible under the rules as modified according to this decision."

Following the superior court's reversal of the DHHS final decision, on 13 April 2016, DHHS instructed Mecklenburg County DSS to reinstate petitioner's Medicaid benefits. Thereafter, following a hospital stay, Pachas entered a nursing facility on 6 May 2016, and his Medicaid benefits continued the entire time he was in the nursing home; on 14 February 2017, he was discharged from the nursing facility and returned home to live with his family. Pachas suffered from anxiety as well as his physical conditions while being away from his family. Pachas was to receive at-home care under Medicaid's Community Alternative Program for Disabled Adults (CAP-DA).

On the same day Pachas left the nursing facility and his care under CAP-DA was set to begin, Mecklenburg County DSS mailed him a notice that his benefits would be changed and, effective 1 March 2017, he would be required to meet a monthly deductible of $1113 for his CAP-DA care. In the notice DSS stated that the change in benefits was required by state regulations found in "MA 2280." The notice also advised Pachas that he had sixty days to request an agency hearing if he disagreed with the decision.

Instead of requesting an agency hearing, Pachas filed a motion in the cause to enforce the court's order and a petition for writ of mandamus in the Superior Court in Mecklenburg County on 15 February 2017. In the motion and petition, Pachas requested the following relief pertinent to this appeal: (1) entry of an order enforcing the court's 17 March 2016 order and directing North Carolina DHHS "to immediately reinstate his Medicaid benefits, including his CAP-DA services," and ordering that the benefits be continued without his having to first meet a deductible; (2) issuance of a writ of mandamus ordering DHHS to reinstate his benefits effective 14 February 2017; and (3) entry of an order requiring Mecklenburg County DSS to reinstate his benefits if DHHS failed to do so within ten days of the court's forthcoming order.

On 6 March 2017, DHHS moved to dismiss petitioner's motion and petition. DHHS argued, in pertinent part, that the motion and petition should be dismissed for these reasons: (1) the superior court did not have jurisdiction over the matter, because petitioner had not exhausted his administrative remedies; (2) with regard to the petition for writ of mandamus specifically, that petitioner had another adequate remedy at law through the agency appeal process; and (3) petitioner's eligibility for the CAP-DA program did not fall within the 17 March 2016 order,

because the CAP-DA program, which has its own eligibility and income limit rules under 42 U.S.C. § 1396n, is a "*Waiver*" program that is separate from the "*State Plan*" that was the subject of the previous order.

In support of his motion in the cause seeking enforcement of the 17 March 2016 order and petition for writ of mandamus, petitioner argued that: (1) DHHS's termination of all of petitioner's Medicaid benefits on 14 February 2017 violated the 17 March 2016 order which required DHHS to immediately reinstate petitioner's Medicaid benefits and continue to provide them until petitioner is "determined ineligible under the rules as modified according to [the order]"; (2) under the terms of DHHS's waiver application for CAP-DA, and as stated in its own instruction manuals, individuals who qualify for Medicaid under the "Categorically Needy" eligibility group, the very category under which the 17 March 2016 order determined that petitioner's benefits were to be reinstated and to continue, are eligible for CAP-DA without a deductible; (3) the CAP-DA waiver provision in 42 U.S.C. § 1396n(c) does not contain any "language waiving the requirement in § 1396a(m) to use 'family size' budgeting"; (4) DHHS's own budgeting rules which state that "the income of a spouse cannot be counted in determining the CAP-DA applicant's Medicaid eligibility" do not apply to "Categorically Needy" Medicaid recipients and are inconsistent with the 17 March 2016 order; and (5) petitioner fully exhausted his administrative remedies previously and he should not be required to do so again now because the superior court has sole jurisdiction to enforce its own order and exhaustion would be an inadequate or futile remedy.

DHHS responded to petitioner's arguments by asserting that the motion and petition should be dismissed on the following grounds: (1) the superior court's 17 March 2016 order "does not apply because it only contemplated Petitioner's eligibility for State Plan services and does not address Petitioner's Medicaid eligibility through the CAP/DA waiver," which is governed by separate federal rules and regulations; (2) petitioner remains eligible for State Plan Medicaid benefits and therefore DHHS did not violate the 17 March 2016 order; (3) petitioner failed to exhaust his available administrative remedies; and (4) petitioner has failed to demonstrate how exhaustion of his administrative remedies would be futile when the administrative remedy provides "relief more or less commensurate with the claim." *Huang v. N.C. State. Univ.*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815 (1992).

The superior court dismissed petitioner's motion in the cause to enforce the court's order and his petition for writ of mandamus on

21 April 2017. In so doing, the court found that DHHS "has not violated the Order signed on March 17, 2016." The court reached this decision for the following reasons:

> 6. According to 42 U.S.C. § 1396n(c)(3), DHHS is allowed to waive the State Plan requirements for income and resource rules under 42 U.S.C. § 1396a(m) that the Court considered in the March 17, 2016 Order.
>
> 7. DHHS does not consider the "size of the family involved" when determining an individual's deductible under the CAP/DA waiver.
>
> 8. Therefore, the Order signed on March 17, 2016 does not apply to Petitioner's Medicaid eligibility under the CAP/DA waiver.
>
> 9. Petitioner must resort to the administrative process governed by N.C.G.S. § 108A-79 to appeal the February 14, 2017 decision issued by the Mecklenburg County DSS.

Following this last order, Julissa Pachas filed a motion on 9 May 2017 to substitute herself as petitioner in the case because Carlos died on 17 April. After being substituted as petitioner, Julissa Pachas appealed the superior court's 21 April 2017 order to the North Carolina Court of Appeals, where she presented the issue of whether "42 U.S.C. § 1396a(m) require[s] respondent/appellee DHHS to determine eligibility for Medicaid for the aged, blind and disabled in North Carolina based on a 'family of the size involved,' regardless of what Medicaid services the aged, blind or disabled person requests or receives."

The Court of Appeals majority affirmed the 21 April 2017 order of the Superior Court in Mecklenburg County dismissing petitioner's motion and petition based on its conclusion that the trial court lacked jurisdiction. *Pachas*, ___ N.C. App. at ___, 814 S.E.2d at 140. The Court of Appeals reached this decision for two reasons. First, in relying on a previous decision from our Court, the Court of Appeals concluded that "[t]he scope of this waiver provision [under 42 U.S.C. § 1396n(c)], and whether the State in fact applied for and received a waiver of the income limits provision, involve facts and legal questions that were *not* 'actually presented and necessarily involved' in the trial court's [17 March 2016] order addressing traditional Medicaid coverage." *Id.* at ___, 814 S.E.2d at 139 (quoting *Tenn.-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974)). Specifically, the Court of Appeals majority reasoned that:

> Here, the trial court properly concluded that the agency's determination of Pachas's CAP/DA program eligibility involved *different* facts and legal issues than the traditional Medicaid benefits at issue in its first order. As the trial court observed, its first order instructed the State to "reinstate Petitioner's Medicaid eligibility through the North Carolina Medicaid State Plan pursuant to the controlling federal statutory provision, 42 U.S.C. § 1396a(m)."

Id. at ___, 814 S.E.2d at 139. The Court of Appeals majority determined that the introduction of these different facts and issues deprived the trial court of the supervisory authority and jurisdiction that it generally maintains under Rule 70 of the North Carolina Rules of Civil Procedure to ensure that an agency complies with the court's order. *Id.* at ___, 814 S.E.2d at 139-40. As a result, the majority concluded that "[t]he trial court lacks jurisdiction to review the legal and factual issues raised in this appeal until they reach the court through exhaustion of the administrative review process and a petition for judicial review." *Id.* at ___, 814 S.E.2d at 140.

Second, the Court of Appeals majority concluded that the trial court did not have jurisdiction over petitioner's motion and petition because petitioner could not demonstrate that the administrative review process was "futile" or "inadequate." *Id.* at ___, 814 S.E.2d at 140. Specifically, the majority reasoned that "[a]lthough the agency seems convinced of its legal position, that does not make the administrative review process 'futile' or 'inadequate' as those terms are defined by law." *Id.* at ___, 814 S.E.2d at 140 (citing *Huang*, 107 N.C. App. at 715, 421 S.E.2d at 815-16).

Presumably as a result of its holding that the trial court did not have jurisdiction over petitioner's motion and petition, the Court of Appeals majority did not announce a holding with regard to the ultimate issue that petitioner presented on appeal: "Does 42 U.S.C. § 1396a(m) require respondent/appellee DHHS to determine eligibility for Medicaid for the aged, blind and disabled in North Carolina based on a 'family of the size involved,' regardless of what Medicaid services the aged, blind or disabled person requests or receives?" *Id.* at ___, 814 S.E.2d at 140 (affirming the trial court's dismissal of petitioner's motion and petition only because the trial court lacked jurisdiction).

The dissenting judge at the Court of Appeals disagreed with the majority's decision that the trial court did not have jurisdiction over petitioner's motion and petition and that petitioner would have to exhaust

his administrative remedies before seeking judicial review. *Id.* at ___, 814 S.E.2d at 140 (Hunter Jr., J., dissenting). The dissenting judge concluded that the trial court did have jurisdiction over petitioner's motion and petition for two reasons. First, the dissenting judge noted that "Pachas is correct that it is well settled the 'exhaustion requirement may be excused if the administrative remedy would be futile or inadequate.' " *Id.* at ___, 814 S.E.2d at 145 (quoting *Justice for Animals, Inc. v. Robeson County*, 164 N.C. App. 366, 372, 595 S.E.2d 773, 777 (2004)). The dissenting judge reasoned that petitioner's administrative remedy here would be futile and inadequate because:

> Given the tragic history of Pachas, I cannot vote to place him, or others similarly situated, back in the hands of the Medicaid bureaucracy, which has already denied benefits on the identical question of family size and its relation to required deductibles for Medicaid coverage. In my view, it is particularly telling that in the first case, the law of his case was based upon the conclusion that the State had made an error of law in denying him benefits. To tell a dying indigent that he or his family must endure another round of "administrative remedies", when the Medicaid authorities moved him from one program to another for their own cost benefits, and when the issue is a matter of law, which had been previously adjudicated, is simply unjust and wrong. Under the specific facts of this case, I would hold requiring the dying indigent to exhaust his administrative remedies would be futile.

Id. at ___, 814 S.E.2d at 145.

Second, the dissenting judge reasoned that the trial court had jurisdiction over petitioner's motion and petition because although N.C.G.S. § 108A-79 provides an administrative "remedy for individuals who wish to challenge the termination of their Medicaid coverage," petitioner here "is not simply challenging the Medicaid coverage termination, but, rather, the violation of the trial court's 17 March 2016 order requiring DHHS to apply his family size to income considerations. Specifically, this is an appeal for enforcement." *Id.* at ___, 814 S.E.2d at 145. The dissenting judge added that "[a] trial court's authority encompasses the power to enforce its own judgments." *Id.* at ___, 814 S.E.2d at 145 (first citing *Sturgill v. Sturgill*, 49 N.C. App. 580, 587, 272 S.E.2d 423, 428-29 (1980); and then citing *Parker v. Parker*, 13 N.C. App. 616, 618, 186 S.E.2d 607, 608 (1972)).

Petitioner filed his notice of appeal based on the dissent in the Court of Appeals presenting the following issue: "Did the Court of Appeals majority err as a matter of law in ruling that the superior court lacked jurisdiction to decide whether its previous order was violated because petitioner failed to exhaust administrative remedies before moving to enforce the court's order?"

II. Analysis

We conclude that the Court of Appeals did err in ruling that the superior court lacked jurisdiction to decide whether DHHS violated the 17 March 2016 order. Because we so conclude, we vacate the decision of the Court of Appeals affirming the trial court's dismissal of petitioner's motion and petition on that basis. We also remand this case to the Court of Appeals to address the merits of whether the superior court erred in determining that DHHS did not violate the 17 March 2016 order because DHHS allegedly obtained a waiver of the requirements of 42 U.S.C. § 1396a(m) in compliance with 42 U.S.C. § 1396n(c). Because we conclude that the trial court had jurisdiction over petitioner's motion and petition, we need not determine whether exhaustion of administrative remedies was inadequate or futile in this case.

The Court of Appeals erred in concluding that the trial court did not have jurisdiction over petitioner's motion and petition because: (1) trial courts have jurisdiction to find new facts and determine whether a party has been "disobedient" under a court order requiring the party to perform a "specific act," N.C. R. Civ. P. 70, and (2) the Court of Appeals relied on an inapposite case from our Court to conclude that, because the issue of petitioner's CAP-DA eligibility involved "facts and legal questions that were *not* 'actually presented and necessarily involved' " in the 17 March 2016 order, *Pachas*, ___ N.C. App. at ___, 814 S.E.2d at 139 (majority opinion) (quoting *Tenn.-Carolina Transp.*, 286 N.C. at 239, 210 S.E.2d at 183), the trial court did not have jurisdiction over the matter.

This Court reviews a decision of the Court of Appeals to determine whether it contains any errors of law. N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010); *see also State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994) (explaining that this is the standard of review of a determination by the Court of Appeals whether the case is before us "by appeal of right or discretionary review" (first citing *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968), *cert. denied*, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969); then citing *State v. Williams*, 274 N.C. 328, 163 S.E.2d 353 (1968); and then citing N.C. R. App. P. 16(a)(1994))).

A. The trial court had jurisdiction under the North Carolina Rules of Civil Procedure (Rule 70) to find new facts and determine whether DHHS disobeyed the 17 March 2016 order.

[1] It is well settled that, consistent with their inherent authority to enforce their own orders, North Carolina trial courts have jurisdiction to find new facts and determine whether a party has been "disobedient" under a previous order that required the party to perform a "specific act." N.C. R. Civ. P. 70. Since 1967 the Rules of Civil Procedure have provided in part:

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the judge may direct the act to be done at the cost of the disobedient party by some other person appointed by the judge and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The judge may also in proper cases adjudge the party in contempt.

N.C. R. Civ. P. 70.

Here it appears that DHHS's decision to cancel petitioner's Medicaid benefits under the CAP-DA program and require him to pay a deductible to regain eligibility invoked the trial court's power to enforce its 17 March 2016 order.[3] In that order the superior court instructed DHHS "to promptly reinstate Medicaid benefits to Petitioner . . . and to continue providing Medicaid to Petitioner until determined ineligible under the rules as modified according to this decision." The rules as modified by the order required that petitioner be considered eligible for Medicaid under the Categorically Needy category so long as his income did not exceed one hundred percent of the federal poverty level based on a family of six while he was providing more one-half of their financial support.

It appears, according to DHHS's own Adult Medicaid Manual and without considering any effect of the waiver that DHHS allegedly obtained, that petitioner—having been determined to fit within the Categorically Needy eligibility group and to be entitled to continued Medicaid benefits

3. We do not express an opinion on the merits of the waiver issue we are remanding to the Court of Appeals.

under the 17 March 2016 order—should have seamlessly qualified on 14 February 2017 for Medicaid's CAP-DA program without a deductible. Specifically, even DHHS's waiver application pursuant to 42 U.S.C. § 1396n(c) lists "Categorically Needy" individuals as a Medicaid-eligible group that will be served by the CAP-DA program. Furthermore, DHHS's own manual provides that DHHS will "[d]etermine eligibility [for CAP-DA] according to requirements for the appropriate aid program/category." Medicaid Eligibility Unit, Div. of Med. Assistance, N.C. Dep't of Health & Human Servs., *Aged, Blind and Disabled Medicaid Manual*, MA-2280 ¶ III.A.a.(2) (Oct. 1, 2012) titled "Medicaid Eligibility and CAP Eligibility." Moreover, DHHS's manual states that "[w]hen Medicaid eligibility can be established regardless of eligibility for CAP," DHHS will "not wait for CAP approval" and it will "[a]uthorize [CAP-DA], if appropriate, as for any other applicant." *Id.* MA-2280 ¶ III.A.a.2(c)(1)-(2). Additionally, DHHS's own manual indicates that "Categorically Needy" Medicaid recipients will not be charged a deductible. *See id.* MA-2360 ¶ I (Nov. 1, 2011) (providing that the deductible requirement is only to be applied to Medically Needy Medicaid recipients and "[t]he policy in this section may not be used to find a client eligible in MAABD Categorically Needy – No Money Payment (N) Classification . . . . Deductible does not apply in these coverage's [sic]"). We conclude that—because the 17 March 2016 order determined that petitioner was to continue receiving Medicaid benefits under the "Categorically Needy" eligibility group until he was determined to be ineligible under the rules as modified by that order—DHHS's decision to terminate petitioner's Medicaid benefits under the CAP-DA program on 14 February 2017 and require him to meet a deductible before he could regain his benefits squarely raises the issue of whether DHHS acted as a "disobedient party" under the 17 March 2016 order. N.C. R. Civ. P. 70.

DHHS contends that it did not disobey the 17 March 2016 order, and that the trial court did not have jurisdiction to enforce that order, because the waiver that it allegedly obtained under 42 U.S.C. § 1396n(c) allowed it to create different eligibility rules for the CAP-DA program. Without reaching any conclusions as to the merits of this argument, we hold that the trial court, in accord with its jurisdiction to find new facts and determine whether a party has been "disobedient" under a previous order directing the party to perform a "specific act," was authorized to determine the precise issue of whether the waiver that DHHS allegedly obtained under 42 U.S.C. § 1396n(c) allowed the agency to comply with the 17 March 2016 order while terminating petitioner's Medicaid benefits under the CAP-DA program on 14 February 2017 and requiring him to pay a deductible before qualifying again for Medicaid.

Our conclusion that the trial court had authority to determine that issue is further supported by the Administrative Procedure Act (the Act) itself. The language of the Act suggests that the General Assembly contemplated that trial courts would have such jurisdiction to enforce their own court orders against disobedient agencies upon motion from a party in the case. Specifically, the Act provides that "[n]othing in this Chapter shall prevent any party or person aggrieved from invoking *any judicial remedy available to the party or person aggrieved under the law* to test the validity of *any administrative action not made reviewable* under this Article." N.C.G.S. § 150B-43 (2017) (emphases added).

Here the relevant judicial remedy available to petitioner under the law is enforcement of the trial court's 17 March 2016 order. Neither the Act, nor N.C.G.S. § 108A-79 which governs public assistance and social services appeals, provide for administrative review of DHHS's alleged violation of the 17 March 2016 order. *See id.* § 108A-79 (2017) (making no mention that the agency appeals process will consider whether the agency violated a court order during either the local appeal hearing, or the hearing before DHHS, or when rendering the final agency decision); *see also id.* § 108A-79(k) (2017) (stating that the judicial review at the superior court "shall be conducted according to the provisions of Article 4, Chapter 150B, of the North Carolina General Statutes"); *see also id.* § 150B-51(b)(1)-(6) (2017) (not including violation of a court order as grounds upon which a trial court can "reverse or modify" a final decision of the agency); *but see id.* § 150B-51(d) (2017) (allowing a trial court to enter certain orders when it reviews "a final [agency] decision allowing judgment on the pleadings or summary judgment").

Because the trial court had jurisdiction to find new facts in order to determine whether DHHS was a disobedient party under its 17 March 2016 order, we conclude that the Court of Appeals erred in holding that the trial court no longer had jurisdiction over the case given the new factual and legal issues regarding the effect of DHHS's alleged waiver under 42 U.S.C. § 1396n(c).

B. The Court of Appeals relied on inapposite authority in limiting the trial court's jurisdiction under the North Carolina Rules of Civil Procedure (Rule 70).

[2] The Court of Appeals majority relied on our decision in *Tennessee-Carolina Transportation, Inc. v. Strick Corp.* for the principle that a "trial court's authority [under the North Carolina Rules of Civil Procedure (Rule 70)] to supervise the agency's actions extends only to issues 'actually presented and necessarily involved in determining the

case.' " *Pachas*, ___ N.C. App. at ___, 814 S.E.2d at 139 (quoting *Tenn.-Carolina Transp.*, 286 N.C. at 239, 210 S.E.2d at 183). The Court of Appeals majority then stated, "In other words, the trial court's continuing jurisdiction applies to issues involving 'the same facts and the same questions, which were determined in the previous *appeal*.' " *Id.* at ___, 814 S.E.2d at 139 (emphasis added) (quoting *Tenn.-Carolina Transp.*, 286 N.C. at 239, 210 S.E.2d at 183)).

The Court of Appeals majority then applied the above principle to the facts here and concluded that the trial court did not have jurisdiction over petitioner's motion and petition, and that petitioner would have to exhaust his administrative remedies, because "[t]he scope of [the 42 U.S.C. § 1396n(c)] waiver provision, and whether the State in fact applied for and received a waiver of the income limits provision, involve facts and legal questions that were *not* 'actually presented and necessarily involved' in the trial court's order addressing traditional Medicaid coverage." *Id.* at ___, 814 S.E.2d at 139 (quoting *Tenn.-Carolina Transp.*, 286 N.C. at 239, 210 S.E.2d at 183).

We conclude that the Court of Appeals erred in relying on *Tennessee-Carolina Transportation* for the proposition that a trial court's jurisdiction under the North Carolina Rules of Civil Procedure (Rule 70) to ensure that an agency complies with the court's order necessarily ends when new facts and legal issues arise that were not "actually presented and necessarily involved" in the previous order. *Id.* at ___, 814 S.E.2d at 139 (quoting *Tenn.-Carolina Transp.*, 286 N.C. at 239, 210 S.E.2d at 183). The *Tennessee-Carolina Transportation* case involved application of the "law of the case" doctrine; it did not involve a motion to enforce a court order as we have here. *See Tenn.-Carolina Transp.*, 286 N.C. at 238-39, 210 S.E.2d at 183-84). The issue in *Tennessee-Carolina Transportation* was whether a decision we made in a former appeal in that case, in which we determined that Pennsylvania law governed the action, continued to apply. *See id.* at 238-39, 210 S.E.2d at 183-84. We concluded that the decision in the former appeal did continue to govern the case because "[t]he decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Id.* at 239, 210 S.E.2d at 183. The full passage from *Tennessee-Carolina Transportation* which the Court of Appeals majority quotes only in part as authority for its rule, reads as follows:

> As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein *actually presented*

> *and necessarily involved in determining the case*, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided *the same facts and the same questions*, *which were determined in the previous appeal*, are involved in the second appeal.

Id. at 239, 210 S.E.2d at 183 (emphases added) (quoting *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 305 (1962) (Parker, J., concurring in the result)); *see also Pachas*, ___ N.C. App. at ___, 814 S.E.2d at 139. Because *Tennessee-Carolina Transportation* involved the doctrine of the law of the case—and did not involve a motion to enforce a court order, which is the issue here—the Court of Appeals majority erred in relying on that case to limit the scope of the trial court's jurisdiction under the North Carolina Rules of Civil Procedure (Rule 70).

III. Conclusion

We vacate the Court of Appeals' decision concluding that the trial court did not have jurisdiction to consider whether DHHS violated the trial court's previous order. Accordingly, we remand to the Court of Appeals to address DHHS's argument that the agency did not violate the 17 March 2016 order because it allegedly obtained a waiver under 42 U.S.C. § 1396n(c), permitting it to create its own rules for CAP-DA eligibility apart from the requirements of 42 U.S.C. § 1396a(m). Because we conclude that the trial court had jurisdiction over petitioner's motion and petition, we need not determine whether exhaustion of administrative remedies was inadequate or futile here.

VACATED AND REMANDED.

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

KEITH SAUNDERS
v.
ADP TOTALSOURCE FI XI, INC., EMPLOYER,
LIBERTY MUTUAL/HELMSMAN MANAGEMENT SERVICES, CARRIER

No. 399PA16

Filed 1 February 2019

Workers Compensation—attorney fees—appeal to superior court—consideration of additional evidence not presented to Commission—discretionary authority

Where the N.C. Industrial Commission declined to award certain attorney fees to plaintiff's attorneys, the superior court on appeal acted within its authority under N.C.G.S. § 97-90(c) when it considered additional evidence not presented to the Commission. The superior court exercised its statutory discretion in ordering attorney fees to be paid to plaintiff's attorneys from the reimbursement for retroactive attendant care medical compensation.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 249 N.C. App. 361, 791 S.E.2d 466 (2016), vacating and remanding an order entered on 4 September 2015 by Judge Alan Z. Thornburg in Superior Court, Buncombe County that reversed in part an opinion and award filed on 23 February 2015 by the North Carolina Industrial Commission. Heard in the Supreme Court on 27 August 2018.

The Sumwalt Law Firm, by Mark T. Sumwalt, Vernon Sumwalt, and Lauren H. Walker; and Grimes Teich Anderson, LLP, by Henry E. Teich, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Kari L. Schultz, and Linda Stephens, for defendant-appellees.

HUDSON, Justice.

Plaintiff Keith Saunders appealed the Opinion and Award of the North Carolina Industrial Commission (the Commission), which declined to award certain attorney's fees to plaintiff's attorneys, to the

Superior Court in Buncombe County pursuant to N.C.G.S. § 97-90(c). The superior court reversed the Commission's decision and ordered attorney's fees to be paid to plaintiff's attorneys from the reimbursement for retroactive attendant care medical compensation that the Commission had awarded to plaintiff. Both plaintiff and defendants ADP TotalSource Fi Xi, Inc. and Liberty Mutual/Helmsman Management Services, appealed from the superior court's order. On appeal, the Court of Appeals vacated the superior court's order and remanded the matter to the court for further remand to the Commission, holding that the superior court exceeded the "narrow scope" of its statutory authority to review the reasonableness of a Commission's fee award under N.C.G.S. § 97-90(c) by taking and considering new evidence that was not presented before the Commission. *Saunders v. ADP TotalSource Fi Xi, Inc.*, 248 N.C. App. 361, 376, 791 S.E.2d 466, 477-78 (2016). Because we conclude that N.C.G.S. § 97-90(c) authorizes the superior court to consider additional evidence and exercise its "discretion" in reviewing the reasonableness or setting the amount of attorney's fees, we reverse.

Background

Plaintiff was employed as a bartender for defendant-employer when on 6 March 2010 and 7 July 2010 he sustained two work-related injuries by accident to his lower back. On 15 October 2010, defendants filed a Form 60 with the North Carolina Industrial Commission, in which they accepted plaintiff's claim as compensable under the Workers' Compensation Act (the Act) and described the injury as "extruded disk herniation left side L4-5." On 21 October 2010, plaintiff underwent back surgery performed by Stephen David, M.D. "involving L4 and L5-S1 laminectomies, bilateral partial medial facetectomies, and bilateral foraminotomies with discectomy." In spite of his surgery, as well as extended physical therapy, plaintiff continued to experience "severe disabling pain" and he developed left foot drop and "reflex sympathetic dystrophy (RSD), or complex regional pain syndrome (CRPS)."

On 3 November 2010, plaintiff retained Henry E. Teich to represent him before the Commission. Plaintiff and Mr. Teich entered into a fee agreement that provided Mr. Teich's law firm a contingency fee of "25% of any recovery as Ordered by the North Carolina Industrial Commission." At the time of this agreement, there were no issues involving attendant care or home modification. Plaintiff and Mr. Teich later supplemented this agreement to provide for an attorney's fee of 25% of ongoing temporary total disability payments. On 23 April 2012, the Commission filed an order approving this arrangement through which Mr. Teich's firm received every fourth temporary total disability check due plaintiff.

Plaintiff's deteriorating medical condition resulted in his "suffer[ing] several falls or near-falls, . . . which place him at a significant[ly] increased risk of suffering a fall," and plaintiff was ultimately rendered incapable of "perform[ing] activities of daily living or otherwise liv[ing] independently." Multiple medical providers recommended that plaintiff install safety equipment and assistance devices in his home and that he receive attendant care medical services. Defendants received notice of plaintiff's attendant care needs at least as of January 2012, and they agreed to provide attendant care to plaintiff starting on 4 February 2012, but they conditioned continued payments for attendant care upon being allowed to take depositions of two of plaintiff's doctors without an evidentiary hearing. Following a dispute about the depositions, defendants ceased providing attendant care payments to plaintiff on 8 May 2012. In the absence of continued attendant care provided by a home health agency, plaintiff's then-partner and now-husband, Glenn Holappa, began providing the necessary attendant care services to plaintiff on a daily basis.

In June 2012, with the consent of plaintiff and Mr. Holappa, Mr. Teich associated Mark T. Sumwalt and The Sumwalt Law Firm to assist in litigating the attendant care issues in plaintiff's claim. Mr. Teich had associated Mr. Sumwalt in previous workers' compensation cases involving attendant care issues because of Mr. Sumwalt's significant experience and expertise in attendant care litigation. On 7 January 2013, plaintiff filed a Form 33 requesting a hearing before the Commission because "defendants are refusing to pay compensation for attendant care services." Plaintiff's counsel extensively litigated the attendant care issues, as well as issues "pertaining to home modifications, equipment needs, prescription medications, and psychological treatment." Plaintiff sought, *inter alia*, ongoing future attendant care through a home health care agency and retroactive compensation for the attendant care services provided by Mr. Holappa following defendants' refusal to provide attendant care beyond 8 May 2012. Defendants denied any compensation for past attendant care, future attendant care, and psychological treatment.

Deputy Commissioner J. Brad Donovan heard the matter on 19 March 2013. On 23 December 2013, Deputy Commissioner Donovan entered an "Opinion and Award in which he awarded retroactive attendant care compensation to Plaintiff's family for eight hours per day, seven days per week, at a rate of $18.00 per hour, and ongoing attendant care compensation for eight hours per day, seven days per week at a rate of $18.00 per hour." Moreover, Deputy Commissioner Donovan "approved a reasonable attorneys' fees [sic] of 25% of the value of the retroactive attendant care services provided by Plaintiff's family from May 8, 2012

to December 23, 2013, which were payable to plaintiff and/or his family." Defendants appealed to the Full Commission, which heard the case on 15 May 2014.

On 23 February 2015, the Full Commission issued an "Opinion and Award in which it awarded retroactive attendant care compensation to Mr. Holappa, for six hours per day, seven days per week, at a rate of $10.00 per hour, and ongoing attendant care compensation through a home health agency for eight hours per day, seven days per week." The Commission found that because plaintiff had not paid Mr. Holappa for the attendant care services he provided, "any payment for retroactive attendant care services should be paid to the provider in the first instance, i.e., Mr. Holappa, as opposed to plaintiff as reimbursement for what he paid out of pocket." Furthermore, the Commission found that "[t]he only attorney fee agreement of record at the Industrial Commission is the one entered into between Grimes & Teich, L.L.P. and plaintiff." With regard to the attorney's fee of twenty-five percent of the reimbursement for retroactive attendant care compensation, the Commission concluded:

> In the case at bar, the Full Commission finds and concludes that the fee agreement between plaintiff and plaintiff's counsel is reasonable, as is the attorney fee plaintiff's counsel has received and will continue to receive from plaintiff's ongoing indemnity compensation. However, "[m]edical and hospital expenses which employers must provide pursuant to N.C.G.S. § 97-25 are not a part of 'compensation' as it always has been defined in the Workers' Compensation Act." *Hyler v. GTE Products Co.*, 333 N.C. 258, 264, 425 S.E.2d 698, 702 (1993) (citation omitted). "[T]he relief obtainable as general 'compensation' is different and is separate and apart from the medical expenses recoverable under the Act's definition of 'medical compensation." *Id.* at 265, 425 S.E.2d at 703. There is no evidence of a fee agreement between plaintiff's counsel and any of plaintiffs medical providers, including Mr. Holappa. The Full Commission concludes that to the extent plaintiff's counsel's fee agreement with plaintiff, and specifically the phrase "any recovery," could be interpreted to include medical compensation, it is unreasonable under the facts of this case. The Full Commission therefore declines to approve an attorney fee for plaintiff's counsel out of the medical compensation which defendants have been ordered to pay to Mr. Holappa.

Plaintiff appealed the Commission's denial of attorney's fees to the Superior Court in Buncombe County pursuant to N.C.G.S. § 97-90(c), which authorizes the senior resident superior court judge to "consider the matter and determine in his discretion the reasonableness of said agreement or fix the fee" in situations in which there is an agreement and "[i]n all other cases where there is no agreement for fee or compensation . . . [to] consider the matter of such fee and determine in his discretion the attorneys' fees to be allowed in the cause." On 27 April 2015, defendants filed a motion to intervene, which was allowed by the superior court.

After a hearing, the superior court entered an order on 25 August 2015, followed by an amended order on 4 September 2015 in order to cure an ambiguity in the final paragraph of the initial order. The superior court reversed the Commission's denial of attorney's fees from the reimbursement for retroactive attendant care medical compensation. In its order, the superior court found, in pertinent part:

> 7. With the knowledge and approval of Plaintiff and Mr. Holappa, attorney Mark T. Sumwalt and his firm The Sumwalt Law Firm were subsequently associated to assist in litigating the attendant care issues that had arisen in Plaintiff's claim as a result of Defendants' refusal to voluntarily provide the recommended attendant care to Plaintiff and compensate Mr. Holappa for the attendant care services he provided to Plaintiff.
>
> 8. Mr, Holappa, through Plaintiff's counsel, submitted an affidavit to this Court in which he stated that he consented and agreed to Plaintiff's counsel's pursuit of such recovery on his behalf with the understanding and desire that any recovery made on his behalf through Plaintiff's workers' compensation claim would be subject to the 25% fee previously agreed to in the retainer agreement.
>
> 9. Mr. Sumwalt was associated in approximately June 2012, and litigation commenced with the clear understanding of all parties involved that any compensation recovered on behalf of Mr. Holappa for providing attendant care services to Plaintiff would be subject to the previously agreed upon amount of 25% of any benefits ordered by the Industrial Commission, in accordance with the parties' retainer agreement contract.

. . . .

13. Plaintiff's counsel did not request fees from the home modifications, equipment needs, prescription medications, or compensation for psychological treatment that Plaintiff's counsel obtained on Plaintiff's behalf through litigation, despite the significant monetary value of these awards. Plaintiff's counsel requested an attorneys' fee only from the attendant care compensation obtained for Mr. Holappa in accordance with the retainer agreement.

. . . .

20. At the hearing in this matter, Mr. Sumwalt represented to this Court that his firm has invested over 500 hours of attorney time in this case and over $13,000.00 in litigation costs.

21. As a result of Mr. Sumwalt's and Mr. Teich's representation, Mr. Holappa recovered over $61,000.00 in retroactive attendant care compensation.

. . . .

26. Neither Plaintiff nor Defendants were able to cite any case where the Industrial Commission failed to award an attorneys' fee from retroactive family member-provided attendant care compensation.

From its findings of fact, the court made the following conclusions of law:

3. In reaching its decision, this Court considered, with regard to the efforts of Mr. Teich and Mr. Sumwalt to achieve an award for retroactive attendant care services, the following: the significant time investment of the attorneys, the amount involved, the favorable results achieved, the contingent nature of the fee retainer agreement, the customary nature of the 25% fee for similar services, the specialized skill level and significant experience of Mr. Sumwalt in the area of attendant care service recovery, and the appropriate and necessary nature of the attorneys' services given the Defendant[s'] denial of the claim. N.C. Gen. Stat. § 97-90(c).

4. After consideration of these factors, this Court determined that Mr. Sumwalt performed significant legal

services and expended substantial sums in litigation costs in this matter, which services and costs were necessary and essential to the prosecution of Plaintiff's case and the achievement of the award for retroactive attendant care services.

5. This Court therefore concludes that Plaintiff's counsel's fee agreement of "25% of any recovery as Ordered by the North Carolina Industrial Commission" is reasonable.

. . . .

7. This Court does not find Defendants' argument that [*Palmer v. Jackson*] prohibits an award of attorneys' fees from retroactive family member-provided attendant care compensation to be persuasive. In Palmer, the plaintiff's attorneys did not have a fee agreement with, or the consent of, the medical provider in that case (a hospital) to pursue the recovery of its fees, and the hospital objected to having to pay an attorneys' fee from the fees that the plaintiff's attorneys recovered on the hospital's behalf outside of an attorney-client relationship. Those are not the facts of the instant case. Plaintiff's counsel had the consent of and a fee agreement with both Plaintiff and Mr. Holappa.

. . . .

9. Awards of the value of retroactive attendant care services are not prohibited, and neither are reasonable attorneys' fees based on such awards.

Accordingly, the court "in its discretion, determine[d] that a reasonable attorney's fee for the retroactive attendant care compensation recovered [on] Mr. Holappa's behalf for services he provided to Plaintiff is 25% and shall therefore be allowed." Both parties appealed to the Court of Appeals.[1]

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1. On appeal, plaintiff argued that the superior court erred in granting defendants' motion to intervene and that defendants lacked standing to challenge a contract to which they were not a party. The Court of Appeals determined that the superior court did not err in allowing defendants' motion to intervene and that defendants did have standing to challenge the superior court's order on appeal. *Saunders*, 249 N.C. App. at 364-69, 791 S.E.2d at 471-74. Plaintiff raised these issues in his petition for discretionary review, but this Court did not allow review of these issues and they are therefore not before this Court.

At the Court of Appeals, defendants argued that the superior court did not have subject-matter jurisdiction to review the Commission's denial of attorney's fees because N.C.G.S. § 97-90(c) limits the superior court solely to reviewing the reasonableness of an attorney's fee under an explicit or implied fee agreement between an attorney and a claimant that was presented to the Commission for approval. Defendants asserted that the only fee agreement presented to the Commission here was between plaintiff and his counsel and that the superior court therefore lacked the authority to consider new affidavits and to review the reasonableness of a purported implied agreement between plaintiff's counsel and Mr. Holappa that had not been presented to the Commission. In the alternative, defendants argued that the Act does not allow attorney's fees to be paid out of medical compensation.

The Court of Appeals examined the language and legislative history of N.C.G.S. § 97-90(c), noting that subsection (c) was added in response to the decision in *Brice v. Robertson House Moving, Wrecking & Salvage Co.*, 249 N.C. 74, 105 S.E.2d 439 (1958), in order "to rectify the specific problem of the trial court not having jurisdiction over attorneys' fees in [ ] workers' compensation cases." *Saunders*, 249 N.C. App. at 371, 791 S.E.2d at 475 (quoting *Palmer v. Jackson*, 157 N.C. App. 625, 632, 579 S.E.2d 901, 906 (2003), *disc. rev. improvidently allowed*, 358 N.C. 373, 595 S.E.2d 145 (2004)). The court determined that "the statute solely applies to an appellate reasonableness review of a fee award on a contract between the claimant-employee and his attorney previously reviewed by the Full Commission, and not a *de novo* hearing." *Id.* at 371, 791 S.E.2d at 474. According to the Court of Appeals, subsection (c)'s "narrow scope" authorizes the superior court "to consider the factors set forth in the statute in reviewing the Commission's determination of the 'reasonableness' of a fee agreement" but does not authorize the superior court "to look beyond the evidence presented before the Commission or to take new evidence." *Id.* at 374, 791 S.E.2d at 476 (citing *Blevins v. Steel Dynamics, Inc.*, 202 N.C. App. 584, 691 S.E.2d 133, 2010 WL 521029 (2010) (unpublished)).

The Court of Appeals determined that the superior court here, in contravention of this statutory authority,

> considered evidence, the purported "fee agreement" between Plaintiff's attorney and Mr. Holappa, which was not considered before the Industrial Commission. Plaintiff's counsel took the indemnity and disability fee contract between Plaintiff and Mr. Teich, added an affidavit, which had never been considered by or ruled upon by

> the Industrial Commission, and argued for the first time before the superior court that these documents "created" an implied third party contract between Plaintiff's counsel and Mr. Holappa.
>
> Plaintiff's counsel did not petition the superior court for appellate review of the "reasonableness" of the Industrial Commission's decision related to the "agreement for fee or compensation" between Plaintiff and his attorneys referenced in the Full Commission's Opinion and Award, but instead presented a theory and a purported "fee contract," which was never presented to or reviewed by the Industrial Commission. *See* N.C. Gen. Stat. § 97-90(c).

Id. at 373-74, 791 S.E.2d at 476. Accordingly, the Court of Appeals concluded that the superior court had "acted beyond the scope of its statutory and limited appellate review of the reasonableness of the Commission's fee award by taking and considering new evidence, which was not presented to the Commission." *Id.* at 375, 791 S.E.2d at 477. The court also questioned whether, given that the enactment of subsection (c) predated the establishment of the Court of Appeals, to which appeals from the Commission under the Act typically lie, "the reasonableness review by the superior court under subsection (c) may have become an obsolete relic." *Id.* at 375, 791 S.E.2d at 477. Nonetheless, the court "refer[red] this issue to the General Assembly and request[ed] its review of . . . the continuing need for this limited appellate review by the superior court of the reasonableness of the Commission's attorney's fee awards." *Id.* at 376, 791 S.E.2d at 477.

The Court of Appeals further determined that the superior court "ruled far beyond an appellate review of the 'reasonableness' of the attorney's fee" in that "[t]he superior court purported to adjudicate a question of workers' compensation law, *i.e.*, whether the Commission may order an attorney's fee to be paid from the award of medical compensation." *Id.* at 374, 791 S.E.2d at 476. According to the Court of Appeals:

> This determination is outside the scope [of] the superior court's appellate jurisdiction under N.C. Gen. Stat. § 97-90(c), and rests within the statutes governing the Industrial Commission, subject to appeal to this Court. N.C. Gen. Stat. § 97-91 (2015). Our Court has determined "medical compensation is solely in the realm of the Industrial Commission, and § 97-90(c) gives no authority

> to the superior court to adjust such an award under the guise of attorneys' fees. Doing so constitutes an improper invasion of the province of the Industrial Commission, and constitutes an abuse of discretion."

Id. at 374, 791 S.E.2d at 476-77 (quoting *Palmer*, 157 N.C. App. at 635, 579 S.E.2d at 908 (citation omitted)). The court concluded that because the superior court "was without jurisdiction under N.C. Gen. Stat. § 90-97(c) to re-weigh the Commission's factual determinations under these facts, or to award, *de novo*, attorney's fees from attendant care medical compensation to be paid to a third party medical provider," the superior court's order "is a nullity and is vacated." *Id.* at 376, 791 S.E.2d at 477. Accordingly, the court remanded the case to the superior court for further remand to the Commission. *Id.* at 376, 791 S.E.2d at 477-78.

On 25 October 2016, plaintiff filed a petition seeking discretionary review of the following issues:

> I. Whether the Court of Appeals' opinion in *Saunders* is inconsistent with the Supreme Court's previous decisions in *Schofield* and *Virmani*.
>
> II. Whether the Court of Appeals' opinion in *Saunders* is inconsistent with its own prior decisions, including *Kanipe*, *Boylan II*, *Koenig*, *Davis*, *Boylan I*, *Creel*, and *Priddy*.
>
> III. Whether the Court of Appeals' opinion in *Saunders* is consistent with N.C. Gen. Stat. § 97-90(c) and case law construing the statute.

On 1 November 2017, this Court entered a special order granting discretionary review solely of Issue III.

Analysis

We conclude that the decision of the Court of Appeals is not consistent with N.C.G.S. § 97-90(c) and therefore, reverse the Court of Appeals. The issue we agreed to hear on discretionary review is one of statutory interpretation, meaning it is a "question[ ] of law and [ ] reviewed de novo." *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010) (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998)); *see also Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) ("When considering a case on discretionary review from the Court of Appeals, we review the decision for errors of law." (citing N.C. R. App. P. 16(a))). "We have held in decision

after decision that our Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependants, and its benefits should not be denied by a technical, narrow, and strict construction." *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968) (citing 3 Strong's North Carolina Index: *Master and Servant* § 45 (1960)); *see also Deese v. Se. Lawn & Tree Expert Co.*, 306 N.C. 275, 278, 293 S.E.2d 140, 143 (1982) ("[I]n all cases of doubt, the intent of the legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Act as a whole—its language, purposes and spirit.").

Attorney's fees are regulated under the Act by N.C.G.S. § 97-90, which states that "[f]ees for attorneys . . . shall be subject to the approval of the Commission." N.C.G.S. § 97-90(a) (2017). In addition, the Act mandates that any attorney who accepts a fee not approved by the Commission or the superior court is guilty of a Class 1 misdemeanor. *Id.* § 97-90(b) (2017). The superior court's role in approving attorney's fees is defined in subsection (c), which provides:

> If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed. If within five days after receipt of notice of such fee allowance, the attorney shall file notice of appeal to the full Commission, the full Commission shall hear the matter and determine whether or not the attorney's agreement as to a fee or the fee allowed is unreasonable. If the full Commission is of the opinion that such agreement or fee allowance is unreasonable and so finds, then the attorney may, by filing written notice of appeal within 10 days after receipt of such action by the full Commission, appeal to the senior resident judge of the superior court in the county in which the cause of action arose or in which the claimant resides; and *upon such appeal said judge shall consider the matter and determine in his discretion the reasonableness of said agreement or fix the fee and direct an order to the Commission* following his determination

therein. The Commission shall, within 20 days after receipt of notice of appeal from its action concerning said agreement or allowance, transmit its findings and reasons as to its action concerning such agreement or allowance to the judge of the superior court designated in the notice of appeal. In all other cases where there is no agreement for fee or compensation, the attorney or claimant may, by filing written notice of appeal within five days after receipt of notice of action of the full Commission with respect to attorneys' fees, appeal to the senior resident judge of the superior court of the district of the county in which the cause arose or in which the claimant resides; and *upon such appeal said judge shall consider the matter of such fee and determine in his discretion the attorneys' fees to be allowed in the cause.* The Commission shall, within 20 days after notice of appeal has been filed, transmit its findings and reasons as to its action concerning such fee or compensation to the judge of the superior court designated in the notice of appeal; provided that the Commission shall in no event have any jurisdiction over any attorneys' fees in any third-party action. In any case in which an attorney appeals to the superior court on the question of attorneys' fees, the appealing attorney shall notify the Commission and the employee of any and all proceedings before the superior court on the appeal, and either or both may appear and be represented at such proceedings.

The Commission, in determining an allowance of attorneys' fees, shall examine the record to determine the services rendered. The factors which may be considered by the Commission in allowing a reasonable fee include, but are not limited to, the time invested, the amount involved, the results achieved, whether the fee is fixed or contingent, the customary fee for similar services, the experience and skill level of the attorney, and the nature of the attorney's services.

In making the allowance of attorneys' fees, the Commission shall, upon its own motion or that of an interested party, set forth findings sufficient to support the amount approved.

> The Commission may deny or reduce an attorney's fees upon proof of solicitation of employment in violation of the Rules of Professional Conduct of the North Carolina State Bar.

Id. § 97-90(c) (2017) (emphases added).

Subsection (c) contains no language that limits the superior court solely to "the [same] factors set forth in the statute" that are to be considered by the Commission or that prohibits the superior court from "look[ing] beyond the evidence presented before the Commission or [ ] tak[ing] new evidence." *Saunders*, 249 N.C. App. at 374, 791 S.E.2d at 476. On the contrary, the statute vests the superior court judge with the authority to "consider the matter and determine *in his discretion* the reasonableness of said agreement or fix the fee" when there is an agreement, and "[i]n all other cases where there is no agreement for fee or compensation . . . [to] consider the matter of such fee and *determine in his discretion* the attorneys' fees to be allowed in the cause." N.C.G.S. § 97-90(c) (emphases added). We find that the plain language of the statute—committing the matter of attorney's fees to the superior court judge to "consider the matter" of a fee and "determine [it] in his discretion"—sets forth a broad, de novo fact-finding role to be played by the superior court. *See, e.g.*, *White v. White*, 312 N.C. 770, 777-78, 324 S.E.2d 829, 833 (1985) (explaining that "[i]t is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion," and "[a] ruling committed to a trial court's discretion is to be accorded great deference" and discussing how "[t]he findings of fact show that the trial court *admitted and considered evidence* relating to several of the twelve factors contained in" the statute at issue (emphasis added) (citations omitted)); *see also Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) ("The abuse of discretion standard of review is applied to those decisions which necessarily require the exercise of judgment. . . . [T]he reviewing court sits only to insure that the decision could, *in light of the factual context in which it is made*, be the product of reason." (emphasis added)). Accordingly, we conclude that the Court of Appeals erred by reading strict limits into the statutory review to be conducted by the superior court. Instead, we hold that, in accord with the authority given in N.C.G.S. § 97-90(c) to "consider the matter" of attorney's fees and "in his discretion" fix the attorney's fees to be allowed, the superior court judge may take and consider additional evidence not presented to the Commission in order to properly consider the matter and exercise the court's discretion.

Here, the Commission found that "[t]he only fee agreement of record at the Industrial Commission is the one entered into between [Teich's firm] and plaintiff" and concluded that "[t]here is no evidence of a fee agreement between plaintiff's counsel and any of plaintiff's medical providers, including Mr. Holappa." The superior court, under its authority to "consider the matter" of attorney's fees and "in [its] discretion" fix the attorney's fees to be allowed, considered the evidence, including an affidavit from Mr. Holappa, and determined that there actually was such an agreement. In fact, the very same agreement between plaintiff's counsel and plaintiff that was before the Commission was the one submitted to the superior court for review; Mr. Holappa's affidavit made clear that he was also a party to that agreement. The superior court thereupon found the following facts:

> 7. With the knowledge and approval of Plaintiff and Mr. Holappa, attorney Mark T. Sumwalt and his firm The Sumwalt Law Firm were subsequently associated to assist in litigating the attendant care issues that had arisen in Plaintiff's claim as a result of Defendants' refusal to voluntarily provide the recommended attendant care to Plaintiff and compensate Mr. Holappa for the attendant care services he provided to Plaintiff.
>
> 8. Mr. Holappa, through Plaintiff's counsel, submitted an affidavit to this Court in which he stated that he consented and agreed to Plaintiff's counsel's pursuit of such recovery on his behalf *with the understanding and desire that any recovery made on his behalf through Plaintiff's workers' compensation claim would be subject to the 25% fee previously agreed to in the retainer agreement.*
>
> 9. Mr. Sumwalt was associated in approximately June 2012, and litigation commenced with the clear understanding of all parties involved that any compensation recovered on behalf of Mr. Holappa for providing attendant care services to Plaintiff would be subject to the previously agreed upon amount of 25% of any benefits ordered by the Industrial Commission, *in accordance with the parties' retainer agreement contract.*
>
> . . . .
>
> 13. Plaintiff's counsel did not request fees from the home modifications, equipment needs, prescription medications, or compensation for psychological treatment that

> Plaintiff's counsel obtained on Plaintiff's behalf through litigation, despite the significant monetary value of these awards. Plaintiff's counsel requested an attorneys' fee only from the attendant care compensation obtained for Mr. Holappa *in accordance with the retainer agreement*.

(Emphases added.) The court then concluded:

> 1. . . . Plaintiff's counsel participated in complex litigation, including the defense of the case on appeal before the Full Commission, predominantly on the issue of attendant care and *with a contingency fee agreement with Plaintiff and Mr. Holappa in place*.
>
> . . . .
>
> 5. This Court therefore concludes that *Plaintiff's counsel's fee agreement of [ ] "25% of any recovery as Ordered by the North Carolina Industrial Commission" is reasonable*.
>
> . . . .
>
> 7. This Court . . . . [finds that the facts in *Palmer*] are not the facts of the instant case. Plaintiff's counsel had the consent of and a fee agreement with both Plaintiff and Mr. Holappa.

(Emphases added.) (Citation omitted.) Having determined that Mr. Holappa was a party to the agreement between plaintiff and his counsel providing for attorney's fees of "25% of any recovery," the superior court considered all the factors listed in subsection (c) and "in its discretion, determine[d] that a reasonable attorney's fee . . . is 25% and shall therefore be allowed."

We note first that "[a] mere recital in an order that it is entered in the exercise of the court's discretion does not necessarily make the subject of the order a discretionary matter" and "[r]ulings of the court on matters of law are as a rule not discretionary." *Hollingsworth GMC Trucks, Inc. v. Smith*, 249 N.C. 764, 767, 107 S.E.2d 746, 749 (1959) (first citing *Poovey v. City of Hickory*, 210 N.C. 630, 631, 188 S.E. 78, 79 (1936); then citing 2 Thomas Johnston Wilson, II & Jane Myers Wilson, *McIntosh North Carolina Practice and Procedure* (2d ed. 1956), § 1782(4) at 209). Here, the Court of Appeals determined that the superior court exceeded its discretionary authority under subsection (c) not only by taking additional evidence, but also by "purport[ing] to adjudicate a question of

workers' compensation law, *i.e.*, whether the Commission may order an attorney's fee to be paid from the award of medical compensation." *Saunders*, 249 N.C. App. at 374, 791 S.E.2d at 476. According to the Court of Appeals, "medical compensation is solely in the realm of the Industrial Commission, and § 97-90(c) gives no authority to the superior court to adjust such an award under the guise of attorneys' fees." *Id.* at 374, 791 S.E.2d at 476 (quoting *Palmer*, 157 N.C. App. at 635, 579 S.E.2d at 908).[2] We disagree and conclude that the superior court below acted exactly within the authority and discretion provided to it by the plain language of N.C.G.S. § 97-90(c).

Moreover, contrary to the suggestion of the Court of Appeals, we do not consider N.C.G.S. § 97-90(c) to be an "obsolete relic." *Id.* at 375, 791 S.E.2d at 477. In noting that subsection (c) was added in response to the *Brice* decision and "prior to the establishment of the Court of Appeals in 1967 and the establishment of [the Court of Appeals'] comprehensive jurisdiction to review direct appeals from the Industrial Commission," *id.* at 371, 791 S.E.2d at 475; *see also* Act of June 2, 1967, ch. 669, sec. 1, 1967 N.C. Sess. Laws 755, 755 (vesting appeals from Commission decisions for errors of law in the Court of Appeals), the Court of Appeals suggested that subsection (c)'s review of attorney's fees was lodged in the superior court merely because the Court of Appeals was not yet in existence when subsection (c) was enacted. In that respect, we note that the legislature, following the creation of the Court of Appeals, more than once has amended subsection (c) without removing the superior court's discretion to review attorney's fees. The Workers' Compensation Reform Act of 1994, ch. 679, sec. 9.1, 1993 N.C. Sess. Laws (Reg. Sess. 1994) 394, 417-18; *see also* Act of July 11, 2013, ch. 278, sec. 1, 2013 N.C. Sess. Laws 755, 755-56 (authorizing the Commission to hear disputes between an employee's previous and current attorneys regarding the division of a fee and providing that "[a]n attorney who is a party to an action under this subsection shall have the same rights of appeal as outlined in subsection (c) of this section"). The superior court's comprehensive factual review of an attorney's fee as contemplated by N.C.G.S. § 97-90(c) is quite unlike the kind of analysis conducted by the Court of Appeals, which typically reviews for errors of law. *See* N.C.G.S. § 97-86 (2017) ("[A]ppeal from the decision of [the] Commission to the Court of Appeals [is] *for errors of law* under the same terms and conditions

2. This contention based on *Palmer* is misplaced, however, as neither the superior court nor the Commission purported to adjudicate the question of law that was at issue in *Palmer*. *See Palmer*, 157 N.C. App. at 627-28, 579 S.E.2d at 903-04. We express no opinion on the decision of the Court of Appeals in *Palmer*, which is not binding on this Court.

as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." (emphasis added)); *see also id.* § 7A-26 (2017) (providing that the Court of Appeals has "jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice and of administrative agencies, *upon matters of law or legal inference*" (emphasis added)).

Indeed, the appellate jurisdiction now possessed by the Court of Appeals was the same as that possessed by the superior court before the enactment of subsection (c), as explained in *Brice*:

> When the appeal comes on for hearing[,] it is heard by the presiding [superior court] judge who sits as an appellate court. His function is to review alleged errors of law made by the Industrial Commission, as disclosed by the record and as presented to him by exceptions duly entered. Necessarily, the scope of review is limited to the record as certified by the Commission and to the questions of law therein presented.
>
> . . . 'In passing upon an appeal from an award of the Industrial Commission in a proceeding coming within the purview of the act, the Superior Court is limited in its inquiry to these two questions of law: (1) Whether or not there was any competent evidence before the commission to support its findings of fact; and (2) whether or not the findings of fact of the commission justify its legal conclusions and decision. *The Superior Court cannot consider the evidence in the proceeding in any event for the purpose of finding the facts for itself.*

Brice, 249 N.C. at 82, 105 S.E.2d at 445 (emphasis added) (citations omitted) (first quoting *Penland v. Bird Coal Co.*, 246 N.C. 26, 33, 97 S.E.2d 432, 438 (1957); then quoting *Thomason v. Red Bird Cab Co.*, 235 N.C. 602, 605, 70 S.E.2d 706, 708 (1952)). We conclude that subsection (c)—enacted "in response to the *Brice* decision," *Saunders*, 249 N.C. App. at 371, 791 S.E.2d at 475—is separate from the appellate review for errors of law that was formerly vested in the superior court and is now vested in the Court of Appeals; instead, a review under subsection 97-90(c) is a unique, fact-based avenue of review covering a limited subject matter[3] that the legislature has chosen to vest in the superior court.

3. Notably, the matter of attorney's fees is not the only area under the Act that the legislature has committed to the discretion of the superior court. In 1983, after the creation

Conclusion

In sum, we hold that the decision of the Court of Appeals here is inconsistent with N.C.G.S. § 97-90(c) and that the superior court had jurisdiction to take and consider additional evidence not previously considered by the Commission. We further conclude that the superior court based its determination on factual findings and an exercise of discretion, as specifically authorized in N.C.G.S. § 97-90(c). Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for remand to the superior court for further remand to the Commission for entry of an order setting attorney's fees as determined by the superior court, and for additional proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

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of the Court of Appeals, the legislature added N.C.G.S. § 97-10.2(j), providing that when an employee obtains a judgment pursuant to a settlement from a third-party tortfeasor, the employee or the employer (or the employer's insurance carrier) may apply to the superior court to have the presiding judge determine the amount of the employer's lien. Act of June 30, 1983, ch. 645, sec. 1, 1983 N.C. Sess. Laws 604, 604; *see* Act of June 26, 1991, ch. 408, sec. 1, 1991 N.C. Sess. Laws 768, 772 (amending subsection (j) to provide that "with or without the consent of the employer, the [superior court] judge shall determine, *in his discretion*, the amount, if any, of the employer's lien" (emphasis added)); *see*, *e.g.*, *Easter-Rozzelle v. City of Charlotte*, 370 N.C. 286, 300, 807 S.E.2d 122, 131 (2017) (concluding that the plaintiff did not waive his right to compensation under the Act by settling with a third-party tortfeasor and receiving settlement proceeds and that "either party here may apply to the superior court judge to determine the amount of defendant's lien").

STATE v. GENTLE

[372 N.C. 47 (2019)]

STATE OF NORTH CAROLINA
v.
DARREN WAYNE GENTLE

No. 240A18

Filed 1 February 2019

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. ___, 817 S.E.2d 833 (2018), finding no error in part and dismissing defendant's appeal in part from a judgment and an order for satellite-based monitoring entered on 6 October 2016 by Judge Lindsay R. Davis in Superior Court, Randolph County. Heard in the Supreme Court on 8 January 2019.

Joshua H. Stein, Attorney General, by Joseph E. Elder, Assistant Attorney General, for the State.

Richard J. Costanza for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
JERRY GIOVANI THOMPSON

No. 24A18

Filed 1 February 2019

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. ___, 809 S.E.2d 340 (2018), vacating and remanding a judgment entered on 3 January 2017 by Judge William R. Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 2 October 2018.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, and Robert T. Broughton, Assistant Attorney General, for the State-appellant.

Erik R. Zimmerman and Travis S. Hinman for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is vacated and this case is remanded to the Court of Appeals for reconsideration in light of our decision in *State v. Wilson*, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2018) (No. 295PA17).

VACATED AND REMANDED.

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

SCIGRIP, INC. F/K/A IPS STRUCTURAL ADHESIVES HOLDINGS, INC., AND IPS INTERMEDIATE HOLDINGS CORPORATION	)	
v.	)	Durham County
SAMUEL B. OSAE AND SCOTT BADER, INC.	)	

No. 139A18

SPECIAL ORDER

Plaintiffs' 23 January 2019 Motion to Protect Against Disclosure of Confidential or Trade Secret Information at Oral Argument is ALLOWED only as to plaintiffs' request that the Court prohibit the parties from revealing any alleged confidential or trade secret information during oral argument. To the extent the parties need to do so, they may utilize the key referenced in plaintiffs' motion.

In all other respects, plaintiffs' motion is DENIED.

By order of the Court in Conference, this the 30th day of January, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of February, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. J.C.

[372 N.C. 50 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Onslow County
	)	
J.C.	)	

No. 405PA17

ORDER

The Motion to Restrict Electronic Access, Place Case "Under Seal," and Redact Superior Court Case Numbers from All Published Materials filed by petitioner in this case is decided as follows: the motion is allowed to the extent that the materials filed in this case, such as the record, briefs, motions, orders, and other filings in this case will not be posted upon the North Carolina appellate court electronic filing site and that any opinion, orders, or similar documents published by the Court in this case will, from and after the date of the entry of this order, omit petitioner's name (as compared to his initials or a pseudonym) and the Onslow County file number(s) relevant to this case. The motion is denied to the extent that the Court declines to remove the Court of Appeals case number(s) from any opinions, orders, or similar documents published by the Court in this case.

By order of the Court in conference, this the 30th day of January, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of February, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

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

30 JANUARY 2019

001P19	Teressa B. Rouse v. Forsyth County Department of Social Services	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA17-884) 2. Respondent's Conditional PDR Under N.C.G.S. § 7A-31 3. Respondent's Motion to Stay Reinstatement of Employee	1. 2. 3. Allowed **01/14/2019**
002A19	State v. John Thomas Coley	1. State's Motion for Temporary Stay (COA18-234) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **01/04/2019** 2.
003P19	State v. Eric Wilson Taylor	1. State's Motion for Temporary Stay (COA17-1284) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/09/2019** Dissolved **01/30/2019** 2. Denied 3. Denied
007P19	Melinda Finan and Robert Quin v. Child Protective Service	1. Plt's (Melinda Finan) *Pro Se* Motion for Appeals 2. Plt's (Melinda Finan) *Pro Se* Motion for Stay 3. Plt's (Melinda Finan) *Pro Se* Motion for Change of Venue	1. Denied **01/07/2019** 2. Denied **01/07/2019** 3. Dismissed **01/07/2019**
011A19	State v. Tyler Deion Greenfield	1. Def's NOA Based Upon a Dissent (COA17-802) 2. State's PDR Under N.C.G.S 3. State's Motion for Temporary Stay 4. State's Petition for *Writ of Supersedeas* 5. Joint Motion to Stay Briefing	1. --- 2. 3. Allowed **01/23/2019** 4. Allowed **01/23/2019** 5. Allowed **01/29/2019**
013P19	In the Matter of the Estate of Johnnie Edward Harper v. Kim L. Harper	1. Def's *Pro Se* Emergency Motion to Stay (COAP18-859) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **01/10/2019** 2. Denied **01/10/2019**

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

30 JANUARY 2019

016P19	In the Matter of the Foreclosure of a Deed of Trust Executed by Michael D. Radcliff and Margene K. Radcliff Dated May 23, 2003 and Recorded in Book 1446 at Page 2024 and Rerecorded in Book 1472 at Page 2465 in the Iredell County Public Registry, North Carolina	1. Appellant's Motion for Temporary Stay (COA18-419) 2. Appellant's Petition for *Writ of Supersedeas* 3. Appellant's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/11/2019** 2. 3.
020P18-2	Vincent J. Mastanduno, Employee v. National Freight Industries, Employer and American Zurich Insurance Company, Carrier	1. Plt's Motion for Temporary Stay (COA17-1058) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Petition for *Writ of Certiorari* to Review Order of COA 4. Plt's PDR Under N.C.G.S § 7A-31	1. Denied **11/05/2018** 2. Denied **11/05/2018** 3. Denied 4. Denied
020P19	State v. Utaris Mandrel Reid	1. State's Motion for Temporary Stay (COAP18-888) 2. State's Petition for *Writ of Supersedeas*	1. Denied **01/18/2019** 2. Denied **01/18/2019**
030P19	State v. Robert Paul DeLair	1. Def's Motion for Temporary Stay (COA18-124) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/23/2019** 2. 3. 4.
035P19	State v. Keven Anthony Morgan	1. Def's *Pro Se* Petition for *Writ of Mandamus* (COA18-575) 2. Def's *Pro Se* Motion for Dismissal of Charges 3. Def's *Pro Se* Motion for Immediate Release from the North Department of Corrections	1. Dismissed **01/23/2019** 2. Dismissed **01/23/2019** 3. Dismissed **01/23/2019**
040P18-2	Amy S. Grissom v. David I. Cohen	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-66)	Denied
041P17-5	Arthur O. Armstrong v. Wilson County, et al.	Plt's *Pro Se* Motion for Petition for Rehearing	Dismissed

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

30 JANUARY 2019

047P02-18	State v. George W. Baldwin	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Alamance County	Denied **12/21/2018**
054P18-2	State v. Carnell Lavance Calhoun	Def's *Pro Se* Motion for PDR (COAP18-799)	Dismissed **Ervin, J., recused**
056PA17	Dr.Robert Corwin, as Trustee for the Beatrice Corwin Living Irrevocable Trust on behalf of class of those similarly situated v. British American Tobacco PLC , et al.	Plt's Petition for Rehearing	Denied
069A06-4	State v. Terraine Sanchez Byers	1. State's Motion for Temporary Stay (COA18-250) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/15/2019** 2. Allowed **01/16/2019** 3. ---
70PA16-3	State v. Nicolas Olivares Pineda	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
093P18-2	Latonya A. Taylor, Individually, and as the Administratrix of the Estates of Sylvester Taylor and Angela Taylor; and as Guardian ad Litem of J.T., N.H., and A.H., Minor Children v. Wake County d/b/a the Division of Social Services	1. Plt's Motion for Reconsideration 2. Def's Motion to Strike Motion for Reconsideration	1. Dismissed 2. Dismissed as moot
123A95-3	State v. Ervy L. Jones, Jr.	Def's *Pro Se* Motion to Appoint Counsel	Dismissed
131P01-15	State v. Anthony Dove	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Lenoir County	Dismissed **Ervin, J., recused**

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

30 JANUARY 2019

139A18	SciGrip, Inc., et al. v. Osae, et al.	Tobias S. Hampson's Motion to Withdraw as Appellate Counsel	Allowed **01/02/2019**
139A18	SciGrip, Inc., et al. v. Osae, et al.	Plts' Motion to Close Courtroom During Oral Argument and to Seal Oral Argument Recording	Denied **01/14/2019**
139A18	SciGrip, Inc., et al. v.Osae, et al	Plts's Motion to Protect Against Disclosure of Confidential or Trade Secret Information at Oral Argument	Special Order
178P18	Elizabeth E. LeTendre v. Currituck County, North Carolina	1. Plt's Motion for Temporary Stay (COA17-1108) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Notice of Appeal Based Upon a Constitutional Question 4. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/23/2019** Dissolved **01/30/2019** 2. Denied 3. Dismissed *ex mero motu* 4. Denied
201PA12-5	Margaret Dickson, Plaintiff v. Robert Rucho, et al., Defendants ——————— North Carolina State Conference of Branches of the NAACP, Plaintiffs v. The State of NC, Defendants	Consent Motion to Dismiss Appeal	Allowed **01/04/2019** **Earls, J., recused**
217PA17-2	State v. Marvin Everett Miller, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-1206-2) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Dismissed as moot
219P18	Greater Harvest Global Ministries, Inc. v. Blackwell Heating & Air Conditioning, Inc.	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-630) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
230P17-4	State v. Anthony Lee McNair	Def's *Pro Se* Motion for All Writs Act	Dismissed

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

30 JANUARY 2019

233P12-2	State v. Montrez Benjamin Williams	1. State's Motion for Temporary Stay (COA16-178) 2. State's Petition for *Writ of Supersedeas* 3. Def's Motion for Temporary Stay 4. Def's Petition for *Writ of Supersedeas* 5. Def's Motion to Remove from Electronic Site	1. Allowed **10/05/2018** 2. 3. Allowed **10/05/2018** 4. 5. Dismissed without prejudice to refile with more specificity **01/30/2019**
235P18-2	State v. Ty Rayshun Davis	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/14/2018**
248A18	Sykes, et al. v. Blue Cross and Blue Shield of North Carolina, et al.	1. Def's (Cigna Healthcare of North Carolina, Inc.) Motion to Admit Joshua B. Simon *Pro Hac Vice* 2. Def's (Cigna Healthcare of North Carolina, Inc.) Motion to Admit Warren Haskel *Pro Hac Vice* 3. Def's (Cigna Healthcare of North Carolina, Inc.) Motion to Admit Dmitriy Tishyevich *Pro Hac Vice* 4. Def's (Blue Cross and Blue Shield of North Carolina) Motion to Admit Peter M. Boyle *Pro Hac Vice* 5. Def's (Blue Cross and Blue Shield of North Carolina) Motion to Admit Christina E. Fahmy *Pro Hac Vice*	1. Allowed 2. Allowed 3. Allowed 4. Allowed 5. Allowed
253P18-2	In re Webster Waller	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/28/2019**
255A17	Billie Bruce Justus as Administrator of the Estate of Pamela Jane Justus v. Rosner, et al.	Tobias S. Hampson's Motion to Withdraw as Appellate Counsel	Allowed **01/02/2019**

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

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259P18	Aisha D. Flood, Administrator of the Estate of Maurice A. Harden v. Jonathan Henry Crews, Individually, and Jonathan Henry Crews, in his capacity as a member of Raleigh Police Department, and City of Raleigh	Def's PDR Under N.C.G.S. § 7A-31 (COA17-740)	Denied
264PA18	In the Matter of B.O.A.	1. North Carolina Association of Social Service Attorneys' Motion to Allow Access to Record on Appeal 2. North Carolina Association of Social Service Attorneys' Motion for Extension of Time to File Amicus Brief	1. Allowed **01/02/2019** 2. Allowed **01/02/2019**
266P18-3	State v. Charles Antonio Means	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Johnston County 2. Def's *Pro Se* Petition for *Writ of Mandamus* 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed
282P18	State v. Christopher Jamme Whitfield and State v. Corey Levi Banner	1. State's Motion for Temporary Stay (COA17-184) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's (Corey Levi Banner) *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Allowed **08/31/2018** Dissolved **01/30/2019** 2. Denied 3. Denied 4. Denied
294A18	State v. Jeffery Daniel Waycaster	1. Def's Notice of Appeal Based Upon a Dissent (COA17-1249) 2. Def's PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed
296P15-3	Ernest James Nichols v. Brian Pulley, Assistant Superintendent for Custody – Nash Correctional; Erik Hooks, Secretary of the North Carolina Department of Public Safety	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/11/2019**

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301P16-3	Michael Anthony Taylor v. Carlos Hernandez, Superintendent of Avery-Mitchell Correctional Institution	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Motion for Notice of Constitutional Challenge 3. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **01/22/2019** 2. Dismissed as moot **01/22/2019** 3. Allowed **01/22/2019**
304P18	State v. Maurice McKinnon	Def's *Pro Se* Motion for PDR (COAP18-494)	Denied
305P97-8	Egbert Francis, Jr. v. Municipal Court of Wake County, et al.	Petitioner's *Pro Se* Motion for Civil Contempt	Dismissed
311P18	State v. Shakita Necole Walton	1. State's Motion for Temporary Stay (COA17-1359) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/21/2018** 2. Allowed 3. Allowed
313P18	Dunhill Holdings, LLC, Plaintiff/ Counter-Defendant v. Tisha L. Lindberg, Defendant/Counter-Plaintiff and Wes Massey, Craig Herndon, Hardee Merritt, and Derek Boone, Defendants ——————— Tisha L. Lindberg, Third-Party Plaintiff v. Greg Lindberg, Third-Party Defendant	1. Plaintiff/Counter- Defendant and Third-Party Def's Motion for Temporary Stay (COAP18-613) 2. Plaintiff/Counter-Defendant and Third-Party Def's Petition for *Writ of Supersedeas* 3. Defendant/ Counter-Plaintiff and Third-Party Plaintiff's Motion for Expedited Consideration	1. Allowed **09/24/2018** Dissolved **01/30/2019** 2. Denied 3. Denied
318P18	Patricia M. Brady v. Bryant C. Van Vlaanderen; Renee M. Van Vlaanderen; Marc S. Townsend; Linda M. Townsend; United Tool & Stamping Company of North Carolina, Inc.; United Realty of North Carolina, LLC; Enterprise Realty, LLC; and Waters Edge Town Apartments, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-61)	Denied

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321P18	Rebecca R. Davis and Matthew M. Davis, Individually and on behalf of Jeanette B. Davis, Trustor of the Jeanette B. Davis Revocable Trust Dated March 11, 2002; and Matthew M. Davis, on behalf of his children, Mallory Fay Davis and Matthew McCabe Davis, Jr. v. Janet D. Rizzo, Individually and as Trustee of the Jeanette B. Davis Revocable Trust Dated March 11, 2002; Anne Page Watson, and Intervenor Jeanette B. Davis	Plts' Petition for *Writ of Certiorari* to Review Decision of COA (COA17-1153)	Denied
326P17-2	State v. Ricky D. Wagoner	1. Def's *Pro Se* Motion for Notice of Appeal (COAP17-575) 2. Def's *Pro Se* Motion for PDR	1. Dismissed *ex mero motu* 2. Denied
328A11	State v. Tony Savalis Summers	Motion to Withdraw as Counsel and Allow the Office of Appellate Defender to Appoint Substitute Counsel	Allowed **01/16/2019**
331A18	Craig Franklin Smith v. North Carolina Board of Funeral Service	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA17-996) 2. Respondent's Motion to Dismiss Appeal	1. Allowed **12/05/2018** 2. Allowed
334P18	Janice Thompson v. Christopher Lee Bass and Donald Wayne Boyd	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1194)	Denied
337P18	In the Matter of C-R.D.G.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA18-148)	Denied

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339A18	Francis X. De Luca and the New Hanover County Board of Education, Plaintiff v. Josh Stein, in his capacity as Attorney General of the State of North Carolina, Defendant, and North Carolina Coastal Federation and Sound Rivers, Inc., Intervenors	1. Def's Notice of Appeal Based Upon a Dissent (COA17-1374) 2. Def's PDR as to Additional Issues 3. Plt's (New Hanover County Board of Education) PDR Under N.C.G.S. § 7A-31 4. Intervenors' Notice of Appeal Based Upon a Dissent 5. Intervenors' PDR as to Additional Issues	1. --- 2. Allowed 3. Allowed 4. --- 5. Allowed
342P18	State v. Hector Tepox Maldonado	Def's PDR Under N.C.G.S. § 7A-31 (COA17-643)	Denied
346P18	Pamela C. Barrett, Individually and as Executor of the Estate of Donald Collins Clements, Jr. v. Nancy Coston	Plt's PDR Under N.C.G.S § 7A-31 (COA18-16)	Denied
348P18	State v. John Scott Hudson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
352P18	Elizabeth E. LeTendre v. Currituck County, North Carolina and Michael Long and Marie Long, Proposed Intervenors	1. Plt's Motion for Temporary Stay (COA18-163) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/18/2018** Dissolved **01/30/2019** 2. Denied 3. Denied
354P18	AVR Davis Raleigh, LLC v. Triangle Construction Company, Inc.	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-958) 2. Plt's PDR Under N.C.G.S. §7A-31 3. Def's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
355P18	State v. Shelly Anne Osborne	1. State's Petition for *Writ of Supersedeas* (COA18-9) 2. State's Application for Temporary Stay 3. State's PDR	1. Allowed 2. Allowed **10/22/2018** 3. Allowed

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356P17-2	State v. Brandon Lee	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/28/2018**
357P18	Thorsten Blumenschein v. Nicole Blumenschein	Plt's PDR Under N.C.G.S. §7A-31 (COA17-1299)	Denied
367P18	State v. Trejuan Marice White	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-136) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
368P18	In the Matter of V.P.M.A.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA17-1386)	Denied
375A15-2	Dabeeruddin Khaja v. Fatima Husna	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-763) 2. Def's Motion to Amend	1. Denied 2. Denied
380P18	State v. John Douglas Huckabee	Def's *Pro Se* Motion For Dismissal	Dismissed as moot
385P18	State v. Daryll Lamar Brooks	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-64)	Denied
391P18-2	Joseph Lee Ham v. Supt. David Millis, et al.	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/07/2018**
394P18	State v. Jasmine L. Burton	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Person County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
401A18	State *ex rel.* Utilities Commission v. Attorney General	Joint Motion for Leave to File Documents Under Seal	Allowed
402P18	Denise Guidotti v. Donald Mac Moore, Sr.	1. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-221) 2. Plt's *Pro Se* Motion to Amend the Petition	1. Denied 2. Allowed

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405PA17	State v. J.C.	1. State's Motion for Temporary Stay (COA17-207-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. State's Petition for *Writ of Certiorari* to Review Order of COA 5. Petitioner's Motion to Proceed Under a Pseudonym 6. Petitioner's Motion to Restrict Electronic Access, Place Case "Under Seal," and Redact Superior Court Case Numbers from All Published Materials	1. Allowed **11/27/2017** 2. Allowed **08/14/2018** 3. Special Order **08/14/2018** 4. Denied **08/14/2018** 5. Allowed 6. Special Order
412P18	Annette Baker, PH.D. v. The North Carolina Psychology Board	1. Plt's PDR Under N.C.G. S. § 7A-31 (COA18-264) 2. Plt's Motion for Temporary Stay 3. Plt's Petition for *Writ of Supersedeas*	1. 2. Allowed **01/23/2019** 3.
418P18	State v. Jonathan Adrian Fuller	1. Def's *Pro Se* Motion for PDR (COA17-495) 2. Def's *Pro Se* Petition for *Writ of Certiorari*	1. Dismissed 2. Denied
421P18	Gregory H. Jones v. Supt. Mike Slagle, et al.	1. Petitioner's *Pro Se* Motion for *Certiorari* 2. Petitioner's *Pro Se* Motion for *Mandamus* and Change of Venue	1. Dismissed 2. Dismissed
422P18	State v. Samuel Eugene Geddie	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-332) 2. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
425A18	Hamlet H.M.A., LLC d/b/a Sandhills Regional Medical Center v. Pedro Hernandez, M.D.	1. Plt's Notice of Appeal Based Upon a Dissent (COA17-744) 2. Plt's PDR as to Additional Issues 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Denied 3. Denied
429P18	State v. James Opleton Bradley	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1391)	Denied
431P18	State v. Raymond Craig Johnson	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-798)	Dismissed

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436P18	State v. Joshua Shane Baker	Def's PDR Under N.C.G.S. § 7A-31 (COA18-70) Denied	
438P09-2	State v. Darron Jermaine Jones	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as moot **Beasley, J., recused**
441A18	State v. Rontel Vincae Royster	1. State's Motion for Temporary Stay (COA18-2) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **12/18/2018** 2. ----- 3.
442P18	The Grande Villas at The Preserve Condominium Homeowners Association, Inc. v. Indian Beach Acquisition LLC and Thomas P. Ryan	Defs' PDR Under N.C.G.S. § 7A-31	Denied
443P18	Pender Cowan Cates, Jr. v. Peter Bucholtz, Administrator	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed without prejudice **01/09/2019**
448P18	State v. Justin Delane Kraft	1. State's Motion for Temporary Stay (COA18-330) 2. State's Petition for *Writ of Supersedeas* 3.State's PDR Under N.C.G.S. §7A-31	1. Allowed **12/21/2018** 2. 3.
450P18	State v. Ron Cornelius Johnson	Def's PDR Under N.C.G.S. § 7A-31 (COA18-241)	Denied
514PA11-3	State v. Harry Sharod James	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot

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518P98-2	State v. Christopher Mosby	1. Def's *Pro Se* Motion for Extension of Time 2. Def's *Pro Se* Motion for Notice of Appeal	1. Dismissed as moot 2. Dismissed *ex mero motu*
542P97-3	State v. Terrence L. Wright	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/15/2019**

COUNTY OF DURHAM, BY AND THROUGH DURHAM DSS, EX REL. SHARON L. WILSON AND TIFFANY A. KING

v.

ROBERT BURNETTE

No. 404A18

Filed 29 March 2019

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. ___, 821 S.E.2d 840 (2018), vacating orders entered on 23 November 2016 by Judge Fred Battaglia in District Court, Durham County, and remanding for entry of new orders. Heard in the Supreme Court on 6 March 2019.

Office of the County Attorney, by Geri Ruzage, Senior Assistant County Attorney, for plaintiff-appellant.

Mary McCullers Reece for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

PREISS v. WINE & DESIGN FRANCHISE, LLC

[372 N.C. 65 (2019)]

EMILY N. PREISS AND WINE AND DESIGN, LLC
v.
WINE AND DESIGN FRANCHISE, LLC, HARRIET E. MILLS, PATRICK MILLS, AND CAPITAL SIGN SOLUTIONS, LLC

No. 390A18

Filed 29 March 2019

Appeal pursuant to N.C.G.S. § 7A-27(a) from an order on motion for sanctions dated 19 July 2018 entered by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice under N.C.G.S. § 7A-45.4. Heard in the Supreme Court on 6 March 2019.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, pro se, appellant.

Batten Lee, PLLC, by Kari R. Johnson, Gloria T. Becker, and Matthew D. Mariani, for defendant-appellees Harriet E. Mills, Patrick Mills, and Capital Sign Solutions, LLC.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 17 CVS 11895
EMILY N. PREISS and WINE AND DESIGN, LLC Plaintiffs, v. WINE AND DESIGN FRANCHISE, LLC; HARRIETT E. MILLS; PATRICK MILLS; and CAPITAL SIGN SOLUTIONS, LLC, Defendants.	**ORDER ON MOTION FOR SANCTIONS AND TO COMPEL DEPOSITION**

THIS MATTER comes before the Court upon Defendants Harriett E. Mills, Patrick Mills, and Capital Sign Solutions, LLC's ("the Mills Defendants") Motion for Sanctions and to Compel Deposition, ("Motion", ECF No. 93), and a memorandum in support of the Motion. (ECF No. 94.) The Mills Defendants seek sanctions pursuant to Rule 37 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 37 (hereinafter, references to the General Statutes will be to "G.S." and references to the Rules of Civil Procedure will be to "Rule(s)"). On June 11, 2018, Plaintiffs filed a response in opposition to the Motion. (Pl. Resp. Opp. Mot. for Sanctions and Compel Depo., ECF No. 107.)

On July 6, 2018, the Court held a hearing on the Motion. At the hearing, the Court advised counsel that it would grant the Motion and asked counsel for the Mills Defendants to file with the Court an affidavit in support of her request for attorneys' fees and costs. Thereafter, counsel for the Mills Defendants, Gloria T. Becker ("Becker"), filed two affidavits in support of her request for attorneys' fees. (ECF Nos. 114 and 115.)

THE COURT, having carefully considered the Motion, the briefs filed in support of and in opposition to the Motion, the arguments of counsel at the hearing, and other appropriate matters of record, concludes, in its discretion, that the Motion should be GRANTED for the reasons set forth below.

I. FACTUAL BACKGROUND

On February 12, 2018, the Court filed the Case Management Order ("CMO") in this action. (CMO, ECF No. 49.) The CMO provided that "[t]he depositions of Plaintiffs Emily Preiss and Wine and Design, L.L.C.

shall take place . . . no later than April 16, 2018. Defendants shall be permitted to take Plaintiffs' deposition before any other party is deposed." (ECF No. 49, at p. 4.)

On March 16, 2018, Defendants noticed the deposition of Emily Preiss ("Preiss") for April 11, 2018, after confirming that date and time of was agreeable to all Parties. (Pl. Mot. for Protective Order, ECF No. 62, at ¶ 1.)

On April 4, 2018, Plaintiffs filed a Motion for Protective Order pursuant to Rule 26(c) requesting that the Court "disallow" the Mills Defendants from taking Preiss's noticed deposition on April 11, 2018 because "the notices of deposition [were] interposed on Ms. Preiss to annoy, confuse, harass and oppress her [and] [e]ven if not for those purposes, Ms. Preiss cannot be expected to give a coherent deposition under her present mental incapacities." (ECF No. 62, at p. 3.) Also on April 4, 2018, Plaintiffs filed a Motion for Extension of Discovery Deadlines (ECF No. 64) requesting a 30-day extension of the time allowed to complete fact discovery. On April 5, 2018, the Mills Defendants filed written responses to the Motion for Protective Order (ECF No. 65) and the Motion for Extension of Discovery Deadlines (ECF No. 66) in which they catalogued the various ways counsel for Plaintiffs had utilized motions practice to avoid participating in the discovery process.

The Court issued an Order that expedited the briefing schedule for the Motions. (Order Expediting Briefing, ECF No. 67.) The Court was unable to hold a hearing on Plaintiffs' motions until April 11, 2018, effectively preventing the Mills Defendants from taking the noticed depositions of Preiss on that date. (Notice of Hearing and Or. To Appear, ECF No. 71.)

At the hearing on April 11, 2018, the Court orally notified counsel that the depositions of Preiss and Wine and Design, L.L.C. would thereafter be Ordered to take place on April 25, 2018, starting at 9:00 a.m., at the offices of counsel for the Mills Defendants in Raleigh, North Carolina.

On April 12, 2018, the Court issued an Order on Plaintiffs' Motion for Extension of Discovery Deadlines. (ECF No. 73.) The Order stated that "[t]he depositions of Plaintiffs Emily Preiss and Wine and Design, L.L.C. **shall take place on April 25, 2018** . . . starting at **9:00 a.m.**" (ECF No. 73, at p. 2 (emphasis in original).)

Also on April 12, 2018, the Court issued an Order on Plaintiff's Motion for Protective Order (ECF No. 74) that contained a second explicit statement that "the depositions of Plaintiffs Emily Preiss and

Wine and Design, L.L.C. shall take place at 4141 Parklake Avenue, Suite 350, Raleigh, North Carolina 27612 on April 25, 2018 beginning at 9:00 a.m." (ECF No. 74, at p. 2 n. 1.)

On April 25, 2018 at 9:00 a.m. Becker and counsel for Defendant Wine and Design Franchise, LLC were present at the designated location for the deposition, had a court reporter present, and were prepared to take Preiss's deposition. However, neither Preiss nor Plaintiff's counsel, R. Hayes Hofler ("Hofler") appeared at the designated location. At 9:30 a.m. neither Preiss nor Hofler had yet appeared, and Becker released the court reporter to leave. Shortly thereafter, Hofler telephoned Becker and claimed that he mistakenly believed the deposition was scheduled to begin at 10:00 a.m. (Br. Supp. Mot. for Sanctions, ECF No. 94, at p. 2.) When Becker asked if Hofler was on his way to Raleigh from his Durham office[1], Hofler responded that he had not yet left his office. (*Id.*) Becker advised Hofler that, under the circumstances, she would not recall the court reporter and wait indefinitely for Hofler and Preiss to appear.[2]

II. LEGAL ANALYSIS

A. Rule 37(d) justifies an award of sanctions against Hofler, in this case

Rule 37 provides that

> If a party . . . fails [ ] to appear before the person who is to take his deposition, after being served with proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule. **In lieu of any order or in addition thereto**, the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

1. Mills Defendants contend, and Hofler does not dispute, that Hofler's offices are at least 30 minutes away from the location designated for the depositions.

2. Preiss apparently appeared at the deposition location, alone, at 10:30 a.m.

Rule 37(d)(emphasis added). The available sanctions under Rule 37(b)(2)(a)–(c) include:

> a. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> [and]
>
> c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Although the Court would be inclined to consider more severe sanctions, Becker made clear at the hearing that she seeks only an award of fees in this situation.

There is no dispute that Preiss and Hofler did not appear at the designated time and location for the Court-ordered deposition of Preiss. Instead, Hofler contends that he mistakenly thought that the deposition was scheduled to begin at 10:00 a.m., and was willing to proceed with the deposition at a later time after he and Preiss arrived at the deposition location. Hofler argues that he should not be required to pay attorneys' fees because Preiss did not fail to appear at her deposition, she merely arrived late, and her late arrival was the result of Hofler's mistake. (ECF No. 107, at pp. 6–8.) Such mistake, Hofler contends, is a "circumstance[ ] mak[ing] an award of expenses unjust." (*Id* (citing Rule 37(d)).)

The Court is not persuaded by Plaintiffs' argument, considering the factual and procedural background of this Motion and this case. The time set for the deposition was noted clearly in open court, featured in bold-face type in the Order on the Motion for Extension of Discovery Deadlines, and cross-referenced in the Order on the Motion for Protective Order issued that same day. There was no excuse that substantially justified Hofler's mistake as to the time for the deposition.

B. Counsel for the Mills Defendants has presented sufficient evidence to justify an award of attorneys' fees in the amount requested

"[A]n award of attorney's fees usually requires that the trial court enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence." *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 672, 554 S.E.2d 356, 366 (2001).

The Mills Defendants seek a total of $4,100.00 in fees for services and costs. Mills Defendants submitted affidavits in support of the attorneys' fees and costs incurred from Preiss and Hofler's failure to appear at the deposition. (Becker Affs., ECF Nos. 114 and 115.) The Mills Defendants seek fees in the amount of $3,770.00 for: 10.3 hours of legal services performed by Becker at an hourly rate of $225.00; 5.9 hours of legal services performed by Matthew D. Mariani at an hourly rate of $175.00; and 5.6 hours of paralegal work at an hourly rate of $75.00. (ECF No. 115, at ¶ 6.) The Mills Defendants also seek costs for Superior Court Reporting (appearance and deposition fee) of $330.00. (*Id.*)

The hourly fees charged by Becker and Mariani are discounted to the Mills Defendants, and are substantially below the hourly rates they typically charge. (ECF No. 115, at ¶¶ 3 and 4.) The hourly rates charged by the two attorneys and the paralegal also are lower than rates charged by comparably skilled and experienced attorneys practicing complex business litigation law in North Carolina. The Mills Defendants submitted evidence that the standard and customary rates charged for such services "range from $250.00/hour to $400.00/hour for a Partner; $200.00/hour to $300.00/hour for associates; and $100/hour to $150[.00]/hour for paralegals." (ECF No. 115, at ¶ 5.)

The Mills Defendants also submitted evidence that the professional services performed as a result of Preiss and Hofler's failure to appear at the deposition included "drafting and serving of the amended Notices of Deposition . . . ; attendance of the actual depositions where [P]laintiffs and counsel failed to appear; drafting and filing of the [Motion]; researching case law, drafting and filing of the Memorandum of Law in Support of the [Motion]; preparation for the hearing on the [Motion]; travel to/from and attendance of hearing on [the Motion]; and drafting of" the first evidentiary affidavit. (ECF No. 115, at ¶ 7.) The Court concludes that each of the tasks described in Becker's affidavit are attributable, and were reasonably necessary, to respond Preiss and Hofler's failure to appear at the noticed deposition.

The Mills Defendants have provided sufficient evidence of the time and labor required to litigate this discovery violation and the costs incurred. The Mills Defendants' counsel are experienced civil litigation attorneys, and the Court concludes that the skill needed to perform the services attributable to Preiss and Hofler's failure to appear at the noticed deposition required attorneys with such experience. The Court finds the rates charged by counsel in the present matter are lower than those charged by other attorneys with similar experience, skill, and ability to that of the Mills Defendants' counsel.

Accordingly, the Court finds that the amount of fees and costs requested by counsel for the Mills Defendants is reasonable, and the Court must award such reasonable fees and expenses pursuant to Rule 37(d).

III. CONCLUSION AND ORDER

THE COURT, having considered the Motion, the briefs filed in support of and in opposition to the Motion, and other appropriate matters of record in this case including the fact that the April 25, 2018 deposition was Court-ordered after Plaintiffs filed motions in an attempt to avoid the previously scheduled depositions of Preiss, CONCLUDES in its discretion that the Motion for Sanctions should be GRANTED.

THEREFORE, IT IS ORDERED that R. Hayes Hofler, as Plaintiffs' Counsel, is hereby sanctioned pursuant to Rule 37(d), is individually liable to counsel for the Mills Defendants for $4,100.000, the amount Mills Defendants' counsel incurred as a result of Plaintiffs' failure to attend a Court-ordered deposition.

Hofler must pay such amount to Mills Defendants' counsel **on or before Friday, August 3, 2018**.

The Court reserves, for consideration at a later date, the Mills Defendants' motion to compel the deposition of Plaintiffs.

SO ORDERED, this the 19th day of July, 2018.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge for
Complex Business Cases

STATE OF NORTH CAROLINA
v.
NOUI PHACHOUMPHONE

No. 65PA18

Filed 29 March 2019

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 810 S.E.2d 748 (2018), finding no prejudicial error after appeal from judgments entered on 22 September 2016 by Judge Eric L. Levinson in Superior Court, Cleveland County. Heard in the Supreme Court on 4 March 2019.

Joshua H. Stein, Attorney General, by Elizabeth Guzman, Assistant Attorney General, for the State.

William D. Spence for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

STATE v. TART

[372 N.C. 73 (2019)]

STATE OF NORTH CAROLINA
v.
JERMAINE ANTWAN TART

No. 427PA17

Filed 29 March 2019

1. Indictment and Information—attempted first-degree murder —kill and murder—malice aforethought

A short-form indictment was sufficient to charge defendant with attempted first-degree murder even though it replaced the statutory language "kill and murder" with "kill and slay." The "malice aforethought" language provided certainty of the offense charged.

2. Criminal Law—prosecutor's arguments—clarifying issues of mental state—permissible hyperbole

The trial court did not err by declining to intervene ex mero motu during the State's closing argument in defendant's trial for attempted first-degree murder. The challenged statements served to clarify issues regarding defendant's mental state and also contained permissible hyperbole.

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

Justice EARLS concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 808 S.E.2d 178 (2017), vacating in part and finding no error in part in judgments entered on 26 August 2016 by Judge V. Bradford Long in Superior Court, Forsyth County. On 9 May 2018, the Supreme Court allowed defendant's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 8 January 2019.

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

Sarah Holladay for defendant-appellee/appellant.

MORGAN, Justice.

This criminal appeal presents two issues for the Court to resolve: whether a short-form indictment sufficiently charged attempted first-degree murder when the wording of the indictment did not precisely duplicate the language of the relevant statute and whether a prosecutor's remarks during closing argument were so grossly improper that the trial court should have intervened *ex mero motu*. While we agree with the Court of Appeals that the State's characterizations during its closing argument do not entitle defendant to a new trial, we reject the lower appellate court's determination regarding the short-form indictment and hold that the indictment was sufficient to vest the trial court with subject-matter jurisdiction to try defendant for attempted first-degree murder. Accordingly, we affirm in part and reverse in part the decision of the Court of Appeals.

Factual and Procedural Background

In late February 2014, defendant Jermaine Antwan Tart was residing at a homeless shelter in Winston-Salem where the victim in this case, Richard Cassidy, was a volunteer worker. On 2 March 2014, Cassidy was leading a group of shelter residents, including defendant, as they walked to an overflow location of the shelter. During the walk to this area, defendant made several inappropriate comments and began to speak incoherently. Defendant suddenly began to assault Cassidy from behind, stabbing Cassidy in the head and knocking him to the ground. Defendant then got on top of Cassidy and continued to attack him, striking Cassidy's head, neck, shoulder, and back with a knife. Even after another shelter resident attempted to intervene in order to try to stop the attack, defendant persisted in his assault of Cassidy. A law enforcement officer arrived on the scene and was able to stop defendant's attack on Cassidy. Although the injuries that Cassidy sustained were serious and life-threatening, he survived the assault. Defendant subsequently stated during interviews with law enforcement officers and mental health professionals that he was upset with Cassidy because Cassidy had allowed others to steal from him, had disrespected defendant, and had shot defendant when defendant was a child.

Defendant was charged with the offenses of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. At trial, there was no dispute that defendant had stabbed Cassidy. The sole contested question concerned defendant's mens rea, namely, whether defendant had the specific intent to attempt to commit first-degree murder.

The State introduced testimony from Richard Blanks, M.D., an expert in the field of forensic psychiatry, who opined that an individual can have a specific intent and a delusion at the same time. Also in his testimony, Dr. Blanks offered defendant's belief that Cassidy had allowed others to steal from defendant as an example of defendant's non-delusional reasons for being angry with Cassidy, even if defendant's beliefs were actually inaccurate. Dr. Blanks testified that these beliefs constituted identifiable non-delusional reasons that could cause defendant to be angry with Cassidy and would further evidence defendant's specific intent to kill Cassidy.

Dr. Christine Herfkens, a psychologist and expert in forensic and clinical neuropsychology who was a witness for the defense, testified that defendant had a long history of mental illness, including schizoaffective disorder and antisocial personality disorder, which is a disorder formerly known as sociopathy. Defendant's medical records indicated that he had been admitted to state hospitals at least twelve times between 2002 and 2014, each time exhibiting homicidal ideation, which Herfkens defined as the desire to kill another person. In addition, defendant was dependent on both alcohol and marijuana.

At the close of the State's evidence and again at the close of all of the evidence, defendant moved to dismiss both charges against him, arguing that he had demonstrated diminished capacity and the absence of the specific intent to kill. The trial court denied these motions. The jury subsequently found defendant guilty of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court sentenced defendant to concurrent terms totaling 207 to 261 months of imprisonment.

Defendant appealed to the Court of Appeals and raised two arguments, neither of which was presented to the trial court. First, defendant challenged the indictment that purported to charge him with attempted first-degree murder, claiming that it was insufficient to confer subject-matter jurisdiction on the trial court. Specifically, defendant noted that the short-form indictment utilized for the attempted first-degree murder charge included one word from the statutorily approved language for charging manslaughter along with the prescribed wording for a murder offense. Second, defendant contended that certain remarks in the prosecutor's closing argument at trial were so grossly improper that the trial court committed reversible error in failing to intervene *ex mero motu*. In a unanimous, unpublished opinion issued on 5 December 2017, the North Carolina Court of Appeals agreed with defendant's indictment

argument and vacated his attempted first-degree murder conviction, but found no error in the trial court's silence during the State's closing argument and therefore upheld the assault conviction. *See State v. Tart*, ___ N.C. App. ___, 808 S.E.2d 178, 2017 WL 6002771 (2017) (unpublished).

On 14 December 2017, the State filed a petition for *writ of supersedeas* and application for temporary stay in this Court. The following day, this Court stayed the decision of the Court of Appeals. On 11 January 2018, the State filed a petition seeking discretionary review of the Court of Appeals' decision regarding sufficiency of the indictment for attempted first-degree murder, and on 22 January, defendant filed a conditional petition for discretionary review of the Court of Appeals' resolution of the closing argument issue. This Court allowed both petitions for discretionary review on 9 May 2018.

Analysis

I. Facial Sufficiency of the Short-form Attempted First-degree Murder Indictment

[1] North Carolina General Statutes section 15-144 sets out the appropriate phrasing which can be utilized in indictments for the criminal offenses of murder and manslaughter. The statute reads in pertinent part:

> [I]t is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), and concluding as aforesaid . . . .

N.C.G.S. § 15-144 (2017). The indictment in the case at bar, in charging defendant with the criminal offense of attempted first-degree murder, states in pertinent part: "the defendant [Jermaine Antwan Tart] unlawfully, willfully and feloniously did attempt to *kill and slay* Richard Cassidy with malice aforethought." (Emphasis added).

A comparison of the statutory requirements to sufficiently charge a person in an indictment for an offense pertaining to murder under N.C.G.S. § 15-144 and the challenged indictment in the instant case offers two notable observations: (1) the phrase "malice aforethought" appears in both the statutory requirements and the current indictment, and (2) the phrase "kill and murder," which is statutorily associated with an offense pertaining to murder in an indictment, is replaced in the current indictment with the phrase "kill and slay," which is statutorily

associated with an offense pertaining to manslaughter in an indictment. Therefore, the indictment that this Court evaluates for its sufficiency to charge defendant with the offense of attempted first-degree murder contains language associated not only with an offense pertaining to murder—namely, "malice aforethought"—but also with an offense pertaining to manslaughter—namely, "kill and slay"—as designated in N.C.G.S. § 15-144.

The State argues that the Court of Appeals erred by employing a new "interchangeability" analysis with respect to the construction of indictments that do not adhere verbatim to their authorizing statutes. In considering the indictment charging defendant with attempted first-degree murder in the present case, the Court of Appeals concluded:

> The indictment in question fails to comply with the short form indictment authorized by N.C.G.S. § 15-144. It states the following: "[t]he jurors for the State upon their oath present that on or about [the dates of offense shown and in the county named above] the defendant named above unlawfully, willfully and feloniously did attempt to *kill and slay* Richard Cassidy with malice aforethought." (emphasis added). It does not allege Defendant attempted to "kill and murder"—the requisite language for murder. Instead it contains the phrase "kill and slay"—the requisite language for manslaughter. The terms "murder" and "slay" are not interchangeable. Thus, this indictment is insufficient to charge attempted murder and the trial court lacked jurisdiction to enter judgment on this charge.

Tart, 2017 WL 6002771, at *3 (second set of brackets in original). We agree with our colleagues at the lower appellate court that "[t]he terms 'murder' and 'slay' are not interchangeable," *id.*; however, the usage of the word "slay" in place of the word "murder" in the indictment here is a distinction without a difference because the indictment against defendant also charged that the killing was done "with malice aforethought." *Id.* Under such circumstances as those present in the case at bar, the words that appear in the short-form indictment are sufficient to charge attempted first-degree murder.

The plain language of N.C.G.S. § 15-144, coupled with consideration of the constitutional purpose of indictments, dictates our determination that the indictment here effectively withstands challenge. An indictment is "a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill." *State v. Thomas*, 236 N.C.

454, 457, 73 S.E.2d 283, 285 (1952) (citations omitted). "Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. I, § 22. This constitutional provision is intended

> (1) [to provide] such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty[,] to pronounce sentence according to the rights of the case.

State v. Greer, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953) (citations omitted).

N.C.G.S. § 15-144 is clear that a short-form indictment for *murder* is sufficient if it alleges "the accused person feloniously, willfully, and of his *malice aforethought*, did *kill and murder* (naming the person killed)," while a short-form indictment for *manslaughter* is sufficient if it alleges "the accused feloniously and willfully did *kill and slay* (naming the person killed)." N.C.G.S. § 15-144 (emphases added). An examination of this statutory language reveals that there are two express differences in the terminology utilized by the General Assembly to establish short-form indictments for the offenses of murder and manslaughter that are critical to the case at bar: (1) the reference in manslaughter offenses that the named defendant did slay an individual, compared with the reference in murder offenses that the defendant did "murder" an individual; and (2) the mandated inclusion in an indictment for a murder offense of the essential element of "malice aforethought," while the allegation of "malice aforethought" is not required to charge manslaughter. The critical and dispositive difference between short-form indictments for murder offenses and manslaughter offenses is the substantive allegation of the element of "malice aforethought" in murder offense short-form indictments, rather than the employment of the synonyms "slay" in manslaughter offense short-form indictments or "murder" in murder offense short-form indictments upon which the Court of Appeals chose to focus.

Black's Law Dictionary defines the noun "murder" as "[t]he killing of a human being with malice aforethought,"[1] *murder*, *Black's Law*

1. *Black's Law Dictionary* does not supply a definition for the word "murder" when used as a verb.

Dictionary (10th ed. 2014) [hereinafter *Black's*], and defines the verb "slay" as "[t]o kill (a person), esp. in battle," *slay*, *Black's*. It is evident from the plain legal definitions of the words "murder" and "slay" that there is no meaningful distinction between the two terms for the purpose of ascertaining the sufficiency of the description of the attempted first-degree murder offense as alleged in the current case that defendant had attempted to kill a human being or person named Richard Cassidy. While it may have been a better practice for the prosecution here to replicate the specific language of N.C.G.S. § 15-144 in alleging defendant's commission of the offense of attempted first-degree murder, the prosecution's failure to do so did not render the indictment fatally defective. The prosecution's proper and necessary inclusion of the legal element "malice aforethought" in the present indictment's charge of attempted first-degree murder substantively and constitutionally distinguishes this charge from an alleged manslaughter offense—despite the usage of the term "slay" instead of the term "murder"—because, as required by *Greer* in its construction of the pertinent provisions of the Constitution of North Carolina, the short-form indictment under review provided such certainty in the statement of the accusation as would identify the offense with which defendant was charged, protected defendant from being put in double jeopardy for the same alleged offense, enabled defendant to prepare for trial, and enabled the trial court to pronounce a sentence upon defendant's conviction of attempted first-degree murder. *Greer*, 238 N.C. at 327, 77 S.E.2d at 919. Therefore, the short-form indictment was sufficient to vest the trial court with subject-matter jurisdiction over this charge.

We hold that the use of the term "slay" instead of "murder" in an indictment that also includes an allegation of "malice aforethought" complies with the relevant constitutional and statutory requirements for valid murder offense indictments and serves its functional purposes with regard to both the defendant and the court. *See id.* at 327, 77 S.E.2d at 919; *see also State v. Rankin*, ___ N.C. ___, ___, 821 S.E.2d 787, 790-91 (2018) ("The law disfavors application of rigid and technical rules to indictments; so long as an indictment adequately expresses the charge against the defendant, it will not be quashed."). Accordingly, we reverse the Court of Appeals' decision on this issue and reinstate the judgment entered upon defendant's conviction for attempted first-degree murder.

II. Remarks during the State's Closing Argument

[2] Defendant contends that the Court of Appeals erred in failing to find that the trial court should have intervened *ex mero motu* during the State's closing argument. Specifically, defendant draws our attention

to comments made to the jury by the prosecutor that defendant "had the specific intent to kill many people, over a 20-year period of time," and that if the jury did not convict, defendant would be "unleashed, yet again, onto our streets." Defendant also argues that there was gross impropriety in the State's claims to the jury that defendant's potentially delusional beliefs were a valid foundation upon which the jury could find that defendant possessed the requisite specific intent for the commission of the offense of attempted first-degree murder. Defendant asserts that these statements were so grossly improper and prejudicial that he is entitled to a new trial. After careful consideration, we cannot fault the trial court in declining to interject itself into the State's closing argument when defendant himself chose to refrain from objecting to these remarks at trial. Accordingly, we affirm the Court of Appeals on this issue.

This Court noted in *State v. Jones*, 355 N.C. 117, 127, 558 S.E.2d 97, 103 (2002):

> A lawyer's function during closing argument is to provide the jury with a summation of the evidence, *Herring v. New York*, 422 U.S. 853, 861-62, 45 L. Ed. 2d 593, 599-600 (1975), which in turn "serves to sharpen and clarify the issues for resolution by the trier of fact," *id.* at 862, 45 L. Ed. 2d at 600, and should be limited to relevant legal issues. *See State v. Allen*, 353 N.C. 504, 508-11, 546 S.E.2d 372, 374-76 (2001).

Regarding closing arguments made to the jury during criminal trials, the North Carolina General Statutes provide that "an attorney may not: (1) become abusive, (2) express his personal belief as to the truth or falsity of the evidence, (3) express his personal belief as to which party should prevail, or (4) make arguments premised on matters outside the record." *Jones*, 355 N.C. at 127, 558 S.E.2d at 104 (discussing N.C.G.S. § 15A-1230(a) (1999)). Through our precedent, this Court has elaborated on the statutory provisions governing closing arguments and emphasized that closing arguments "must: (1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passions or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *Id.* at 135, 558 S.E.2d at 108.

Nonetheless,

> [w]here a defendant fails to object to the closing arguments at trial, defendant must establish that the remarks

> were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. "To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). " '[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *State v. Hipp*s, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999).

State v. Mitchell, 353 N.C. 309, 324, 543 S.E.2d 830, 839 (2001), *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (second alteration in original); *see also State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001) ("[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." (quoting *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996))), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002). While these cited cases and their progeny do not in any way diminish the professional, ethical expectations for prosecutors in making their final arguments to the fact-finder, they serve to establish the standards and considerations by which the actions or inactions of the neutral trial judge must be measured during the parties' closing arguments in a criminal trial, especially when the party challenging the propriety of the opposing party's closing argument in such a criminal trial is silent during the rendition of the disputed remarks, but on appeal challenges the trial judge's simultaneous silence. In circumstances in which a defendant in his or her role as an obvious interested party in a criminal trial fails to object to the other party's closing statement at trial, yet assigns as error the detached trial judge's routine taciturnity during closing arguments in the absence of any objection, this Court has consistently viewed the appealing party's burden to show prejudice and reversible error as a heavy one. *See Anthony*, 354 N.C. at 427, 555 S.E.2d at 592.

Even when a reviewing court determines that a trial court erred in failing to intervene *ex mero motu*, a new trial will be granted only if "the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106 (citations omitted). "[T]o warrant a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair." *State v. Mann*, 355 N.C. 294, 307-08, 560 S.E.2d 776, 785 (citation omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). In assessing whether this level of prejudice has been shown, the challenged statements must be considered "in context and in light of the overall factual circumstances to which they refer." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995) (citing *State v. Pinch*, 306 N.C. 1, 24, 292 S.E.2d 203, 221, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *and overruled on other grounds by, inter alia*, *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988)), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996).). Thus, "[o]nly when it finds *both* an improper argument and prejudice will this Court conclude that the error merits appropriate relief." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (emphasis added) (citing *Jones*, 355 N.C. at 134-35, 558 S.E.2d at 108-09).

In applying the analysis enunciated in the cited case law to determine whether or not there was any impropriety in the prosecutor's closing argument, defendant emphasizes the "substantial evidence of [defendant's] mental illness and inability to form specific intent" and contends that the challenged remarks by the prosecution "lacked a reasonable basis in the record and appealed to the passions and prejudices of the jury." Before this Court,[2] defendant identifies three portions of the State's closing argument as grossly improper.

In the first instance, the prosecutor told the jury that defendant's mental health history

> is ripe with examples of violence, and homicidal ideations, the desire and intent to kill other people. The mental illness, if he did in fact suffer one, it didn't prevent him from forming the specific intent to kill. *He had the specific intent to kill many people, over a 20-year period of time.*

2. In the Court of Appeals, defendant challenged additional portions of the State's closing argument, but defendant did not petition this Court for review of the Court of Appeals' ruling on those portions, and therefore we do not address them here.

> That mental illness continued to come back up through all of these diagnoses, through all of these hospitalizations.

(Emphasis added).

Defendant characterizes the Court of Appeals' review of these comments, in which it opined that "each [challenged] term was referenced during testimony and has a basis in the record," *Tart*, 2017 WL 6002771, at 4, as "wrongly conflat[ing]" the legal concept of "specific intent" with the psychiatric concept of "homicidal ideation." The only definition of "homicidal ideation" given to the jury at trial came from Herfkens, who testified as an expert on defendant's behalf about defendant's past mental health issues and who described "homicidal ideation" as "the intent, the desire to kill another person." She then testified that defendant's "homicidal ideation" appeared "throughout his mental health records." Dr. Richard Blanks, an expert in forensic psychiatry who appeared on behalf of the State, testified that defendant's "[t]houghts and desires to kill other people" were a "consistent theme" in his hospital admission records. In addition, defendant told Cassidy during the stabbing that defendant was "going to kill" Cassidy. The mens rea element of specific intent to kill has been defined in our legal system as being existent when a "defendant intended for his action to result in the victim's death." *State v. Phillips*, 365 N.C. 103, 141, 711 S.E.2d 122, 149 (2011) (*State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992)), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176 (2012). Further, the prosecutor's summation comments must be considered in context and in light of the overall factual circumstances to which they refer, as required by *Alston*, which here equated to the State's rebuttal of defendant's staunchest position at trial that his mental illness precluded him from forming the specific intent to kill Cassidy as required to sustain a conviction for attempted first-degree murder or assault with a deadly weapon with intent to kill or both. Indeed, the prosecutor framed these disputed statements during the State's closing argument in a manner that served to sharpen and clarify the issues for the jury, as characterized in *Herring*, by explaining that any mental illness defendant had "didn't prevent him from forming the specific intent to kill." In this context and in light of the evidence adduced at trial that included references adopted by the prosecutor that were gleaned from expert testimony, the first portion of the State's closing argument challenged by defendant did not constitute gross impropriety so as to require the trial court to intervene *ex mero motu*. This passage from the prosecutor's closing statement was premised on matters contained in the record in compliance with *Jones* and was consistent with the specific guidelines for closing arguments as set out by the General Assembly in N.C.G.S. § 15A-1230(a) and reiterated in *Jones*.

In the second excerpt from the State's closing argument denounced by defendant, the prosecutor argued:

> You are, in a very real way, the conscience of our community. You are the ones who are standing on the wall. You're the ones who are standing up for [the victim, Cassidy], who, for the last 10 years of his life, has stood up for the poor, for the marginalized, for the forgotten, and for the hopeless.
>
> You can stand up for him. You can protect our communities and ensure that a homicidal, manipulative, sociopath, is not unleashed, yet again, onto our streets.
>
> . . . You can protect our communities and ensure that a homicidal, manipulative, sociopath, is *not unleashed*, *yet again*, *onto our streets*.
>
> I'm not asking you to do anything other than follow the law.

(Emphasis added). Defendant contends that the reference to being "unleashed" was inflammatory and prejudicial. In addressing this statement, the Court of Appeals noted that appellate courts "have upheld other similar 'hyperbolic expression[s] of the State's position that a not guilty verdict, in light of the evidence of guilt, would be an injustice.'" *Tart*, 2017 WL 6002771, at *4 (alteration in original) (first quoting *State v. Pittman*, 332 N.C. 244, 262, 420 S.E.2d 437, 447 (1992) (holding, as described by the Court of Appeals, *Tart*, 2017 WL 6002771, at *4, that "the prosecutor's statement indicating if the defendant was not convicted 'justice in Halifax County will be dead' was not improper"); and then citing *State v. Brown*, 177 N.C. App. 177, 189-90, 628 S.E.2d 787, 794-95 (2006)). We agree with the lower appellate court that this type of vivid communication to the jury falls within the realm of permissible hyperbole on the part of the State in line with our precedent. *See State v. Braxton*, 352 N.C. 158, 203, 531 S.E.2d 428, 454 (2000) (opining that the State's argument that the defendant's self-defense claim was "vomit on the law of North Carolina" was permissible hyperbole), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *see also State v. Harvell*, 334 N.C. 356, 363, 432 S.E.2d 125, 129 (1993) (stating that failure to convict the defendant would amount to "a wound that's going to fester" was permissible hyperbole).

The final passage of the State's closing argument which defendant argues is grossly improper and prejudicial concerns the prosecutor's

reference to defendant's potentially delusional, but factually plausible, motives for stabbing Cassidy. This portion of the prosecutor's summation would encompass defendant's claims that Cassidy allowed defendant's medication to be stolen and told defendant to put defendant's belongings away, that Cassidy had disrespected defendant, and that Cassidy had shot defendant when defendant was a child. Defendant posits now that there is no evidence in the trial record to show that these events actually occurred and therefore "[w]holly imagined events cannot create a rational basis for a defendant's actions." Following a competency hearing, the trial court found defendant to be competent to stand trial for the charged offenses. During the trial, references were made to these events through testimonial evidence that is contained in the record. Based on the evidence generated during the trial and the accompanying issues, defendant's mental state was argued to the jury by the State and the defense in their respective closing arguments. Later, the jury was instructed on the concept of diminished capacity and its possible effect on the ability to form the specific intent to kill. As previously noted, the principles espoused by this Court in *Jones*, *Mitchell*, and *Alston* are jointly invoked so as to establish that the prosecutor's closing argument in this arena of the case is substantiated by the trial record's context, that the prosecutor's statements about the existence of defendant's motives to harm Cassidy served to sharpen and clarify the issues for the jurors as the triers of fact, and that ultimately the trial court was not under a duty to intervene *ex mero motu* during the State's closing argument because the summation was not grossly improper.

In light of the facts and circumstances of this case, the trial record, the legal theories presented by the parties, and the applicable law, we cannot conclude that the trial court erred in declining to interject itself into the State's closing argument while defendant chose to sit silently and raise no objection to the now-challenged remarks. The portions of the State's summation that have been addressed before this Court do not rise to the level of those previously found in our case decisions to be so grossly improper as to require *ex mero motu* action by the trial court. Accordingly, we affirm the Court of Appeals' decision on this issue.

Conclusion

In sum, we reverse the determination by the Court of Appeals regarding the sufficiency of the short-form indictment and reinstate the judgment entered upon defendant's conviction for attempted first-degree murder. We affirm the portion of the Court of Appeals' decision which concludes that the trial court did not abuse its discretion in declining to intervene *ex mero motu* during the State's closing argument.

AFFIRMED IN PART; REVERSED IN PART.

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

Justice EARLS concurring in part and dissenting in part.

I agree with the majority's holding that "the indictment in this case was sufficient to vest the trial court with subject matter jurisdiction to try defendant for attempted first-degree murder." Nonetheless, a new trial is warranted because the prosecutor's statements to the jury in this case are similar to statements this Court has previously held to be improper and to constitute prejudicial error necessitating a new trial, even when not objected to at trial. In addition, the trial judge should have intervened *ex mero motu* during the prosecutor's closing argument when the prosecutor urged the jury to convict Jermaine Antwan Tart based not on whether Mr. Tart had the requisite mental intent at the time of the offense but rather out of fear that as a "homicidal, manipulative, sociopath" who "had the specific intent to kill many people, over a 20-year period of time," he would be "unleashed, yet again, onto our streets" to kill innocent people. Thus, I would reverse the decision of the Court of Appeals and remand for a new trial.

The prosecutor's closing argument was improper in two significant respects, each one independently sufficient to justify a new trial. Together they assuredly dictate that result. The first impropriety was the prosecutor's inflammatory name-calling and fear mongering, including calling defendant "a homicidal sociopath" four times during the closing argument. The second impropriety was the prosecutor's reliance on events that all the evidence showed never happened as "factual" motivations supposedly leading defendant to decide to kill Mr. Cassidy. Take away these parts of the prosecution's closing argument and all that is left is the prosecutor's appropriate description of the attack itself, summary of defendant's actions immediately after the attack, and discussion of the jury instructions. The improprieties that occurred were not mere throwaway lines in a long and proper argument; they were the heart of the prosecutor's presentation to the jury. The nature of the improper statements "rendered the proceedings fundamentally unfair." *State v. Mann*, 355 N.C. 294, 308, 560 S.E.2d 776, 785 (citation omitted), *cert. denied*, 537 U.S. 1005 (2002).

1. Standard of Review

Two different standards apply when reviewing cases involving improper closing arguments, depending on whether there was an objection at trial. If the defendant made a timely objection, the question 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). The standard of review for improper closing arguments when, as in this case, the defendant fails to object is "whether the argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835 (1999).

This Court has explained that "[w]hen the prosecutor becomes abusive, injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate and it becomes the duty of the trial judge to intervene to stop improper argument and to instruct the jury not to consider it." *State v. Smith*, 279 N.C. 163, 166, 181 S.E.2d 458, 460 (1971). In *Smith* the Court concluded that "[i]n these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." *Id.* at 166, 181 S.E.2d at 460 (quoting *Berger v. United States*, 295 U.S. 78, 89 (1935)). In reviewing statements made during closing arguments, this Court does not examine the statements in isolation but rather "give[s] consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Dalton*, 369 N.C. 311, 316, 794 S.E.2d 485, 489 (2016) (quoting *State v. Ward*, 354 N.C. 231, 265, 555 S.E.2d 251, 273 (2001)). "Improper remarks may be prejudicial either because of their individual stigma or because of the general tenor of the argument as a whole." *Jones*, 355 N.C. at 133, 558 S.E.2d at 108.

2. Improper Name-Calling and Appeals to Prejudice

There can be no doubt that in this case the only issue the jury needed to determine was whether Mr. Tart had the requisite mental capacity to intend to kill Mr. Cassidy. There was no dispute over whether Tart was the person who attacked Cassidy; Tart agreed that there should not be a self-defense instruction, and both the prosecution and the defense argued to the jury in closing that the only question for them was Mr. Tart's state of mind at the time of the attack. The only issue for the jury was whether defendant was delusional and unable to form the intent to kill, as the defense contended: "This whole case turns on the capacity of Mr. Tart's mind, around 8 o'clock at night at First Presbyterian Church in downtown Winston-Salem on March 2nd, 2014. Was he capable of

forming the specific intent to kill Mr. Cassidy? . . . [W]as his mind all there enough for him to be able to?" Or was he intending to kill Mr. Cassidy with premeditation, as the prosecution argued: "The intent, his intent to kill Richard Cassidy is written all over this case. It is written in blood. His intent to kill Richard Cassidy is a stain on the sidewalk in front of First Presbyterian Church." Additionally, the court instructed the jury on the issue of lack of mental capacity as it related to both the attempted first-degree murder charge and the charge of assault with a deadly weapon with intent to kill inflicting serious injury.[1]

In these circumstances, the prosecutor's repeated statements that Tart is a "violent, manipulative, homicidal sociopath" were not intended to shed light on whether he was indeed delusional at the time of the attack but rather to make the point that defendant needed to be incarcerated so he would not harm anyone else. The prosecutor's statements "were purposely intended to deflect the jury away from its proper role as a fact-finder by appealing to its members' passions and/or prejudices," causing the remarks to be prejudicial and grossly improper. *Jones*, 355 N.C. at 134, 558 S.E.2d at 108. The prosecutor hammered home this theme by referencing the testimony of Dr. Herfkens who, it must be said, had examined Tart and concluded that "at the time of the crime, Jermaine was acting under the influence of a severe mental illness that did not allow him to properly understand reality and the significance of his alleged actions." Nevertheless, the prosecutor used that evidence to make this argument to the jury:

> But what she did consider is the Defendant's mental health history, a 20-year mental health history.
>
> Members of jury [sic], that is ripe with examples of violence, and homicidal ideations, the desire and intent to kill other people. The mental illness, if he did in fact suffer one, it didn't prevent him from forming the specific intent to kill. He had the specific intent to kill many people, over a 20-year period of time. That mental illness continued to come back up through all of these diagnoses, through all of these hospitalizations.

1. For example, with regard to the attempted murder charge, the jury was instructed, "If, as a result of lack of mental capacity, the Defendant did not have the specific intent to kill Mr. Cassidy, formed after premeditation and deliberation, the Defendant is not guilty of Attempted First Degree Murder."

> Antisocial Personality Disorder, a disorder characterized by violence. By deceit. By manipulation. By an inability to conform your conduct to the confines of the law. . . . You know what a synonym is for someone who suffers from Antisocial Personality Disorder? A sociopath.
>
> So the Defendant is a violent, manipulative, homicidal sociopath. That's his diagnosis. Based on that. They want you to just give him a slap on the wrist for this. Because he's been diagnosed as a homicidal sociopath, we'll let you do this.
>
> . . . .
>
> . . . You can protect our communities and ensure that a homicidal, manipulative, sociopath, is not unleashed, yet again, onto our streets.

The prosecutor set up this argument to use the pejorative term "sociopath" by referencing and asking about the term in his cross-examination of Dr. Herfkens, and in his questioning of Dr. Blanks when called by the State to rebut the testimony of Dr. Herfkens, and he persisted in using the word even though both experts testified that the term is no longer used by medical professionals.

Notably, the prosecutor used a tactic similar to one that this Court found improper in *State v. Dalton*, 369 N.C. at 314, 320, 794 S.E.2d at 488, 491, in which the prosecutor attempted to dissuade the jury from finding the defendant not guilty by reason of insanity because such a verdict could result in the defendant "be[ing] back home in less than two months." (Emphasis omitted.) In *Dalton*, the evidence presented at trial concerning the defendant's severe mental illness did not support the prosecutor's assertions that the defendant would "very possibl[y]" be released in fifty days. *Id.* at 318, 794 S.E.2d at 490. Nevertheless, as in *Dalton*, the statement here that "[y]ou can protect our communities and ensure that a homicidal, manipulative, sociopath, is not unleashed, yet again, onto our streets" is also prejudicial because the remark was not directed at the issue the jury needed to decide under the law but rather was intended to create the fear of future harm. *See*, *e.g.*, *id.* at 319, 794 S.E.2d at 490 (Regarding defendants with mental health issues, prosecutors must remember that "[t]he level of possibility or probability of release is not the salient issue; rather, it is the evidence and all reasonable inferences that can be drawn from that evidence which govern counsel's arguments in closing."). Just as with the insanity defense at issue in *Dalton*, the diminished capacity defense requires the defendant's

own attorney to provide evidence of the defendant's mental illness. *See*, *e.g.*, *id.* at 320, 794 S.E.2d at 491 (Jackson, J., concurring) ("Because the defendant has the burden of proving the affirmative defense of insanity, even the defendant's own attorney may provide evidence that the defendant's mental illness caused him or her to engage in conduct that a jury might find shocking or reprehensible." (citing *State v. Wetmore*, 298 N.C. 743, 746-47, 259 S.E.2d 870, 873 (1979))). Here there is considerable evidence that Mr. Tart was incapable of knowing right from wrong at the time of the crime: for example, his assertions that Mr. Cassidy had killed him in 1989 and more recently arranged for others to kill him again, and his statements to police right after the incident that he heard Mr. Cassidy say he was going to have Mr. Tart killed and that Cassidy had shot him in the head when he was eight years old. Thus, as in *Dalton*, "a juror who believes the evidence of [diminished capacity] might nevertheless be motivated to find the defendant guilty based on fear for the safety of the community." *Id.* at 322, 794 S.E.2d at 492 (citing *State v. Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1976)).

The prosecutor's rhetoric in his closing argument likely sparked fear in the minds of the jurors that defendant was like a wild animal who, if "unleashed . . . onto [the] streets," would again try to kill someone. "This Court does not condone comparisons between defendants and animals." *State v. Roache*, 358 N.C. 243, 297, 595 S.E.2d 381, 416 (2004). The prosecutor's use of language more identified with an animal, such as "unleashed," dehumanized defendant and was only heightened by the prosecutor's repeated, derogatory name-calling that characterized defendant as a homicidal sociopath. Using this theme of fear, the prosecutor "improperly [led] the jury to base its decision not on the evidence relating to the issues submitted, but on misleading characterizations, crafted by counsel, that [were] intended to undermine reason in favor of visceral appeal." *Id.* at 297-98, 595 S.E.2d at 416 (first alteration in original) (quoting *Jones*, 355 N.C. at 134, 558 S.E.2d at 108). Rather than mere "hyperbole," these statements were improper and highly prejudicial in the circumstances of this case.

The prosecutor's further assertion that defendant had the specific intent to kill many people over a twenty-year period was drawn in part from an expert witness's report that defendant had murderous ideations that could be defined as an intent. The prosecutor then took this information and manipulated it to suggest to the jury that defendant had been roaming the streets looking for someone to kill and would do so again. As this Court observed in *State v. Miller*, 271 N.C. 646, 657, 157 S.E.2d 335, 344 (1967), "[d]efendants in criminal prosecutions should be

convicted upon the evidence in the case, and not upon prejudice created by abuse administered by the solicitor in his argument."

This Court has previously found less derogatory statements about a defendant to be plain error justifying a new trial, even when the defendant did not object at trial. In describing the defendant in *Smith*, the prosecutor stated he was "lower than the bone belly of a cur dog." 279 N.C. at 165, 181 S.E.2d at 459. This Court granted the defendant a new trial and noted that by failing to intervene in the prosecutor's argument, the trial judge "was derelict in his duty." *Id.* at 167, 181 S.E.2d at 461. In *State v. Matthews*, 358 N.C. 102, 111, 591 S.E.2d 535, 542 (2004), this Court concluded that counsel engaged in improper name-calling by referring to the defendant's theory of the case as "bull crap." (Emphasis omitted.)

In *Jones* the prosecutor in his closing argument compared the Columbine school shootings and the Oklahoma City bombing with the defendant's crime, which this Court noted was "a thinly veiled attempt to appeal to the jury's emotions." 355 N.C. at 132, 558 S.E.2d at 107. The Court held the closing arguments to be improper and prejudicial, and vacated the defendant's death sentence because the trial judge failed to intervene. *Id.* at 132-35, 558 S.E.2d at 107-09. Indeed, the Court there noted: "[T]his Court is mindful of the reluctance of counsel to interrupt his adversary and object during the course of closing argument for fear of incurring jury disfavor." *Id.* at 129, 558 S.E.2d at 105; *see also State v. Moss*, 180 W. Va. 363, 368, 376 S.E.2d 569, 574 (1988) (finding that a prosecutor's statements that a defendant was a "psychopath" and needed to be convicted of first-degree murder so that he would "never be released to slaughter women and children" in the community were plain error and denied the defendant his fundamental right to a fair trial).

The statements made by the State in its closing argument here were grossly improper and required the trial court to intervene *ex mero motu*. This Court has long established that a defendant has a "right to a fair and impartial trial . . . . where passion and prejudice and facts not in evidence may have no part." *State v. Smith*, 240 N.C. 631, 636, 83 S.E.2d 656, 659 (1954). It is within the court's power and "is the duty of the judge to interfere when the remarks of counsel are not warranted by the evidence, and are calculated to mislead or prejudice the jury." *Id.* at 635, 83 S.E.2d at 659 (citations omitted). The purpose of this protection is "to safeguard the rights of litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered in the prosecution or defense of his cause, by extraneous considerations, which militate against a fair hearing." *Id.* at 635, 83 S.E.2d at 659 (quoting *Starr v. S. Cotton Oil Co.*, 165 N.C. 587,

595, 81 S.E. 776, 779 (1914)). It is imperative that the prosecutor remember "that the State's interest 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' " *Matthews*, 358 N.C. at 112, 591 S.E.2d at 542 (quoting *Berger*, 295 U.S. at 88).

3. Referring to Delusions as Fact

The second impropriety in the prosecutor's argument occurred when he suggested that delusional thoughts and statements about things that never happened could have rationally led Jermaine Tart to form the requisite specific intent to kill Mr. Cassidy. At two different times in his closing argument, the prosecutor referred to events that Cassidy testified did not happen, and he urged the jury to find that those events explained why Tart's attack on Cassidy was rationally motivated by a premeditated intent to kill untouched by diminished mental capacity. The prosecutor referred to each of these things that never happened as a "factual, non-delusion reason, or motivation for doing what he did." It is improper for counsel to make arguments that are not based on reasonable inferences that may be drawn from the evidence admitted at trial. *See State v. Anderson*, 322 N.C. 22, 37, 366 S.E.2d 459, 468 (1988).

There is simply no support for the proposition that events that never happened, such as Cassidy stealing Tart's medicine, which Cassidy testified never occurred, or Cassidy not giving Tart his telephone number, which again, Cassidy testified never happened, could appropriately be called "factual" and "non-delusional." Wholly imagined events cannot support a reasonable inference that defendant acted rationally. The mere fact that Mr. Tart tragically chose to act on his delusions is not proof of specific intent. *See Roache*, 358 N.C. at 282, 595 S.E.2d at 407. Thus, the prosecutor improperly implied that events that never occurred could be "factual" and could therefore explain a rational intent to kill.

The majority dismisses this argument by pointing out that the trial court found defendant to be competent to stand trial. This is completely beside the point. The issue is whether, at the time of this assault, Mr. Tart was suffering from a mental illness such that he lacked the mental capacity to form the requisite intent to kill with premeditation. Even the prosecution admits that defendant's mental state on the night of 2 March 2014 is what is at issue in this case. That defendant subsequently received treatment, took medications, and ultimately was found competent to stand trial answers a completely different question than whether he suffered from a diminished mental capacity on the night of this incident. For the prosecutor to argue that things which never

happened could be "factual" and could explain Tart's actions was an improper inference from the evidence presented at the trial of this case.

"In sum, improper closing arguments cannot be tolerated." *Matthews*, 358 N.C. at 112, 591 S.E.2d at 542. For all these reasons, and taking into account all the improper statements made here, I must respectfully dissent from the portion of the majority opinion that concludes the trial court did not abuse its discretion in declining to intervene *ex mero motu* during the State's closing argument. The trial court should have stopped the prosecutor's use of improper and prejudicial statements in closing argument that were designed to inflame the jury's fears, direct its attention away from the issue to be decided, and cause jurors to infer facts contrary to those in evidence. A new, fair trial is warranted.

STATE OF NORTH CAROLINA, UPON RELATION OF [ROY A. COOPER, III], INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA	)	
v.	)	WAKE COUNTY
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; CHARLTON L. ALLEN, IN HIS OFFICIAL CAPACITY AS CHAIR OF NORTH CAROLINA INDUSTRIAL COMMISSION; AND YOLANDA K. STITH, IN HER OFFICIAL CAPACITY AS VICE-CHAIR OF THE NORTH CAROLINA INDUSTRIAL COMMISSION	)	

No. 21P19

ORDER

Upon consideration of the Petition for Writ of Certiorari, Petition for Writ of Supersedeas, and Motion for Temporary Stay filed by plaintiff on the 17th day of January 2019, the Petition for Writ of Certiorari and the Petition for Writ of Supersedeas are ALLOWED for the limited purpose of vacating the order entered by the Court of Appeals on the 9th day of January 2019 and reinstating in part the order and judgment of the Superior Court in Wake County, entered on the 3rd day of December 2018. As provided in part in the order and judgment of the superior court, "Conclusion" paragraph four, Part V of Session Law 2016-125 is enjoined until the appeal pending in the Court of Appeals has been concluded and the mandate issued, or until further order of this Court. The order of the Court of Appeals, dated the 9th day of January 2019, allowing in part defendants' petition for writ of supersedeas is hereby vacated. This case is remanded to the Court of Appeals for a determination on the merits of the underlying constitutional and other issues, if any, in the appeal. As a result of the foregoing, plaintiff's Motion for Temporary Stay to this Court is DISMISSED AS MOOT.

By order of this Court in Conference, this 6th day of February, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of February, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
Clerk

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

27 MARCH 2019

Justice Davis did not participate in any of these cases.

004P19	State v. Carlos Devito Payne	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1132)	Dismissed
005P19	State v. Ludlow Ray Daw, Jr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-117)	Denied
014P19	Shallotte Partners, LLC v. Berkadia Commercial Mortgage, LLC and Samet Corporation	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1288)	Denied
016P19	In the Matter of the Foreclosure of a Deed of Trust Executed by Michael D. Radcliff and Margene K. Radcliff Dated May 23, 2003 and Recorded in Book 1446 at Page 2024 and Rerecorded in Book 1472 at Page 2465 in the Iredell County Public Registry, North Carolina	1. Appellant's Motion for Temporary Stay (COA18-419) 2. Appellant's Petition for *Writ of Supersedeas* 3. Appellant's PDR Under N.C.G.S. § 7A-31 4. Appellant's Motion to Withdraw Petition for *Writ of Supersedeas* and PDR	1. Allowed **01/11/2019** Dissolved **02/28/2019** 2. --- **02/28/2019** 3. --- **02/28/2019** 4. Allowed **02/28/2019**
017P19	Joseph Earl Clark, II v. Carlton Joyner, Deputy Director, North Carolina Department of Public Safety, Division of Adult Corrections	Petitioner's *Pro Se* Motion for PDR (COAP18-251)	Denied
019P19	Bank of America, N.A. v. Gary W. Schmitt and May L. Schmitt	1. Defs' Notice of Appeal Based Upon a Constitutional Question (COA18-222) 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied **Ervin, J., recused**
021P19	Roy Cooper v. Philip Berger, et al.	1. Motion for Temporary Stay (COAP18-865) 2. Petition for *Writ of Supersedeas* 3. Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed as moot **02/06/2019** 2. Special Order **02/06/2019** 3. Special Order **02/06/2019**

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

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022P19	State v. Jennifer Jimenez/April Myers	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
024P19	In re Samuel Shuford	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
026P19	State v. Carico Rodriquez Hayward	Def's PDR Under N.C.G.S. § 7A-31 (COA18-650)	Denied
027P19	State v. Ernie Donnell Pinnix, II	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1199)	Denied
028P19	State v. Karlos Antonio Holmes	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1237)	Denied
035P19-2	State v. Keven Anthony Morgan	Def's *Pro S*e PDR Under N.C.G.S. § 7A-31 (COA18-575)	Denied
039P19	State v. John Henry Williams	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Harnett County	Dismissed
042A19	Accardi v. Hartford Underwriters Insurance Company	1. Motion to Admit Kim E. Rinehart *Pro Hac Vice* 2. Motion to Admit David R. Roth *Pro Hac Vice*	1. Allowed **02/21/2019** 2. Allowed **02/21/2019**
043P19	Phillip Ray Mahler, Employee v. Smithfield, Employer, Self-Insured (ESIS, Third-Party Administrator)	Plt's *Pro Se* Motion for Notice of Appeal	Dismissed
046P19	In the Matter of E.M.	1. State's Motion for Temporary Stay (COA18-685) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Respondent's Motion for Extension of Time to File Response to PDR	1. Allowed **01/31/2019** 2. 3. 4. Allowed **03/04/2019**
047P19	State v. Michael R. Solomon	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Warren County	Dismissed

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048P19	State v. Cameron Lee Hinton	1. Def's *Pro Se* Motion for Temporary Stay 2. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. Denied **02/06/2019** 2. Denied **02/06/2019**
049P19	State v. Shemar Frost	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/04/2019**
052P19	In re Judge Ridgeway Wake County Senior Resident Superior Court Judge	Petitioner's (Bruce L. Gorham) Motion for Appeal from NC Judicial Standards Commission	Dismissed
054P19	State v. Rogelio Albino Diaz Tomas	Def's Petition for *Writ of Mandamus*	Denied **02/26/2019**
056P19	State v. William David Gibson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-454)	Denied
060P19	George Reynold Evans v. Ernie Lee, Onslow County District Attorney and State of North Carolina	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
066P19	State v. Montise A. Mitchell	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-333) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
067P19	State v. Steven Wayne Powers	1. Def's *Pro Se* Motion for Notice of Appeal (COAP19-97) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 4. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Watauga County	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
075P19	State v. Adam Warren Conley	1. State's Motion for Temporary Stay (COA18-305) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **03/06/2019** 2.
090P19	State v. Orlando Cooper	1. State's Motion for Temporary Stay (COA18-637) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **03/20/2019** 2.

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094P19	State v. James A. Cox	1. State's Motion for Temporary Stay (COA18-692) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **03/22/2019** 2.
100P19	Linda Byrd-Russ v. Nefertiti Byrd	1. Def's *Pro Se* Motion for Temporary Stay (COAP19-142) 2. Def's *Pro Se* Petition for *Writ of Supersedeas* 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **03/27/2019** 2. Denied **03/27/2019** 3. Denied **03/27/2019**
109P17-6	In re Olander R. Bynum	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
115A04-2	State v. Scott David Allen	1. Def's *Pro Se* Motion for Temporary Stay 2. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. Denied **03/25/2019** 2. Denied **03/25/2019**
130A03-2	State v. Quintel Martinez Augustine	Amici Curiae's (Former State and Federal Prosecutors) Motion for Withdrawal and Substitution of Counsel	Allowed **03/14/2019** **Ervin, J., recused**
131P01-16	State v. Anthony Dove	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed **Ervin, J., recused**
132P18-2	Beth Desmond v. The News and Observer Publishing Company, McClatchy Newspapers, Inc., and Mandy Locke	1. Defs' (The News and Observer Publishing Company and Mandy Locke) Notice of Appeal Based Upon a Constitutional Question (COA18-411) 2. Defs' (The News and Observer Publishing Company and Mandy Locke) PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal 4. Professor William Van Alystyne's Motion for Leave to File Amicus Brief 5. The Reporter Committee for Freedom of Press, et al.'s Motion for Leave to File Amicus Brief	1. --- 2. Allowed 3. Allowed 4. Allowed 5. Allowed

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

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133A09-2	State v. Timothy Ray Casey	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues 5. Def's Motion to Dismiss Appeal	1. Allowed **02/06/2019** Dissolved **03/27/2019** 2. Denied 3. --- 4. Denied 5. Allowed
140PA18/ 141PA18	State v. Robert Dwayne Lewis	State's Motion to Amend Brief	Allowed **03/12/2019**
142PA17-2	State v. Terance Germaine Malachi	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Denied **03/26/2019** 2.
147P18	Christopher Chambers, on behalf of himself and all others similarly situated v. The Moses H. Cone Memorial Hospital; The Moses H. Cone Memorial Hospital Operating Corporation d/b/a Moses Cone Health System and d/b/a Cone Health; and Does 1 through 25, Inclusive	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-686) 2. North Carolina Justice Center, Center for Responsible Lending, and North Carolina Advocates for Justice's Conditional Motion for Leave to File Amicus Brief 3. Plt's Motion to Amend PDR	1. Allowed 2. Allowed 3. Allowed
156P09-2	Wadell Bynum v. Mecklenburg County School Board	Plt's *Pro Se* Motion for Notice of Appeal	Dismissed
174P18-2	State v. Robert Harold Johnson	Def's *Pro Se* Motion for a Rehearing	Dismissed
176P11-4	State v. Floyd Calvin Cody	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-503) 2. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied

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181A93-4	State v. Rayford Lewis Burke	1. Amicus Curiae's Motion to Admit W. Kerrel Murray *Pro Hac Vice* 2. Amicus Curiae's Motion to Admit Jin Hee Lee *Pro Hac Vice* 3. NAACP Legal Defense & Educational Fund, Inc.'s Motion for Leave to File Amicus Brief 4. NAACP Legal Defense & Educational Fund, Inc.'s Motion for Leave to Participate in Oral Argument 5. Def's Motion for Leave to File Supplemental Brief	1. Allowed **02/19/2019** 2. Allowed **02/19/2019** 3. Allowed **02/19/2019** 4. Allowed **02/19/2019** 5. Allowed **02/19/2019** **Ervin, J., recused**
183PA16-2	The City of Charlotte v. University Financial Properties, LLC, et al.	Def's (University Financial Properties, LLC) Motion for Withdrawal of Issues Presented in the Conditional Petition	Allowed
210P16-4	Dale Patrick Martin v. State of North Carolina, Mike Slagle (Supt.)	Petitioner's *Pro Se* Motion for Notice of Appeal	Dismissed
233P12-2	State v. Montrez Benjamin Williams	1. State's Motion for Temporary Stay (COA16-178) 2. State's Petition for *Writ of Supersedeas* 3. Def's Motion for Temporary Stay 4. Def's Petition for *Writ of Supersedeas* 5. Def's Motion to Remove from Electronic Site 6. Def's Motion to Remove from Electronic Site	1. Allowed **10/05/2018** 2. 3. Allowed **10/05/2018** 4. 5. Dismissed without prejudice to refile with more specificity **01/30/2019** 6. Denied **02/07/2019**
238A18	In the Matter of T.T.E.	Juvenile-Appellee's Motion to Withdraw as Private Assigned Counsel and to Appoint the Appellate Defender	Allowed **03/06/2019**

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244A18	Town of Nags Head v. William W. Richardson and Wife, Martha W. Richardson	1. Plt's Notice of Appeal Based Upon a Dissent (COA17-498) 2. Defs' Notice of Appeal Based Upon a Dissent 3. Defs' Amended Notice of Appeal Based Upon a Dissent 4. Defs' PDR Under N.C.G.S. § 7A-31 5. Defs' Petition for *Writ of Certiorari* to Review Decision of COA 6. Plt's Motion to Dismiss and Strike Defs' Cross-Appeal and PDR 7. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. --- 3. --- 4. 5. 6. 7. Denied **03/27/2019**
251PA18	Sykes, et al. v. Health Network Solutions, Inc., et al.	Plts' Motion to Seal Portions of the Reply Brief	Allowed **02/13/2019**
263P17-2	NNN Durham Office Portfolio 1, LLC, et al. v. Highwoods Realty Limited Partnership, et al.	Attorney Jeremy M. Falcone's Motion to Withdraw as Counsel	Allowed **03/12/2019**
263P18	State v. Cedric Theodis Hobbs, Jr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1255) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed
272A14	State v. Jonathan Douglas Richardson	Motion to Withdraw as Counsel and Allow the Appellate Defender to Appoint New Counsel	Allowed **03/13/2019**
273P18	State v. Gregory Charles Baskins	1. State's Motion for Temporary Stay (COA17-1327) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR	1. Allowed **08/27/2018** Dissolved **03/27/2019** 2. Denied 3. Denied

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277P18-3	State v. Gabriel A. Ferrari	1. Def's *Pro Se* Motion for Freedom of Information Act to Reveal the Name of the Judges	1. Dismissed
		2. Def's *Pro Se* Motion to Obtain Copies of the Judges' Oath of Office	2. Dismissed
		3. Def's *Pro Se* Motion for Reconsideration	3. Dismissed
		4. Def's *Pro Se* Motion to Strike the Judge's Order	4. Dismissed
		5. Def's *Pro Se* Motion to Protest Against Defendant Political Religious Persecution, False Accusation, Coverup Intimidation in the Case of Lee Haney Ret. Army Col. Death by Arson	5. Dismissed
294A18	State v. Jeffrey Daniel Waycaster	Def's Motion to File Amended New Brief	Allowed **03/06/2019**
295P18	State v. Charles Ward Ayers	1. State's Motion for Temporary Stay (COA17-725)	1. Allowed **09/12/2018** Dissolved **03/27/2019**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
303P18	State v. Gregory Garrison Cole	Def's PDR Under N.C.G.S. § 7A-31 (COA17-732)	Denied
306P18	Hunter F. Grodner v. Andrzej Grodner	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-570, 17-813)	1. Dismissed *ex mero motu*
		2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	2. Denied
311PA18	State v. Shakita Necole Walton	Appellate Defender's Motion to Allow Counsel to be Withdrawn and for Appellate Defender to Assign Additional Counsel	Allowed **02/04/2019**
315PA18	Cooper v. Berger, et al.	Joint Motion to Continue Oral Argument of 4 March 2019	Allowed **02/22/2019**
315PA18	Cooper v. Berger, et al.	Joint Motion to Withdraw Appeal	Allowed

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322P18	Town of Littleton v. Layne Heavy Civil, Inc. f/d/b/a Reynolds, Inc.; Layne Inliner, LLC f/d/b/a Reynolds Inliner, LLC; and Mack Gay Associates, P.A.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1137) 2. Plt's Motion to Amend PDR	1. Denied 2. Allowed **11/07/2018**
327P02-11	State v. Guy Tobias LeGrande	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/07/2019** **Ervin, J., recused**
335P18	In the Matter of J.B.	1. State's Motion for Temporary Stay (COA17-1373) 2. State's Petition for *Writ of Supersedeas* 3. Counsel's Motion to Withdraw as Counsel of Record 4. Juvenile's Motion to Appoint the Appellate Defender 5. Juvenile's Motion for Extension of Time to Respond to PDR 6. State's PDR Under N.C.G.S §7A-31	1. Allowed **10/08/2018** Dissolved **03/27/2019** 2. Denied 3. Allowed **10/11/2018** 4. Allowed **10/11/2018** 5. Allowed **10/11/2018** 6. Denied
336P18	State v. Alvin Kenneth Keels	Def's PDR Under N.C.G.S. § 7A-31 (COA18-170)	Denied
339A18	New Hanover Cty. Bd. of Educ. v. Stein	1. Def's and Intervenors' Motion to Designate Parties 2. Def's and Intervenors' Motion to Reset the 30-Day Deadline for Opening Briefs from Date of the Court's Order on this Motion	1. Allowed **02/06/2019** 2. Allowed **02/06/2019**
339A18	New Hanover Cty. Bd. of Educ. v. Stein	Plt's Motion to Amend Caption	Allowed **02/19/2019**

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344P18	In the Matter of the Foreclosure of a Deed of Trust Executed by David L. Frucella and Marilyn L. Frucella Dated June 28, 1985 and Recorded in Book 5044 at Page 764 in the Mecklenburg County Public Registry, North Carolina	Respondents' PDR Under N.C.G.S. § 7A-31 (COA18-212)	Denied
355P13-2	State v. Willard Alan Smith	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Rowan County 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed as moot
359P18	State v. Rodney Lee Enoch	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1248)	Denied
363P18	State v. Juan Antonia Miller	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-1130) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
364P18	State v. Ernest Raysean Gray	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-1162) 2. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot
366A10	State v. Michael Patrick Ryan	Def's Motion to Correct Certificate of Service in Defendant-Appellee's Brief	Allowed **03/13/2019**
369P18	Cabarrus County Board of Education v. Department of State Treasurer, Retirement Systems Division; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	Respondents' PDR Under N.C.G.S § 7A-31 (COA17-1017)	Allowed

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371P18	Cabarrus County Board of Education v. Board of Trustees, Teachers' and State Employees' Retirement System; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	Respondents' PDR Under N.C.G.S. § 7A-31 (COA17-1019)	Allowed
378P18-2	State v. Napier Sandford Fuller	Def's *Pro Se* Motion for an Emergency Injunction for ADA Title II Accommodations for a Court Appearance on 2/25/19	Denied **02/22/2019**
382P18	State v. Flint Fitzgerald Johnson, Jr.	1. Def's *Pro Se* Motion for Notice of Appeal (COAP18-166) 2. Def's *Pro Se* Motion for Appellant Brief	1. Dismissed 2. Dismissed **Ervin, J., recused**
388P09-3	State v. Shayno Marcus Thomas	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-196) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot **Ervin, J., recused**
389P18	Desiree Block v. Matthew Block	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-200)	Denied
396P18	State v. William Sakon Parker	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1226)	Denied **Morgan, J., recused**
404A18	County of Durham v. Burnette	1. Def's Motion to Strike Appellant's Second Argument 2. Plt's Motion for Permission to Provide Supplemental Authority 3. Plt's Motion to Amend Table of Cases and Authorities	1. Dismissed as moot 2. Allowed 3. Allowed
405P18	In the Matter of E.W.P.	Respondent's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-183)	Denied

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406P18	State v. Cory Dion Bennett	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-1027)	1. Allowed
		2. State's Conditional PDR Under N.C.G.S. § 7A-31	2. Allowed
407P18	State v. James Daren Sisk	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-211)	1. ---
		2. Def's Motion to Withdraw *Pro Se* PDR	2. Allowed
		3. Def's Motion for Temporary Stay	3. Allowed **11/21/2018** Dissolved **03/27/2019**
		4. Def's Petition for *Writ of Supersedeas*	4. Denied
		5. Def's PDR Under N.C.G.S. § 7A-31	5. Denied
408P18	State v. Maurice Edward Thompson	Def's *Pro Se* Motion to Dismiss	Dismissed *ex mero motu*
409P18	State v. Deshawn Lamar Perry	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1330)	Denied
410P18	Town of Apex v. Beverly L. Rubin	1. Plt's Motion for Temporary Stay (COA17-955)	1. Allowed **11/21/2018** Dissolved **03/27/2019**
		2. Plt's Petition for *Writ of Supersedeas*	2. Denied
		3. Plt's PDR Under N.C.G.S. § 7A-31	3. Denied
411A94-6	State v. Marcus Reymond Robinson	Amici Curiae's (Former State and Federal Prosecutors) Motion for Withdrawal and Substitution of Counsel	Allowed **03/14/2019**
411P18	State v. Craig Deonte Hairston	Def's PDR (COA17-1357)	Denied
415P18	Everett's Lake Corporation v. Lewis Edward Dye, Jr.	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-360)	Denied
416P18	State v. Joseph Gill	1. State's Motion for Temporary Stay (COA18-191)	1. Allowed **11/21/2018** Dissolved **03/27/2019**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied

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435P18	Appalachian Materials, LLC v. Watauga County, a North Carolina County, and Terry Covell, Sharen Covell, and Blue Ridge Environmental Defense League, Inc. d/b/a High Country Watch	Respondent's PDR Under N.C.G.S. § 7A-31 (COA18-188)	Denied
437P18	Carlos Chavez v. Irwin Carmichael, Sheriff, Mecklenburg County ——————— Luis Lopez v. Irwin Carmichael, Sheriff, Mecklenburg County	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA18-17)	Allowed
439P18	State v. Gregory Garrison Cole	Def's PDR Under N.C.G.S. § 7A-31 (COA18-286)	Denied
440P18	Wadell Bynum v. Progressive Universal Insurance	Plt's *Pro Se* Motion for Notice of Appeal	Dismissed
441A98-4	State v. Tilmon Charles Golphin	Amici Curiae's (Former State and Federal Prosecutors) Motion for Withdrawal and Substitution of Counsel	Allowed **03/14/2019** **Beasley, C.J., recused**
441A18	State v. Rontel Vincae Royster	1. State's Motion for Temporary Stay (COA18-2) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **12/18/2018** 2. Allowed **03/14/2019** 3. —

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445P18	In the Matter of the Appeal of Snow Camp, LLC, from the Decision of the Alamance County Board of Equalization and Review to Deny the Partial Exclusion of Certain Personal Property for Tax Year 2016	Alamance County's PDR Under N.C.G.S. § 7A-31 (COA18-388)	Denied
446P18	In the Matter of the Appeal of Kelford Owner, LLC, from the Decision of the Bertie County Board of Equalization and Review to Deny the Partial Exclusion of Certain Personal Property for Tax Year 2016	Bertie County's PDR Under N.C.G.S. § 7A-31 (COA18-389)	Denied
449P18	Rozina Wadhwania, M.D. v. Wake Forest University Baptist Medical Center	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-252)	Denied
452A18	In the Matter of William Thomas Duncan, Jr.	Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA18-318)	Dismissed *ex mero motu*
453P18	State v. Barbara Jean Myers-McNeil	Def's Motion to Withdraw as Private Counsel and to Appoint the Public Defender	Allowed **03/13/2019**
454P18	State v. Stanley Demon Dowd	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-491) 2. Def's Petition for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
456P18	Sadie J. Carter and Helen C. Lytch v. St. Augustine's University	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA17-1008) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
457P18	State v. Antwion Marquette Warren	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-223)	Denied
536P00-9	Terrance L. James v. State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **Ervin, J., recused**

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548A00-2	State v. Christina Shea Walters	Amici Curiae's (Former State and Federal Prosecutors) Motion for Withdrawal and Substitution of Counsel	Allowed **03/14/2019**
597P01-4	State v. Maechel Shawn Patterson	Def's *Pro Se* Motion for Notice of Appeal (COAP17-245)	Dismissed **Ervin, J., recused**
629P01-7	State v. John Edward Butler	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Robeson County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot

IN RE E.D.

[372 N.C. 111 (2019)]

IN THE MATTER OF E.D.

No. 125PA18

Filed 10 May 2019

Appeal and Error—preservation of issues—failure to raise issue at trial—no automatic preservation

An alleged violation of N.C.G.S. § 122C-266(a), concerning examination of an involuntarily committed patient by a physician, was not preserved for appellate review where respondent did not raise it during the district court hearing on her involuntary commitment. There was not automatic preservation of the issue because the statute did not require a specific act by a trial judge and did not place any responsibility on a presiding judge.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 813 S.E.2d 630 (2018), vacating an order entered on 5 January 2017 by Judge Dan Nagle in District Court, Wake County. Heard in the Supreme Court on 6 March 2019.

Joshua H. Stein, Attorney General, by Robert T. Broughton, Assistant Attorney General, for the State, petitioner-appellant.

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

HUDSON, Justice.

This case is before us pursuant to the State's petition for discretionary review[1] of the Court of Appeals' decision which held that "in cases where a respondent [who is involuntarily committed to a State health facility] does not receive an examination by a second physician as mandated by N.C. Gen. Stat. § 122C-266(a), the respondent is not required to make a showing of prejudice resulting from the statutory violation in order to have the trial court's order authorizing her continued commitment vacated." *In re E.D.*, ___ N.C. App. ___, ___, 813 S.E.2d 630,

1. Respondent's conditional petition for discretionary review was denied on 7 June 2018.

634 (2018). We now review: (1) whether "the Court of Appeals erred in concluding that N.C. Gen. Stat. § 122C-266(a) was the type of statutory mandate for which the right to appellate review is automatically preserved regardless of a failure to object in the trial court"; and (2) whether "the Court of Appeals erred in concluding that appellate relief is automatically merited upon the showing of a violation of N.C. Gen. Stat. § 122C-266(a)." Because the Court of Appeals erred in concluding that N.C.G.S. § 122C-266(a) imposes a statutory mandate that automatically preserves violation of that subsection for appellate review—and because respondent did not otherwise preserve her argument alleging the violation by objecting on that basis at the hearing on her involuntary commitment—we reverse the Court of Appeals' decision without deciding whether prejudice must be shown to obtain relief on appeal.

I. Factual and Procedural Background

The facts of this case begin on 26 December 2016 when respondent's sister filed an affidavit and petition for involuntary commitment in the District Court in Wake County requesting that respondent be taken into custody.

In the affidavit respondent's sister swore that respondent was mentally ill, was a danger to herself or others, was in need of treatment for her mental illness in order to prevent further disability and deterioration that would predictably result in dangerousness, and was a substance abuser who was dangerous to herself or others. In support of these assertions, respondent's sister swore to the following facts: (1) respondent was suicidal; (2) respondent attempted to jump out of a moving vehicle on Christmas Eve; (3) respondent threatened to kill her sister, her niece, and her mother when respondent's sister turned out a light in her own home and moved eggs in the refrigerator; (4) respondent has thrown knives, computers, and chairs at her sister; (5) respondent has been diagnosed with bipolar I disorder with manic, psychotic features; (6) respondent has abused prescription drugs and attempted to break down a bathroom door when she was intoxicated after drinking liquor; and (7) respondent threatened to "beat the skin off" her mother's face.

At 7:01 p.m. on the same day that respondent's sister filed the affidavit and petition, a magistrate found that respondent was mentally ill, was a danger to herself or others, was in need of treatment in order to prevent further disability and deterioration that would predictably result in dangerousness, and was a substance abuser who was dangerous to herself or others. Based on these findings, the magistrate ordered that law enforcement take the respondent into custody for examination by a

physician or eligible psychologist within twenty-four hours of issuance of the order.[2] Respondent was taken into custody by Raleigh police at 8:00 p.m., and she was transported to UNC Hospital in Chapel Hill, North Carolina, at 8:30 p.m.[3]

On 27 December at 1:30 p.m., respondent received her first examination by a physician as required by law.[4] The examining physician opined that respondent was mentally ill, was a danger to herself, and was a danger to others. As a result of these findings, the physician recommended that respondent should be subject to inpatient commitment for fifteen days.[5]

On the same day as her first examination at UNC Hospital, respondent was transported to UNC Wakebrook Psychiatric Services (UNC Wakebrook) in Raleigh to begin her inpatient commitment. After her arrival at UNC Wakebrook, respondent received her second examination as required by law at 4:45 p.m.;[6] however, during this examination, respondent was seen by a *psychologist*. She was not examined by a *physician* as required by law. N.C.G.S. § 122C-266(a) (2017) ("[W]ithin 24 hours of arrival at a 24-hour facility described in G.S. 122C-252, the respondent shall be examined by a *physician*." (emphasis added)); *see also id.* § 122C-3(29), (30a) (Supp. 2018) (defining "physician" and "psychologist" separately, and stating that a "physician" is "an individual

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2. N.C.G.S. § 122C-261(b) (2017) ("If the clerk or magistrate finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably mentally ill and either (i) dangerous to self, as defined in G.S. 122C-3(11)a., or dangerous to others, as defined in G.S. 122C-3(11)b., or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness, the clerk or magistrate shall issue an order to a law enforcement officer or any other person authorized under G.S. 122C-251 to take the respondent into custody for examination by a physician or eligible psychologist.").

3. Under North Carolina law, a law enforcement officer who assumes custody over a mentally ill individual under N.C.G.S. § 122C-261(b) must, "[w]ithout unnecessary delay," take the individual to a facility for an examination "by a physician or eligible psychologist." *Id.* § 122C-263(a) (2017).

4. North Carolina law requires that, upon being taken into custody, the individual be examined by a "physician or eligible psychologist" within twenty-four hours. *Id.* § 122C-263(c) (2017).

5. "If the physician or eligible psychologist finds that the respondent is mentally ill and is dangerous to self, as defined in G.S. 122C-3(11)a., or others, as defined in G.S. 122C-3(11)b., the physician or eligible psychologist shall recommend inpatient commitment, and shall so show on the examination report." *Id.* § 122C-263(d)(2) (2017).

6. *Id.* § 122C-266(a) (2017) (requiring that a person subject to involuntary inpatient commitment be examined within twenty-four hours of arrival at a facility).

licensed to practice medicine in North Carolina under Chapter 90 of the General Statutes or a licensed medical doctor employed by the Veterans Administration").

Based on her evaluation of respondent, the psychologist opined that respondent was mentally ill, a danger to herself, and a danger to others. Accordingly, the psychologist recommended that respondent be subject to inpatient commitment for five to ten days.[7] Respondent remained in custody at UNC Wakebrook until the hearing on her involuntary commitment in the District Court in Wake County on 5 January 2017.

Immediately following the hearing, the district court ordered that respondent be involuntarily committed at UNC Wakebrook for a period not to exceed thirty days.[8] In its order the court found that respondent was mentally ill; and was a danger to herself and others. At no point during the hearing did respondent raise the issue that her second examination was not conducted by a physician as required by N.C.G.S. § 122C-266(a). Respondent filed her notice of appeal on 27 January 2017.

The Court of Appeals vacated respondent's involuntary commitment order. *In re E.D.*, ___ N.C. App. at ___, 813 S.E.2d at 634. In so doing, the court reached two conclusions that are pertinent here. First, relying on its own decision in *In re Spencer*, the Court of Appeals held that respondent's argument—that N.C.G.S. § 122C-266(a) was violated when her second examination was conducted by a psychologist in lieu of a physician—was preserved for appellate review even though respondent did not raise the issue in the district court hearing on her involuntary commitment. *Id.* at ___, 813 S.E.2d at 632 (citing *In re Spencer*, 236

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7. "If the physician finds that the respondent is mentally ill and is dangerous to self, as defined by G.S. 122C-3(11)a., or others, as defined by G.S. 122C-3(11)b., the physician shall hold the respondent at the facility pending the district court hearing." *Id.* § 122C-266(a)(1). "A hearing shall be held in district court within 10 days of the day the respondent is taken into law enforcement custody pursuant to G.S. 122C-261(e) or G.S. 122C-262." *Id.* § 122C- 268(a) (Supp. 2018).

8. "To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self, as defined in G.S. 122C-3(11)a., or dangerous to others, as defined in G.S. 122C-3(11)b. The court shall record the facts that support its findings." *Id.* § 122C-268(j) (Supp. 2018).

Although respondent's involuntary commitment order has expired, this case is not moot. *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 635 (1977) ("The possibility that respondent's commitment in this case might likewise form the basis for a future commitment, along with other obvious collateral consequences, convinces us that this appeal is not moot.").

N.C. App. 80, 84-85, 762 S.E.2d 637, 640 (2014), *disc. rev. denied*, 367 N.C. 811, 767 S.E.2d 529 (2015). Specifically, the Court of Appeals reasoned that its previous decision in *In re Spencer* required it to conclude that N.C.G.S. § 122C-266(a) places a "statutory mandate" upon the trial court that renders any violation of that subsection automatically preserved for appellate review. *Id.* at ___, 813 S.E.2d at 632.

Second, the Court of Appeals relied on its own decision in *In re Barnhill*, to hold that the violation of N.C.G.S. § 122C-266(a) entitled respondent to relief without her needing to show that she was prejudiced by the violation. *Id.* at ___, 813 S.E.2d at 633 (citing *In re Barnhill*, 72 N.C. App. 530, 532, 325 S.E.2d 308, 309 (1985)). In its analysis the Court of Appeals distinguished the facts here and those of *In re Barnhill*, from the facts of *In re Spencer*, in which a respondent was required to demonstrate prejudice. *Id.* at ___, 813 S.E.2d at 633-34 (citations omitted). The court reasoned that *In re Spencer* is distinct from the situation presented here because in *In re Spencer*, the respondent conceded that he was actually examined by a physician, *id.* at ___, 813 S.E.2d at 633 ("Here, respondent concedes that Dr. Saeed's testimony illustrates that he conducted an examination of respondent on 23 July 2013, the day after he was admitted to Holly Hill Hospital." (quoting *In re Spencer*, 236 N.C. App. at 85, 762 S.E.2d at 640)); however, "no written records existed documenting the fact that a second physician had examined the respondent," *id.* at ___, 813 S.E.2d at 633 (citing *In re Spencer*, 236 N.C. App. at 84, 762 S.E.2d at 640). The Court of Appeals limited *In re Spencer* to its facts by reasoning that "*Spencer* cannot be read as standing for the entirely separate proposition that in cases where—as here—the second examination requirement of N.C. Gen. Stat. § 122C-266(a) clearly has *not* been followed, a respondent must nevertheless show prejudice stemming from her failure to receive a second examination." *Id.* at ___, 813 S.E.2d at 633-34.

We allowed the State's petition for discretionary review of the Court of Appeals' decision on 7 June 2018 and now review the issues presented therein: (1) whether respondent's issue is automatically preserved for appellate review; and (2) whether respondent is entitled to relief on appeal without the need to demonstrate prejudice from the violation of N.C.G.S. § 122C-266(a).

II. Analysis

We conclude that the Court of Appeals erred when it held that N.C.G.S. § 122C-266(a) imposes a statutory mandate that automatically preserves a violation of that provision for appellate review. On that

basis, we reverse the decision of the Court of Appeals. Because we so conclude, and because respondent did not raise the issue of the violation of N.C.G.S. § 122C-266(a) at the district court hearing on her involuntary commitment, this issue is not preserved for appellate review. As a result, we need not—and do not—reach the issue of whether the Court of Appeals erred in concluding that respondent was not required to demonstrate prejudice from the violation.

This Court reviews a decision of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010) (citing *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994)).

Rule 10 of the North Carolina Rules of Appellate Procedure states the general rule governing how parties preserve issues for appellate review:

> 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 context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1). Here, because respondent did not raise the issue of the violation of N.C.G.S. § 122C-266(a) before the district court, she failed to preserve this issue for appellate review under Rule 10 of the North Carolina Rules of Appellate Procedure.

Nonetheless, "[i]t is well established that 'when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial.' " *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (first quoting *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (citation omitted); then citing *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004), *cert. denied*, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d. 285 (2005)); *see State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988) ("When a trial court acts contrary to a statutory *mandate*, the error ordinarily is not waived by the defendant's failure to object at trial." (citing *Ashe*, 314 N.C. at 39, 331 S.E.2d at 659)); *see also State v. Bryant*, 189 N.C. 112, 115, 126 S.E. 107, 109 (1925) ("The fact that exception was not entered at the time the remark was uttered is immaterial. The statute is mandatory, and . . . may be excepted to after the verdict." (citation omitted)).

When a statute "is clearly mandatory, and its mandate is directed to the trial court," the statute automatically preserves statutory violations as issues for appellate review. *Hucks*, 323 N.C. at 579, 374 S.E.2d at 244; *see Ashe*, 314 N.C. at 40, 331 S.E.2d at 659 ("N.C.G.S. § 15A-1233(a) require[s] 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."); *Bryant*, 189 N.C. at 114, 126 S.E. at 108 ("No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven . . . ." (quoting 1 N.C. Cons. Stat. § 564 (1919)); *see also State v. Aikens*, 342 N.C. 567, 578, 467 S.E.2d 99, 106 (1996) (concluding that N.C.G.S. § 15A-1235(c) (1988) was "permissive rather than mandatory" (citing *State v. Williams*, 315 N.C. 310, 326, 338 S.E.2d 75, 85 (1986))).

The State and respondent do not disagree with the rule that a statute's mandate must be directed to the trial court in order to automatically preserve a statutory violation as an issue for appellate review; *see, e.g.*, *Davis*, 364 N.C. at 303, 698 S.E.2d at 68 (concluding that the trial court "is not authorized to impose punishment for the offenses enumerated in subsection (b) [of N.C.G.S. § 20-141.4 (2009)]"); *Hucks*, 323 N.C. at 579, 374 S.E.2d at 244; however, they do disagree about when a statute's mandate is directed to the trial court. Specifically, and relying on our decisions in *Davis*, *Hucks*, and *Ashe*,[9] the State contends that a statute directs its mandate to a trial court when it does so expressly or when

9. The State also relies on our decision in *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000), *cert. denied*, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001). However, such reliance is misplaced because, in that decision, we did not conclude that the issue was automatically preserved for appeal. *Id.* at 177, 531 S.E.2d at 439. In fact, *Braxton* belongs to a line of cases in which we have determined that a defendant waives appellate review of the requirement found in N.C.G.S. § 15A-1214(a) that jurors be selected from the panel by a random procedure when that defendant fails to follow the statutory procedure for challenging the jury panel. *See* N.C.G.S. § 15A-1211(c) (2017) ("The State or the defendant may challenge the jury panel."); *Braxton*, 352 N.C. at 177, 531 S.E.2d at 439 ("In this case, defendant never followed th[e] specific procedure [under N.C.G.S. § 15A-1211(c) (1999) for asserting a challenge to the jury empaneling procedure]. . . . In light of defendant's failure to follow the procedures . . . we hold that defendant failed to preserve this issue for appellate review." (citing *State v. Atkins*, 349 N.C. 62, 102-03, 505 S.E.2d 97, 122 (1998), *cert. denied*, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999)); *see also Tirado*, 358 N.C. at 571, 599 S.E.2d at 530 (reasoning that the defendants waived their assignment of error regarding selection of their jury panel when they failed to follow the procedure in N.C.G.S. § 15A-1211(c) (2003)); *State v. Wiley*, 355 N.C. 592, 606-07, 565 S.E.2d 22, 34-35 (2002) (concluding that the defendant's statutory challenge to the jury selection procedure was preserved in N.C.G.S. § 15A-1211(c) (2001), but ultimately determining that the defendant's failure to follow the statutory procedure waived his challenge), *cert. denied*, 537 U.S. 1117, 123 S. Ct. 882, 154 L. Ed. 2d 795 (2003); *State v. Meyer*,

it "involve[s] actions that a trial court can perform: returning jurors to a courtroom, ensuring a random panel of jurors, appointing assistant counsel, or sentencing in accordance with the law." Respondent argues, however, that the State's interpretation of our case law is "not the end of the story. Some statutes, this Court has observed, implicitly impose a mandate on the trial court." Specifically, respondent relies on our decisions in *Hucks*, *State v. Lawrence*, and *State v. Cummings*, in contending that a statute also directs a mandate to a trial court when the enactment implicitly requires the trial court "to supervise the conduct of other state actors."

Accordingly, the State argues that the Court of Appeals erred in concluding that the issue of the violation of N.C.G.S. § 122C-266(a) was automatically preserved because that statute does not expressly direct its mandate at the trial court, and because the mandate involves "a psychiatric examination of a civil-commitment respondent" which the trial court cannot perform. By contrast, respondent argues that the Court of Appeals was correct to conclude that the issue was automatically preserved because the district court, presumably through its role in conducting hearings, is implicitly called upon to supervise state health care facilities when people are involuntarily committed to those facilities.

We conclude that the State's reading of our prior decisions is more consistent with our present view of these cases. Specifically, in *Davis* we concluded that there was a statutory mandate that automatically preserved an issue for appellate review when the statute at issue prohibited the trial court from entering additional sentences against defendant because other judgments entered against him "impose[d] greater punishment for the same conduct." 364 N.C. at 305-06 698 S.E.2d at 70 (citing N.C.G.S. § 20-141.4(b) (2009)). In *Hucks* we concluded that appellate review was automatically preserved for the alleged violation of a statute that "state[d] simply but unequivocally that an indigent facing a possible death penalty may not be tried unless an assistant counsel has been appointed in a timely manner." 323 N.C. at 579, 374 S.E.2d at 244

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353 N.C. 92, 112-13, 540 S.E.2d 1, 13 (2000) (concluding that the defendant did not preserve the issue for appellate review when he failed to follow the procedure contained in N.C.G.S. § 15A-1211(c) (1999)), *cert. denied*, 534 U.S. 839, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001); *State v. Golphin*, 352 N.C. 364, 411-12, 533 S.E.2d 168, 202 (2000) (concluding that the defendants' challenge to the jury empaneling procedure on the grounds that it was not random as required by N.C.G.S. § 15A-1214(a) (1999) was preserved even though defendants did not follow the procedure contained in N.C.G.S. § 15A-1211(c), but ultimately concluding that their failure to comply with that subsection waived the challenge), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d. 305 (2001).

(citing N.C.G.S. § 7A-450(b1)). We reasoned that "[t]he statute requires the trial court to appoint assistant counsel as a matter of course when an indigent is to be prosecuted in a capital case. It neither expressly nor impliedly places any responsibility on the defendant to ask for assistant counsel." *Id.* at 579, 374 N.C. at 244. In *Ashe* we concluded appellate review was automatically preserved for the violation of a statute that "require[d] 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." 314 N.C. at 40, 331 S.E.2d at 659 (citing N.C.G.S. § 15A-1233(a)). Finally, in *Bryant* we concluded that appellate review was automatically preserved for the violation of a statute which stated that "[n]o judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven." 189 N.C. at 114, 126 S.E. at 108 (quoting 1 N.C. Cons. Stat. § 564 (1919)).

In each of these cases we concluded that there was a statutory mandate that automatically preserved an issue for appellate review when the mandate was directed to the trial court either: (1) by requiring a specific act by the trial judge, *Bryant*, 189 N.C. at 114, 126 S.E. at 108; or (2) by requiring specific courtroom proceedings that the trial judge has authority to direct, *see Davis*, 364 N.C. at 301-06, 698 S.E.2d at 67-70; *Hucks*, 323 N.C. at 579, 374 S.E.2d at 244; *Ashe*, 314 N.C. at 40, 331 S.E.2d at 659.

We are not persuaded by respondent's argument that our case law extends the statutory mandate exception in Rule 10(a) of the North Carolina Rules of Appellate Procedure beyond the two instances described above. Specifically, respondent's reliance on our decision in *Hucks* is misplaced because in that case the statute required the trial court to act within its authority to direct courtroom proceedings to appoint an assistant counsel for an indigent defendant in a capital murder trial. 323 N.C. at 579, 374 S.E.2d at 244.

Further, we do not view *State v. Lawrence* as compelling authority here because in that case the statute required the trial court to act within its authority to direct courtroom proceedings to ensure that the State passed a full panel of twelve jurors to the defendant during jury selection. 352 N.C. 1, 12-13, 530 S.E.2d 807, 814-15 (2000) (citing N.C.G.S. § 15A-1214(d) (1999), which stated that "[w]hen the prosecutor is satisfied with the 12 in the box, they must then be tendered to the defendant"), *cert. denied*, 531 U.S. 1083, 121 S. Ct. 789, 148 L. Ed. 2d 684 (2001).

Unlike the cases involving the requirement that jurors be selected from the panel at random under N.C.G.S. § 15A-1214(a), our cases, such

as *Lawrence*, which concern the requirement that a prosecutor tender a full panel of jurors to the defendant under N.C.G.S. § 15A-1214(d) and (f), have held that a violation of that requirement is automatically preserved for appellate review. *See State v. Garcia*, 358 N.C. 382, 406, 597 S.E.2d 724, 742 (2004) (concluding that appellate review was automatically preserved when the prosecutor passed less than a full panel of twelve replacement jurors to the defendant during jury selection and thereby violated N.C.G.S. § 15A-1214(f) (2003)), *cert. denied*, 543 U.S. 1156, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005); *see also State v. Jaynes*, 353 N.C. 534, 544-45, 549 S.E.2d 179, 189 (2001) (concluding that appellate review was automatically preserved when, in violation of N.C.G.S. § 15A-1214(d) (1999), the defendant was allowed to examine prospective jurors before the State was able to challenge those jurors and to pass a full panel of jurors to the defendant), *cert. denied*, 535 U.S. 934, 122 S. Ct. 1310, 152 L. Ed. 2d 220 (2002); *Lawrence*, 352 N.C. at 13, 530 S.E.2d at 815. We have also held that appellate review is automatically preserved for a violation of N.C.G.S. § 15A-1214(c) which involves the defendant's and prosecutor's right to voir dire jurors. *State v. Jones*, 336 N.C. 490, 496-97, 445 S.E.2d 23, 26 (1994).

Unlike the statutory mandate in N.C.G.S. § 15A-1214(a), the mandates in N.C.G.S. §§ 15A-1214(c) and 15A-1214(d) and (f) directly involve the trial court's responsibility "to exercise its discretion," *id.* at 497, 445 S.E.2d at 27, to see that "[f]airness is promoted by ensuring that the defendant has a full opportunity to face jurors, question them, and challenge unsatisfactory candidates." *Garcia*, 358 N.C. at 407, 597 S.E.2d at 743. By contrast, the responsibility is squarely on either "[t]he State or the defendant," N.C.G.S. 15A-1211(c) (2017), to challenge the empaneling procedure that occurs before jurors are "assigned to the jury box" and "retain [their] seat[s]," *id.* § 15A-1214(a) (2017). As such, appellate review of N.C.G.S. § 15A-1214(a) is waived when the appellant fails to follow the procedure for challenging a jury panel set out in N.C.G.S. § 15A-1211(c). *Cf. Hucks*, 323 N.C. at 579, 374 S.E.2d at 244 (concluding that appellate review of the issue was automatically preserved, in part, because the statute "neither expressly nor impliedly place[d] any responsibility on the defendant to ask for assistant counsel"); *Ashe*, 314 N.C. at 35, 331 S.E.2d at 657 ("While the statute does not expressly say that the trial judge must have the jurors conducted to the courtroom, we have no doubt that the legislature intended to place this responsibility on the judge presiding at the trial.").

Finally, to the extent respondent relies on *State v. Cummings*, we conclude that *Cummings* is inapposite because the Court there did not

even address whether there was a statutory mandate that automatically preserved a statutory violation as an issue for appellate review. 352 N.C. 600, 611-12, 536 S.E.2d 36, 46 (2000) (discussing how a "statutory mandate" found in N.C.G.S. § 148-76 (1999) allowed the prosecution to subpoena defendant's prison records but not addressing whether any alleged violation of the "statutory mandate" was automatically preserved as an issue for appellate review), *cert. denied*, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

We hold that a statutory mandate that automatically preserves an issue for appellate review is one that, either: (1) requires a specific act by a trial judge, *see State v. Starr*, 365 N.C. 314, 316-19, 718 S.E.2d 362, 364-66 (2011) (concluding that appellate review was automatically preserved when the trial judge refused to exercise his discretion to either allow or deny the jury's request to review evidence under N.C.G.S. § 15A-1223(a) (2009)); *Bryant*, 189 N.C. at 114, 126 S.E. at 108; or (2) leaves "no doubt that the legislature intended to place th[e] responsibility on the judge presiding at the trial," *Ashe*, 314 N.C. at 35, 331 S.E.2d at 657, or at specific courtroom proceedings that the trial judge has authority to direct,[10] *id.* at 40, 331 S.E.2d at 659; *see also Davis*, 364 N.C. at 301-06, 698 S.E.2d at 67-70; *Garcia*, 358 N.C. at 406, 597 S.E.2d at 742 (concluding that appellate review was automatically preserved when the prosecutor passed less than a full panel of twelve replacement jurors to the defendant during jury selection and thereby violated N.C.G.S. § 15A-1214(f) (2003)); *Jaynes*, 353 N.C. at 544-45, 549 S.E.2d at 189 (concluding that appellate review was automatically preserved when, in violation of N.C.G.S. § 15A-1214(d) (1999), the defendant was allowed to examine prospective jurors before the State was able to challenge those jurors and to pass a full panel of jurors to the defendant); *Jones*, 336 N.C. at 496-97, 445 S.E.2d at 26 (concluding that appellate review was automatically preserved when the defendant claimed that the trial court's ruling violated his right to voir dire jurors under N.C.G.S. § 15A-1214(c)

10. Consistent with our prior case law, this rule does not treat the North Carolina Rules of Evidence as statutes that contain mandates that automatically preserve issues for appellate review. *See State v. Young*, 368 N.C. 188, 209, 775 S.E.2d 291, 305 (2015) ("The same logic upon which the Court of Appeals relied in reaching a contrary result would necessarily result in treating most of the provisions of the North Carolina Rules of Evidence as 'mandatory,' a result that would be contrary to the manner in which this Court has treated evidentiary arguments that were not supported by an objection lodged at trial for most of its history. As a result, since defendant did not object to the admission of evidence concerning the wrongful death and declaratory judgment complaint and default judgments on the basis of N.C.G.S. § 1-149, he is not entitled to challenge the admission of this evidence as violative of that statutory provision on appeal.").

(1988)); *State v. Buchanan*, 330 N.C. 202, 224-27, 410 S.E.2d 832, 845-47 (1991) (concluding that appellate review was automatically preserved when the trial judge violated N.C.G.S. § 15A-2000(b) (1988) by failing to individually poll the jurors on whether they agreed with the defendant's sentence in a capital case in violation of N.C.G.S. § 15A-2000(b) (1988)); *Hucks*, 323 N.C. at 579, 374 S.E.2d at 244.

Here N.C.G.S. § 122C-266(a) states that "within 24 hours of arrival at a 24-hour facility described in G.S. 122C-252, the respondent shall be examined by a physician." As such, this statute does not require a specific act by a trial judge. Furthermore, the statute does not place any responsibility on a presiding judge. Instead, the provision requires that a physician perform an examination at a designated "state facilit[y]." *Id.* § 122C-252 (2017). Therefore, N.C.G.S. § 122C-266(a) does not fit within either category of statutory mandates that would automatically preserve an issue for appellate review.

As a result, we conclude that this alleged violation of N.C.G.S. § 122C-266(a) is not automatically preserved and that respondent failed to preserve the issue when she did not raise it during the district court hearing on her involuntary commitment. *See* N.C. R. App. P. 10(a)(1). Accordingly, the Court of Appeals' decision in *In re Spencer*, 236 N.C. App. 80, 762 S.E.2d 637 (2014), is overruled to the extent it conflicts with this conclusion.

III. Conclusion

Because respondent's issue is not preserved for appellate review, we reverse the decision of the Court of Appeals on that basis. Moreover, because of our decision, we need not—and do not—reach the issue of whether the Court of Appeals erred in concluding that respondent was automatically entitled to relief without having to demonstrate that she was prejudiced by the violation of N.C.G.S. § 122C-266(a).

REVERSED.

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

IN RE SMITH

[372 N.C. 123 (2019)]

IN RE INQUIRY CONCERNING A JUDGE, NO. 17-143
APRIL M. SMITH, RESPONDENT

No. 419A18

Filed 10 May 2019

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 7 November 2018 that Respondent April M. Smith, a Judge of the General Court of Justice, District Court Division, Judicial District Twelve, be publicly reprimanded for conduct in violation of Canons 1, 2A, 3A(3), and 3B(1) of the North Carolina Code of Judicial Conduct, and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. This matter was calendared for argument in the Supreme Court on 4 March 2019, but determined on the record without briefs or oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or Respondent.

ORDER

The issue before the Court is whether District Court Judge April M. Smith, Respondent, should be publicly reprimanded for violations of Canons 1, 2A, 3A(3), and 3B(1) of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). Respondent has not challenged the findings of fact made by the Judicial Standards Commission (the Commission) or opposed the Commission's recommendation that she be publicly reprimanded by this Court.

On 20 February 2018, Commission Counsel filed a Statement of Charges against Respondent alleging that she had engaged in conduct inappropriate to her office by demonstrating a lack of respect for the judicial office and for the Chief District Judge; by failing to facilitate the administrative duties of the Chief Judge and court staff; by repeatedly and regularly making disparaging comments about the Chief Judge to other judges, judicial staff, clerical staff, and members of the local bar; and by failing to diligently discharge her duties, bringing the judicial office into

disrepute. Respondent fully cooperated with the Commission's inquiry into this matter. In the Statement of Charges, Commission Counsel asserted that Respondent's actions constituted conduct inappropriate to her judicial office and prejudicial to the administration of justice that brings the judicial office into disrepute or otherwise constituted grounds for disciplinary proceedings under Chapter 7A, Article 30 of the North Carolina General Statutes.

Respondent filed her answer on 9 April 2018. On 20 August 2018, Commission Counsel and Respondent entered into a Stipulation and Agreement for Stated Disposition (the Stipulation) containing joint evidentiary, factual, and disciplinary stipulations as permitted by Commission Rule 22 that tended to support a decision to publicly reprimand Respondent. The Stipulation was filed with the Commission on 22 August 2018. The Commission heard this matter on 5 October and entered its recommendation on 7 November 2018, which contains the following stipulated findings of fact:

> 1. Respondent is one (1) of ten (10) judges of the General Court of Justice, District Court Division, Judicial District 12 (Cumberland County). She was elected in November 2014 at thirty-five (35) years old along with two (2) other district court judges. In 2017, another district court judge was elected for a total of ten (10) judges. There are eight (8) courtrooms available for district court proceedings in the Cumberland County Courthouse.
>
> 2. The current Chief District Court Judge was elected more than twenty (20) years ago and was appointed Chief Judge commencing January 1, 2015 upon the retirement of the previous Chief District Court Judge. After Respondent's election, the Chief Judge assigned Respondent primarily to serve as one of the court's family court judges and to hear domestic violence matters, although she was also assigned to hear various criminal cases.
>
> 3. At the start of 2015, when Respondent began her service as a judge, she believed her relationship with the Chief Judge to be pleasant and collegial. By the end of 2015, however, Respondent became frustrated with the Chief Judge based on scheduling and communication differences.
>
> 4. Beginning in 2016, Respondent also began experiencing serious health issues that required Respondent to

attend frequent medical appointments. Over a period of time, Respondent's health deteriorated as her physicians attempted to determine what medical condition she was dealing with. In 2017, Respondent was diagnosed with two (2) chronic autoimmune diseases—Systemic Lupus Erythematosus and Mixed Connective Tissue Disorder. These two conditions have required Respondent to receive various medical treatments including chemotherapy and she is subject to experiencing "flares." As a result of these health issues, Respondent has taken multiple leaves of absence. The Chief Judge has accommodated all of Respondent's requests for medical leaves of absence pursuant to physician orders.

5. Thereafter, Respondent's relationship with the Chief Judge deteriorated further because she believed that the Chief Judge was subjecting her to unfair treatment in court assignments. Among other things:

> a. Respondent perceived that the Chief Judge assigned her more often to Courtroom 3A than other judges. Courtroom 3A is considered a difficult courtroom because judges who preside there must hear not only their regularly scheduled calendar, but also accept walk-in domestic violence, temporary custody and other cases. This makes presiding in Courtroom 3A a long and often times stressful day.
>
> b. Respondent also believed that she was being assigned disproportionately to Courtroom 3A on Fridays after concluding family court trials and hearings earlier in the week, when other family law judges were not.
>
> c. Respondent believed that the Chief Judge provided other judges with more unassigned days than were provided to her.
>
> d. Respondent believed that the Chief Judge unfairly assigned her to cover other courtrooms when her special sessions concluded while not requiring the same of other judges.

e. Respondent believed the Chief Judge failed to accommodate her requests for unassigned days or time off, either to attend medical appointments, preside over swearing-in ceremonies, attend educational programs for judges, or take vacation time.

6. As a result of the perceptions noted above, Respondent began complaining about her court assignments, unassigned days, and her opinion that the Chief Judge treated her unfairly, to other judges in her district, retired judges, court staff, and local attorneys, all of whom she considered to be her friends. Respondent also suggested to her case manager and a courtroom clerk that the Chief Judge's decisions regarding her schedule were based in part on racial prejudice.

7. Respondent's frustration about her schedule and her resentment towards the Chief Judge became known throughout the courthouse, notwithstanding the fact that Respondent believed these were private conversations among friends.

8. Respondent at various times sought guidance and advice from the former Chief Judge about how to deal with her relationship with the Chief Judge. In early 2017, in an attempt to seek guidance on how to address what she perceived to be unfair treatment by the Chief Judge, Respondent contacted the North Carolina Administrative Office of the Courts and the Judicial Standards Commission regarding her concerns and frustration about her court schedule and perceived treatment by the Chief Judge. At or around the same time, the Chief Judge independently reached out to the Commission seeking guidance to resolve the situation.

9. In early March 2017, with the consent of both Respondent and the Chief Judge, the Commission referred the matter to the Chief Justice's Commission on Professionalism (CJCP) to assist with resolving the professional differences between the two judges. Shortly thereafter, the Executive Director of the CJCP notified the Commission that his effort to meet with Respondent had failed because Respondent had to unexpectedly cancel

their initial meeting due to her deteriorating health condition and necessity of going on medical leave for 30 days. Respondent was advised to contact the CJCP Executive Director to reschedule the meeting, but had not done so by the time the Executive Director retired in the summer of 2017.

10. Notwithstanding Respondent's complaints of an unfair schedule, court statistics and records demonstrate that Respondent was scheduled for and actually presided over fewer court sessions than most of her colleagues in 2016 and 2017. These same statistics and records further show that Respondent had more days off the bench (either as unassigned or personal days off) than any other judge in the district in 2015 and 2017, and had the second most days off the bench in 2016 (the most days off was for a colleague undergoing cancer treatment).

11. With respect to Courtroom 3A, court records show that Respondent was scheduled for the most court sessions in Courtroom 3A in 2015. That schedule, however, was set in part by the former Chief Judge who left office at the end of 2014, and not the current Chief Judge about whom Respondent repeatedly complains. In addition, the higher number of assignments to Courtroom 3A in 2015 was a reflection not of the Chief Judge's bias, but reflected a pattern of assigning judges based on existing experience, the role of certain judges in presiding over specialized courts, and the necessity of minimizing potential conflicts of interests given Respondent's status as [a] new judge with connections to former clients and certain attorneys. In 2016 and 2017, when the current Chief Judge prepared the entire schedule, Respondent was scheduled, and actually presided, in Courtroom 3A fewer times than several of her colleagues.

12. The Chief Judge similarly accommodated, and continues to accommodate, Respondent's physician ordered medical leaves of absence due to her illness and prepares the court schedules accordingly.

13. The Commission's investigation found that Respondent also engaged in conduct that created a perception that her judicial duties did not take precedence

over her personal commitments and work schedule preferences. While Respondent contends that she works diligently to resolve cases and that this periodically results in her concluding the court's business early, the Commission's investigation identified examples of conduct to include the following:

> a. Certain attorneys that frequently appeared before Respondent reported to the Commission that Respondent regularly rushed to conclude cases to avoid working the full afternoon or the next day. This caused some attorneys to have concerns about a full and fair opportunity to be heard, and it placed administrative burdens on court staff.
>
> b. Respondent admits that she often did not take breaks at any specific interval and instead preferred to finish her cases. Respondent encouraged court staff to leave their duty stations to take breaks while court was still in session provided that the electronic recording equipment remained on.
>
> c. Several attorneys reported to the Commission that in open court, Respondent would announce that she was adjourning court early for personal appointments, such as for hair and nail salon visits or to spend time with her child.
>
> d. Respondent's courtroom statements and conduct, coupled with her repeated complaints about her schedule and the Chief Judge, resulted in an unfavorable cartoon about Respondent circulating amongst the bar.

14. Because of these concerns, several members of the domestic bar requested that the Chief Judge remove Respondent from domestic cases. In addition, several judicial and court colleagues brought to the Chief Judge's attention concerns regarding Respondent's work habits and courtroom conduct, especially the frequency of concluding court sessions early and the perceived

unwillingness of Respondent to assist other family court judges.

15. After these concerns were brought to his attention, the Chief Judge used his administrative and scheduling authority to reassign Respondent to cover other courtrooms if she concluded her calendars early and had time available that was not otherwise scheduled for time off or unassigned days. The Chief Judge did not take this approach with other domestic judges because he found that they routinely offered to help in other courtrooms or checked in with him when they finished early without prompting.

16. Respondent now acknowledges that her frequent complaints to other judges, court personnel, and members of the local bar regarding her perception that the Chief Judge was being unfair and biased towards her created unintended consequences, including harm to collegial relations. Respondent further recognizes that even if intended to be private conversations, the cumulative impact of voicing her internal grievance with a colleague to so many people within the courthouse was harmful to public confidence in the administration of the court.

17. Respondent also recognizes that her conduct and statements in the courtroom between 2015 and 2017 were perceived by some attorneys and court staff as indicating a desire to avoid her judicial duties to accommodate her own scheduling preferences and personal circumstances.

(Citations to pages of the Stipulation omitted.)

Based on these findings of fact, the Commission concluded as a matter of law that:

1. Canon 1 of the Code of Judicial Conduct sets forth the broad principle that "[a] judge should uphold the integrity and independence of the judiciary." To do so, Canon 1 requires that a "judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved."

2. Canon 2 of the Code of Judicial Conduct generally mandates that "[a] judge should avoid impropriety in all the judge's activities." Canon 2A specifies that "[a] judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

3. In addition, Canon 3A(3) requires a judge to "be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity."

4. In accepting this Stipulation and making a recommendation of public reprimand, the Commission distinguishes the Supreme Court's decision in *In re Belk*, 364 N.C. 114, 690 S.E.2d 685 (2012), which found that a single, isolated confrontation between a district court judge and his or her chief judge, after which the relationship returned to normal, did not support a finding of a violation of Canons 1, 2A, 3A(3) or N.C.G.S. § 7A-376. *See id.* at 126, 690 S.E.2d at 693 ("[w]hile a district court judge must respect the Chief District Court Judge's duties and authority, the nature of the relationship between coworkers may at times produce episodes of contention, disagreement, and frustration . . . [and] discipline is not normally imposed for a single incident of improper behavior exhibited towards a coworker.").

5. Unlike *Belk*, Respondent's personal conduct in this case went far beyond a single confrontation with her Chief Judge about her court assignments. The Commission's findings of fact, as supported by the Stipulation, show that Respondent's conduct involved a pattern of pervasive complaints attacking the personal integrity and fairness of the Chief Judge to anyone who would listen, including other active and retired judges, court staff, local attorneys, the Administrative Office of the Courts and the Judicial Standards Commission. She also suggested to court personnel working with the Chief Judge that his scheduling decisions towards her were racially motivated. At the same time, the Commission's findings of fact as agreed to by Respondent show no evidence of racial

bias or that Respondent's schedule was unfair or burdensome as compared to other judges. On the contrary, the findings of fact establish that the Chief Judge used accepted and reasonable practices in scheduling judges and that the Chief Judge did not assign Respondent to preside in Courtroom 3A more often than her colleagues. Even when she did preside, she admittedly rushed through court sessions to the detriment of the parties and even courtroom staff, whom she would direct to leave their duty stations in the courtroom during ongoing court proceedings if they needed or were entitled to a break. Moreover, Respondent's conduct resulted in requests from the local bar to remove her from domestic courtrooms and the circulation of a cartoon mocking her poor work habits. Respondent now acknowledges that the cumulative impact of her continued conduct in complaining that the Chief Judge was biased and unfair was harmful to public confidence in the administration of the court.

6. Based on the facts contained in the Stipulation and accepted as the findings of fact herein, the Commission thus concludes as a matter of law that Respondent failed to personally observe appropriate standards of conduct necessary to ensure that the integrity of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct; failed to conduct herself in a manner that promotes public confidence in the integrity of the judiciary, in violation of Canon 2A of the North Carolina Code of Judicial Conduct; and failed to be "patient, dignified and courteous" to her colleagues, the Chief Judge, and those who appeared before her in violation of Canon 3A(3) of the North Carolina Code of Judicial Conduct.

7. In addition to the conclusions of law as to Canons 1, 2A and 3A(3), the Commission also concludes as a matter of law that Respondent violated Canon 3B(1) of the North Carolina Code of Judicial Conduct, which requires a judge to "diligently discharge the judge's administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials." This conclusion is based upon (1)

> Respondent's conduct in consistently complaining about having to preside in court too often, and then when she did preside, at times directing court staff to leave their duty stations while court was still in session in order to take necessary break[s]; and (2) unfairly impugning the Chief Judge's reputation and interfering with the Chief Judge's duties in making court assignments through unjustified attacks on his impartiality and integrity, and disrupting the professionalism, cooperation and collegiality that are the hallmarks of judicial service.
>
> 8. The Commission further finds that Respondent's inexperience and status as a new judge does not excuse her from strict adherence to the ethical standards embodied in the North Carolina Code of Judicial Conduct. As the North Carolina Supreme Court stated in *In re Badgett*, 362 N.C. 482, 666 S.E.2d 743 (2008), "[a] trial judge cannot rely on his [or her] inexperience or lack of training to excuse acts which tend to bring the judicial office into disrepute." *Id.* at 489, 666 S.E.2d at 747-48 (internal quotations omitted). As indicated to Respondent during the hearing of this matter, in assuming the duties of a judge of the State of North Carolina, Respondent is subject to restrictions on her personal and professional conduct that a private citizen would find burdensome and must accept those burdens gladly and willingly given the enormous power and responsibilities of the judicial office.
>
> 9. Based on the foregoing, the Commission further concludes that Respondent's violations of the Code of Judicial Conduct amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C. Gen. Stat. § 7A-376(b). *See also* Code of Judicial Conduct, Preamble ("[a] violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute"). In reflecting on her conduct, Respondent also agrees that based on the totality of the circumstances, she violated the foregoing provisions of the North Carolina Code of Judicial Conduct and N.C. Gen. Stat. § 7A-376.

(Brackets in original) (Citations to pages of the Stipulation omitted).

Based on these Findings of Fact and Conclusions of Law, the Commission recommended that this Court publicly reprimand Respondent. The Commission based this recommendation on its earlier findings and conclusions and the following additional dispositional determinations:

> 1. The Commission finds that as a mitigating factor, Respondent has agreed to seek the assistance of the Chief Justice's Commission on Professionalism (CJCP) to assist her in developing a more professional and cooperative working relationship with the Chief Judge and her judicial and court colleagues. The Commission notes that its first effort to resolve the Respondent's concerns about her schedule and working with the Chief Judge were referred to the CJCP. Regrettably, Respondent did not follow through in that process for months after she returned from her medical leave of absence, at which time she continued her pattern of complaining about her work schedule and the Chief Judge. It is the Commission's hope that this time, Respondent will fully engage in the opportunity to improve her professionalism and understanding of the serious implications of her conduct on public confidence in the administration of justice.
>
> 2. The Commission finds as an additional mitigating factor that Respondent has expressed regret over the negative impact that these matters have had on her reputation as a judge, the reputation of the Chief Judge, and the court in which she serves, and that she has a strong commitment to and leadership in support of the community she serves.
>
> 3. In making a recommendation of public reprimand, the Commission finds that this sanction is consistent with N.C. Gen. Stat. § 7A-374.2(7), which provides that a public reprimand is appropriate where "a judge has violated the Code of Judicial Conduct and has engaged in conduct prejudicial to the administration of justice, but that misconduct is minor." Although the Commission has some concern that the misconduct at issue is more than "minor," a more severe sanction would require evidence that Respondent willfully engaged in misconduct prejudicial to the administration of justice. *See* N.C. Gen.

> Stat. § 7A-374.2(1) (definition of censure); *see also In re Nowell*, 293 N.C. 235, 248, 237 S.E.2d 246, 255 (1977) ("*Wilful misconduct in office* is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad faith . . . .") (internal citations omitted). Given the agreed upon facts contained in the Stipulation, the Commission concludes that a public reprimand is the most appropriate sanction.
>
> 4. The Commission and Respondent acknowledge the ultimate jurisdiction for the discipline of judges is vested in the North Carolina Supreme Court pursuant to Chapter 7A, Article 30 of the North Carolina General Statutes, which may either accept, reject or modify any disciplinary recommendation from the Commission.
>
> 5. The Commission and Respondent also acknowledge and agree that although the Respondent has raised her medical issues as a mitigating factor, this disciplinary action is based on misconduct alone as set forth herein and does not bar or limit any future action by the Commission to institute proceedings against Respondent pursuant to N.C. Gen. Stat. § 7A-376(c) if it appears that Respondent suffers from a physical or mental incapacity interfering with the performance of her judicial duties.
>
> 6. Pursuant to N.C. Gen. Stat. § 7A-377(a5), which requires that at least five members of the Commission concur in a recommendation of public discipline to the Supreme Court, all six Commission members present at the hearing of this matter concur in this recommendation to **publicly reprimand Respondent**.

(Citations to pages of the Stipulation omitted.)

"The Supreme Court 'acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court' when reviewing a recommendation from the Commission." *In re Hartsfield*, 365 N.C. 418, 428, 722 S.E.2d 496, 503 (2012) (order) (quoting *In re Badgett*, 362 N.C. 202, 207, 657 S.E.2d 346, 349 (2008) (order)). Neither the Commission's findings of fact nor its conclusions of law are binding, but they may be adopted by this Court. *Id.* at 428, 722 S.E.2d at 503 (citing *In re Badgett*,

362 N.C. at 206, 657 S.E.2d at 349). If the Commission's findings are adequately supported by clear and convincing evidence, the Court must determine whether those findings support the Commission's conclusions of law. *Id.* at 429, 722 S.E.2d at 503 (citing *In re Badgett*, 362 N.C. at 207, 657 S.E.2d at 349).

The Commission found the stipulated facts to be supported by "clear, cogent and convincing evidence." In executing the Stipulation, Respondent agreed that those facts and information would serve as the evidentiary and factual basis for the Commission's recommendation, and Respondent does not contest the findings or conclusions made by the Commission. We agree that the Commission's findings are supported by clear, cogent, and convincing evidence, and we now adopt them as our own. Furthermore, we agree with the Commission's conclusions that Respondent's conduct violates Canons 1, 2A, 3A(3), and 3B(1) of the North Carolina Code of Judicial Conduct, and is prejudicial to the administration of justice, thus bringing the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

This Court is not bound by the recommendations of the Commission. *Id.* at 428-29, 722 S.E.2d at 503. Rather, we may exercise our own judgment in arriving at a disciplinary decision in light of Respondent's violations of several canons of the North Carolina Code of Judicial Conduct. *Id.* at 429, 722 S.E.2d at 503. Accordingly, "[w]e may adopt the Commission's recommendation, or we may impose a lesser or more severe sanction." *Id.* at 429, 722 S.E.2d at 503. The Commission recommended that Respondent be publicly reprimanded. Respondent does not contest the Commission's findings of fact or conclusions of law and voluntarily entered into the Stipulation with the understanding that the Commission's recommendation would be a public reprimand.

We appreciate Respondent's cooperation and candor with the Commission throughout these proceedings. Furthermore, we recognize Respondent's expressions of remorse and her willingness to seek assistance from the CJCP to improve her professional reputation and repair her relationship with the Chief Judge. Weighing the severity of Respondent's misconduct against her candor and cooperation, we conclude that the Commission's recommended public reprimand is appropriate.

Therefore, the Supreme Court of North Carolina orders that Respondent April M. Smith be PUBLICLY REPRIMANDED for conduct

in violation of Canons 1, 2A, 3A(3), and 3B(1) of the North Carolina Code of Judicial Conduct, and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

By order of the Court in Conference, this the 10th day of May, 2019.

s/Earls, J.
For the Court

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

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of May, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

LAWRENCE PIAZZA AND SALVATORE LAMPURI
v.
DAVID KIRKBRIDE, GREGORY BRANNON, AND ROBERT RICE

No. 181A16

Filed 10 May 2019

1. Securities—fraud—jury verdicts—consistency

Where a jury found defendant liable for securities fraud, the trial court did not abuse its discretion by denying defendant's motion for a new trial on the grounds that the jury's verdicts were impermissibly inconsistent. The record contained sufficient justification to support the jury's conclusion that defendant, and not his co-defendant, made materially false and misleading statements to investors.

2. Securities—fraud—jury instruction—written request

The trial court did not err by rejecting defendant's request for a "safe harbor" jury instruction in his trial for securities fraud. Defendant failed to submit an adequate written request for the instruction.

3. Appeal and Error—jury verdict—invited error

The Supreme Court rejected defendant's argument that the jury's verdict finding him liable for securities fraud was contrary to law. Defendant requested the jury instruction of which he complained on appeal.

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, 246 N.C. App. 576, 785 S.E.2d 695 (2016), affirming a judgment entered on 13 March 2014 and an order entered on 11 April 2014, both by Judge G. Bryan Collins, Jr., in Superior Court, Wake County. On 18 August 2016, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 20 March 2017.

Poyner Spruill LLP, by Steven B. Epstein and Andrew H. Erteschik, for plaintiff-appellees.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg and Mark A. Finkelstein, for defendant-appellant Gregory Brannon.

ERVIN, Justice.

In this case, we are called upon to decide whether the Court of Appeals erred by determining that the trial court did not err by refusing to grant a new trial to a defendant who was held liable pursuant to N.C.G.S. § 78A-56(a)(2), which prohibits a person from selling securities by means of false and misleading statements of material fact. After carefully considering the record in light of the applicable law, we modify and affirm the Court of Appeals' decision to uphold the trial court's judgment.

I. Factual Background

A. Substantive Facts

Defendant Gregory Brannon[1] met plaintiff Lawrence Piazza in 1986, when they were both students at the University of Chicago Medical School. After graduating from medical school, Dr. Piazza became an eye surgeon while defendant practiced obstetrics and gynecological medicine. Defendant met Robert Rice in the early 1990s. Defendant, along with Dr. Piazza, invested in Arckosian, a start-up entity that Mr. Rice had founded that later went out of business. Following the demise of Arckosian, Mr. Rice co-founded, with David Kirkbride, a company called Z Reality. In 2006, defendant met John Cummings when Mr. Cummings accompanied his wife to a prenatal appointment. Similarly, defendant met plaintiff Salvatore Lampuri during defendant's attendance upon Mr. Lampuri's wife in connection with the birth of the couple's first child.

In 2007, Mr. Rice and Mr. Kirkbride founded Neogence Enterprises, Inc., a technology company that had developed and was attempting to market an augmented reality application for smartphones known as Mirascape. The funding upon which Neogence relied was provided by "angel investors," including Dr. Piazza, who received convertible promissory notes in connection with the making of their investments. Mr. Rice served as Neogence's Chief Executive Officer, with responsibility for fundraising and technical development, while Mr. Kirkbride assisted with Neogence's fundraising efforts. Defendant became a member of Neogence's board of directors, upon which he served with Mr. Rice and Mr. Kirkbride. In 2009, Mr. Cummings joined Neogence as Chief Sales Officer.

On 29 April 2010, Mr. Cummings attended a social event in New York at which he met an account executive from McGarry Bowen, an advertising agency that served a number of clients, including Verizon

1. We will refer to defendant Gregory Brannon as defendant throughout the remainder of this opinion.

Wireless. The McGarry Bowen account executive invited Mr. Cummings to a meeting with Verizon that had been scheduled for the following day. At the 30 April 2010 meeting, Mr. Cummings described the work that Neogence was doing to various McGarry Bowen employees and a Verizon executive. During the course of this meeting, a McGarry Bowen account executive told Mr. Cummings that McGarry Bowen would consider using Mirascape as part of an upcoming advertising campaign in the event that Neogence was able to develop Mirascape consistently with McGarry Bowen's expectations.

After the meeting ended, Mr. Cummings discussed what had happened with defendant, Mr. Rice, and Mr. Kirkbride. On the same date, defendant e-mailed Dr. Piazza for the purpose of informing him of what had occurred during the McGarry Bowen meeting and stating that Neogence needed an additional $100,000.00 to $200,000.00 as quickly as possible to take advantage of the opportunity that had arisen during the McGarry Bowen meeting. Later that day, Mr. Rice sent an e-mail to Dr. Piazza seeking an additional $200,000.00 in "angel funding" relating to this "opportunity." On 28 May 2010, Dr. Piazza invested an additional $150,000.00 in Neogence following a meeting with Mr. Cummings and Mr. Kirkbride. In addition, defendant, Mr. Rice, and other Neogence agents discussed what had happened at the McGarry Bowen meeting with Mr. Lampuri. Subsequently, Mr. Lampuri made an investment in Neogence as well.

Unfortunately, Neogence was unable to get Mirascape to function properly in a timely manner. During the following year, Neogence began to experience financial difficulties. After failing to comply with Dr. Piazza's request that his investment be returned in accordance with the provisions of his convertible promissory notes, Neogence ceased doing business in early July 2011. Dr. Piazza eventually filed suit against Neogence to enforce the convertible promissory notes and obtained the entry of a default judgment.

B. Procedural History

On 10 October 2012, plaintiffs filed a complaint against defendant, Mr. Kirkbride, and Mr. Rice in which they sought to recover damages from defendants on the basis of allegations that defendants had committed material violations of the North Carolina Securities Act. In apt time, defendants filed responsive pleadings in which they sought dismissal of plaintiffs' complaint, denied the material allegations of plaintiffs' complaint, asserted various counterclaims and crossclaims, and raised various affirmative defenses, including, but not limited to, contributory

negligence, failure to mitigate damages, failure to show reasonable reliance, unclean hands, and waiver and estoppel. On 25 November 2013, Judge Donald W. Stephens entered an order granting summary judgment in favor of Mr. Kirkbride and refusing to grant summary judgment in favor of defendant and Mr. Rice.

The issues between plaintiffs and the remaining defendants came on for trial before the trial court and a jury at the 10 February 2014 civil session of Superior Court, Wake County. At the conclusion of the trial, the trial court submitted the following issues to the jury for the purpose of determining whether plaintiffs were entitled to recover damages from defendant based upon a violation of N.C.G.S. § 78A-56(a)(2)[2]:

> ISSUE 1:
>
> Did Defendant, Gregory Brannon, in soliciting the Plaintiff, Lawrence Piazza, to pay money for a security, make a statement which was materially false or misleading, or which under the circumstances was materially false or misleading because of the omission of other facts, where the Plaintiff, Lawrence Piazza, was unaware of the true or omitted facts?
>
> ANSWER: Yes
>
> If you answer the first issue "yes," move to the second issue. If you answer the first issue "no," move to the third issue.
>
> ISSUE 2:
>
> Did the Defendant, Gregory Brannon, not know and in the exercise of reasonable care, could not have known of the untruth or omission in his offer or sale of a security to the Plaintiff, Lawrence Piazza?

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2. N.C.G.S. § 78A-56(a)(2) imposes civil liability upon anyone who:

> Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.

N.C.G.S. § 78A-56(a)(2) (2017).

ANSWER: No

No matter your verdict on the first and/or second issues, move to the third issue.

ISSUE 3:

Did the Defendant, Gregory Brannon, in soliciting the Plaintiff, Salvatore Lampuri, to pay money for a security, make a statement which was materially false or misleading, or which under the circumstances was materially false or misleading because of the omission of other facts, where the Plaintiff, Salvatore Lampuri, was unaware of the true or omitted facts?

ANSWER: Yes

If you answer the third issue "yes," move to the fourth issue. If you answer the third issue "no," move to the fifth issue.

ISSUE 4:

Did the Defendant, Gregory Brannon, not know and in the exercise of reasonable care, could not have known of the untruth or omission in his offer or sale of a security to the Plaintiff, Salvatore Lampuri?

ANSWER: No

On the other hand, in answering the same questions regarding Mr. Rice, the jury determined that Mr. Rice had not made any false or misleading statements to plaintiffs. On 13 March 2014, the trial court entered a judgment ordering defendant to pay $150,000.00 in compensatory damages to Dr. Piazza and $100,000.00 in compensatory damages to Mr. Lampuri and to pay plaintiffs $123,804.00 in attorney's fees and $8,493.79 in costs, plus interest. On 17 March 2014, defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. On 11 April 2014, the trial court denied defendant's motion. On 21 April 2014 and 5 May 2014, defendant noted an appeal from the final judgment, the order awarding costs and attorneys' fees, and the order denying his motion for judgment notwithstanding the verdict or a new trial to the Court of Appeals.

In challenging the trial court's judgment and orders before the Court of Appeals, defendant argued that the trial court had erred by determining that plaintiffs had sufficiently established that defendant was liable

to plaintiffs pursuant to N.C.G.S. § 78A-56(a)(2), including whether defendant was primarily or secondarily liable and whether plaintiffs were required to prove that defendant acted with scienter; declining to instruct the jury concerning the extent to which defendant was entitled to rely upon the director safe harbor provision set out in N.C.G.S. § 55-8-30(b); denying defendant's motion for a new trial on the grounds that the verdict was impermissibly inconsistent; and ordering defendant to pay attorneys' fees to plaintiffs. *Piazza v. Kirkbride*, 246 N.C. App. 576, 600-01, 603, 611, 614, 785 S.E.2d 695, 710-12, 717, 719 (2016). On 5 April 2016, the Court of Appeals filed an opinion concluding that " 'any person' who is a seller or offeror" of securities is liable pursuant to N.C.G.S. § 78A-56(a). *Id.* at 603, 785 S.E.2d at 712. In addition, the Court of Appeals held that "a section 78A-56(a)(2) civil plaintiff need not prove *scienter*," so that "a materially false or misleading statement or omission made in connection with a security offer or sale is actionable even if the person making the statement or omission did not know it was false, so long as the person was negligent under section 78A-56(a)(2)," *id.* at 601, 785 S.E.2d at 711, and that "a defendant does not have to be a securities professional to be liable under the" North Carolina Securities Act, *id.* at 602, 785 S.E.2d at 712. Moreover, the Court of Appeals rejected defendant's contention that the trial court had erred by refusing to deliver a director safe harbor instruction given that "the jury found [defendant] liable to Plaintiffs . . . for his individual representations, which were the product of his own acts," rather than "his directorial responsibilities set out by the board," *id.* at 605-06, 785 S.E.2d at 713-14, and that defendant had "waived the Safe Harbor affirmative defense" by failing to plead it, *id.* at 609, 785 S.E.2d at 716. Finally, the Court of Appeals observed that "it is not illogical or inconsistent for two [Securities Act] defendants to achieve different results in a single action." *Id.* at 611, 785 S.E.2d at 717. Although a majority of the Court of Appeals affirmed the challenged trial court decisions, Judge Tyson filed a partial dissent in which he concluded that "[t]he trial court erred by failing to instruct the jury on the Director Safe Harbor provision as [defendant] requested in light of the evidence presented," *id.* at 615, 785 S.E.2d at 719-20 (Tyson, J., concurring in part and dissenting in part), and that the jury's verdicts with respect to defendant's liability to Dr. Piazza were impermissibly inconsistent with the jury's verdict with respect to Mr. Rice's liability to Dr. Piazza on the grounds that it was "extreme, legally unsound, and patently illogical" "[t]o deem [defendant] Brannon's statements to [plaintiff] Piazza as 'securities fraud,' while acquitting [defendant] Rice, the Chief Executive," *id.* at 615, 785 S.E.2d at 720.

On 10 May 2016, defendant noted an appeal to this Court from the Court of Appeals' decision based upon Judge Tyson's dissent. On 18 August 2016, this Court allowed defendant's petition for discretionary review with respect to additional issues.

II. Substantive Legal Analysis

A. Inconsistent Verdicts

[1] In seeking to persuade us to reverse the Court of Appeals' decision, defendant initially argues that the trial court erred by denying his motion for a new trial on the grounds that the jury's determinations that defendant, but not Mr. Rice, made false and misleading statements to plaintiffs "are so contradictory as to invalidate the judgment" given that the statements that defendant and Mr. Rice made to plaintiffs were essentially identical, quoting *Palmer v. Jennette*, 227 N.C. 377, 379, 42 S.E.2d 345, 347 (1947). In defendant's view, the Court of Appeals erred by reconciling the jury's verdicts based upon the relative strength of the showings that defendant and Mr. Rice made with respect to the reasonable care issue. Although we agree with defendant that the logic upon which the Court of Appeals relied in upholding the trial court's decision to deny defendant's new trial motion was faulty, we do not believe that the trial court abused its discretion by rejecting defendant's contention that the jury's verdicts were impermissibly inconsistent.[3]

"The trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand; and, if no question of law or legal inference is involved in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion." *Selph v. Selph*, 267 N.C. 635, 637, 148 S.E.2d 574, 575-76 (1966) (first citing *Goldston v. Wright*, 257 N.C. 279, 279, 125 S.E.2d 462, 463 (1962) (per curiam); then citing *Walston v. Greene*, 246 N.C. 617, 617, 99 S.E.2d 805, 805-06 (1957) (per curiam); then citing

3. The trial court, without objection from defendant, instructed the jury that "a statement or omission is material if the information disclosed or the information omitted would have assumed actual significance in the deliberations of a reasonable investor" and that "the plaintiffs do not need to prove that they relied on the false or misleading information defendants provided, or what significance they attributed to that information." Defendant did not object to this instruction before the trial court or challenge it in any way before either this Court or the Court of Appeals, and we express no opinion concerning its correctness. Similarly, defendant has not argued before this Court that his new trial motion should have been allowed or that he is otherwise entitled to relief because plaintiffs knew or should have known of the "true facts" or that plaintiffs did not or should not have reasonably relied upon defendant's representations. "The scope of review on appeal is limited to issues so presented in the several briefs." N.C. R. App. P. 28(a).

Roberts v. Hill, 240 N.C. 373, 380, 82 S.E.2d 373, 380 (1954); and then citing *Pruitt v. Ray*, 230 N.C. 322, 322-23, 52 S.E.2d 876, 876-77 (1949) (per curiam)). Inconsistent verdicts in the same actions may constitute grounds for awarding a new trial. *See, e.g.*, *Porter v. W. N.C. R.R. Co.*, 97 N.C. 66, 73-75, 2 S.E. 580, 583-85 (1887) (ordering a new trial when the jury's answer to one question indicated that the plaintiff did not negligently contribute to the accident that led to his death while its answer to another question indicated that the same plaintiff was contributorily negligent). As defendant candidly concedes, the decision concerning whether to grant a new trial on the basis of allegedly inconsistent verdicts is one of discretion rather than one of law. For that reason, our review of defendant's challenge to the denial of his motion for a new trial on the grounds that the jury's verdicts were impermissibly inconsistent "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982) (citations omitted). An abuse of discretion has occurred when a trial court's discretionary decision was "manifestly unsupported by reason"; for that reason, such a discretionary decision will not be overturned on appeal absent "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).

The prior decisions of this Court suggest that jury verdicts should not be set aside for inconsistency lightly. For example, we have stated "that a verdict should be liberally and favorably construed with a view of sustaining it, if possible." *Guy v. Gould*, 202 N.C. 727, 729, 164 S.E. 120, 121 (1932).[4] Our authority to overturn a trial court's discretionary decision to grant or deny a new trial motion should be exercised "with *great care and exceeding reluctance*," *In re Will of Buck*, 350 N.C. 621, 626, 516 S.E.2d 858, 861 (1999), given our "great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial" in light of "their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved," *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605, and our belief that "the exercise of this discretion sets aside a jury

4. Similarly, we have also determined that, "[w]hen a judgment has been entered on seemingly inconsistent findings of fact, it is the duty of the reviewing court to reconcile the findings and uphold the judgment if practicable." *Davis v. Ludlum*, 255 N.C. 663, 666, 122 S.E.2d 500, 502 (1961) (citing *Bradham v. Robinson*, 236 N.C. 589, 593, 73 S.E.2d 555, 558 (1952)).

verdict and, therefore, will always have some tendency to diminish the fundamental right to trial by jury in civil cases which is guaranteed by our Constitution." *In re Buck*, 350 N.C. at 626, 516 S.E.2d at 861. As a result, the relevant issue is not whether we would have made the same decision that the trial court made in ruling upon defendant's new trial motion; whether we would have made different credibility determinations, viewed the evidence differently, or reached a different result than the jury, or whether there was other evidence upon which the jury could have relied in resolving the liability issues submitted for its decision in this case; instead, the issue before us is whether the trial court had a rational basis for determining that a reasonable jury could have reached different decisions with respect to the issue of whether defendant and Mr. Rice made false and misleading representations to plaintiffs. A careful review of the record in light of the very deferential standard of review applicable in this case satisfies us that the trial court did not abuse its discretion by denying defendant's motion for a new trial.

1. Statements to Piazza

On 30 April 2010, defendant sent the following e-mail to Dr. Piazza and a number of other recipients:

> Guys John Cummings just had a meeting in NY with Verizon. We need $100K - $200K ASAP, in 3-4 weeks we go back to Verizon we have an opportunity to be their featured AR. Rob is going to send out a summary later today. I know all of you are BUSY!!! I need you to give a few minutes to look at this potential. THANK YOU for your TRUST!!
>
> Greg
>
> John Cummings 919 601 9090 Rob Rice 919 802 5257

Dr. Piazza "became aware of the Verizon opportunity" when he received this e-mail. A few hours later, Mr. Rice sent the following e-mail to defendant and the recipients of defendant's earlier communication, including Dr. Piazza:

> Gentlemen,
>
> John Cummings met with McGarry Bowen (NY Marketing Agency) and the director of new technologies at Verizon (I believe that was his title) this afternoon in New York. John can give you more details directly.

John basically laid out our strategy of "meeting consumer demand by providing the first social media marketplace that enables people to buy, sell, and trade virtual goods for use in mobile and augmented reality. Mirascape allows consumers to create and sell their own augmented reality content and experiences for a profit." This is important because it dramatically distinguishes us from other startups in the industry that are more focused on directory AR, single-user experiences, or marketing gimmicks for the PC.

He described our short term approach with Allied Integrated Marketing to re-purpose QR codes and turn traditional media into trigger/activation points for the delivery of media, as well as the early phase of virtual goods (dynamically linked and collectible). The next step is the earthmarks, which allow users to upload all media types to specific locations, share them with each other, interact, and build influence and reputation. The next stage of this is letting users link earthmarks and 3D media together in waypoints, which allows for drag and drop creation of treasure hunts, tour guides, and all sorts of engaging promotions and experiences.

Verizon responded extremely well to this and asked how we differentiate ourselves from others like Layar. The answer, simply put, is that we are focusing on empowering the user to create content, as well as building a vibrant virtual goods marketplace, again centered on the user. Our model is based on microtransactions and data (where I believe the real value of this emerging industry is), while others are focusing more on custom channels or layers that do not support social very well or are lacking the virtual goods. Layar may have a content store going live, letting people sell access to custom layars ("show me the nearest subway"), but we are the first launching a virtual goods marketplace (tapping into one of the newest and fastest growing multi-billion dollar markets).

While we have been seeking $200k in additional angel funding to meet our milestones and deliverables (June for Allied and July for a public beta launch), we now have an opportunity to go back to Verizon in about three weeks to blow their minds with a demo that shows everything we

are doing with Allied, as well as all of the earthmark stuff (and some of the early social marketplace functionality). The opportunity here is to become the featured AR application for Verizon, OEM'd[5] on all of the DROID smartmobiles, and leverage their marketing. Even bigger, if we can pull this off with Verizon, it puts us squarely in the limelight of catching the eyes of other Fortune 100 companies for marketing, promotions, and strategic partnerships.

The challenge here, is that we have to jump to warp speed to accelerate development . . . not only to meet our milestones, but to WOW Verizon. This is a one-shot opportunity. As things currently are, we are crawling along to meeting the milestones, but there is no way we can deliver the perfect demo for Verizon without immediate funding. I need resources to bring on additional developers as a strike team to do this fast, hard, and well. Not only do we need to take the app and the website to the next level, but we need to make it look fantastic, as well as the actual demo/presentation . . . . This is a huge chance and opportunity, but we can't do it alone. We need help finding additional angel capital that can make a decision and move quickly.

We need $200k. That's four people at $50k. I know we can do this. We are perfectly positioned to take down some phenomenal strategic partnerships and deals (on top of what we already have done), launch on the market, blow every other AR company completely out of the water, and take the lead in this industry. Even beyond that, opportunities like this emerging industry only happen once a decade or so . . . unless something major happens in biotech or nanotechnology, I don't see any other world-changing technologies coming of age any time soon. Mobile, Social, Local, Virtual is the magical convergence that we are deep in the middle of with augmented reality and Mirascape.

I've attached an updated version of our pitch deck that has some new info in it for those of you that haven't seen one recently.

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5. The term "OEM" means that the application or software is a default application pre-installed on the smartphone.

> As usual, please feel free to call or email me at any time with any questions. Thank you for everything you have done for us so far.
>
> Best regards,
>
> Robert Rice
> CEO Neogence Enterprises

As an initial matter, we believe that the Court of Appeals' emphasis upon the extent to which defendant and Mr. Rice took reasonable care to avoid making materially false or misleading statements to Dr. Piazza, which was the subject of the second issue that the trial court submitted for the jury's consideration with respect to each defendant, as a justification for the trial court's failure to treat the jury's verdicts as impermissibly inconsistent overlooks the fact that the jury found against defendant and in favor of Mr. Rice on the basis of the "materially false and misleading statement" issue rather than on the basis of the "reasonable care" issue. The fact that the record would support differing treatment of defendant and Mr. Rice with respect to the "reasonable care" issue simply sheds no light on the extent to which a reasonable jury could have found that defendant, but not Mr. Rice, made materially false and misleading statements to plaintiffs. Thus, the Court of Appeals erred by upholding the trial court's decision to deny defendant's new trial motion on the grounds that defendant and Mr. Rice took differing levels of care to determine the accuracy of the statements that they made to Dr. Piazza. Instead, any determination of the extent, if any, to which the jury's verdicts with respect to the "materially false and misleading" statement issue were impermissibly inconsistent necessarily requires a careful examination of the statements that defendant and Mr. Rice made to Dr. Piazza and the circumstances under which those statements were made.

As defendant emphasizes, the e-mails that defendant and Mr. Rice sent to Dr. Piazza both indicate that Mirascape had an opportunity to become Verizon's featured, pre-loaded augmented reality application. On the other hand, the e-mail transmitted by Mr. Rice provided considerably more detail about the opportunity that had allegedly arisen from the McGarry Bowen meeting than the e-mail sent by defendant. Mr. Rice opened his e-mail by noting that Mr. Cummings had met with employees of McGarry Bowen and Verizon and that Mr. Cummings "can give you more details directly." Moreover, Mr. Rice provided specific details concerning the information that Mr. Cummings had presented at the meeting and noted that Neogence's work with Allied Integrated Marketing and the development of earthmarks had generated the most interest

from the attendees. Although Mr. Rice did, as defendant notes, state that Mirascape could "become the featured AR application for Verizon, OEM'd on all of the DROID smartmobiles," he also mentioned the actual opportunity that stemmed from the McGarry Bowen meeting, which was to "leverage [Verizon's] marketing." In addition, Mr. Rice stated that Neogence would first have to create a "demo" displaying "everything we are doing with Allied, as well as all of the earthmark stuff" before mentioning other milestones that Neogence had been working to achieve, including a public beta launch scheduled for July 2010, and noting that additional funding would be needed to complete both the Verizon presentation and achieve the other pre-existing goals. A trial judge could have reasonably determined that the jury, after studying these e-mails, had a rational basis for concluding that defendant's communication, which mentions only Verizon and the opportunity "to be their featured AR," was a materially false or misleading statement and that the substantial additional information contained in Mr. Rice's communication, coupled with his open invitation for the recipients to contact him if they had any questions, provided a sufficient basis to refrain from the making of such a determination concerning Mr. Rice's communication.

Our decision to uphold the Court of Appeals' decision with respect to the inconsistent verdict issue relating to Dr. Piazza is bolstered by information contained in Mr. Rice's trial testimony.[6] Among other things, Mr. Rice testified that:

> Q. Okay. Just below this specific language, you then go on to say, "The opportunity here is to become the featured AR application for Verizon -- for Verizon OEMed on all the Droid smart mobiles and leverage their marketing." Are these three separate possibilities that you're discussing in regard to Verizon?
>
> A. I believe so. I mean, this was kind of bundled together, but they were all possibilities. They all have different advantages and disadvantages.
>
> Q. Well, how are they different?
>
> A. Well, leveraging somebody's marketing, for example, if I have ten dollars to go out and put up some posters that I printed on my laptop somewhere, that's only going [to] get me so far. But if I have somebody, say, in a large company and say, hey, we're going to do this big campaign for a new

6. Unlike Mr. Rice, defendant did not testify at trial.

> car coming out for a new movie, and sure, we'll stick your logo on the side and include you, you're basically leveraging all of those dollars to get the exposure and kind of the brand recognition, as opposed to what you would do on your own. That's very different from something where you're, you know, being OEMed or pre-installed on a mobile device. In that case, you're not getting the marketing exposure and attention, but you're getting distribution. So you -- you're in front of a lot more people, and it's already in the hand. If I see an ad on TV, I think oh, that's cool maybe I'll buy the burger or download the app. But if it's already in my phone or in hand, I have it immediately. People are much more likely to play and use it. The disadvantage of OEMing is what people call bloatware.
>
> Q. I'm sorry, what?
>
> A. Bloatware. I don't know how many times I bought a computer or phone that had stuff on it I didn't want. You know, TurboTax or Norton Antivirus, whatever tools. So you have the advantage of more distribution, but there's also the risk that there may be some negative, you know, connotations that there's more crap on my phone and get rid of it. So there's different advantages and disadvantages depending on how it's structured.

A trial judge could have rationally determined that the jury had a reasonable basis for concluding that Mr. Rice's statement that Neogence might be able to "leverage their marketing" if Neogence was able to successfully demonstrate Mirascape at a subsequent meeting and his explanation of the benefits of "leveraging" McGarry Bowen's marketing efforts on behalf of Verizon, as compared to preloading Mirascape on Verizon phones, "significantly altered the total mix of available information" to a reasonable investor and justified a finding that Mr. Rice's statements, taken in context and as a whole, were not materially false and misleading, while the same could not be said for defendant's statements. *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S. Ct. 2126, 2132, 48 L. Ed. 2d 757, 766 (1976) (footnote omitted) (explaining that an omission is material in the event that there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"); *Ehrenhaus v. Baker*, 216 N.C. App. 59, 88, 717 S.E.2d 9, 28-29 (2011) (adopting the standard for materiality set forth in *TSC Indus.*), *appeal dismissed and disc. rev. denied*, 366 N.C. 420,

735 S.E.2d 332 (2012). In other words, given that including Mirascape in McGarry Bowen's marketing efforts was the opportunity that was actually discussed at the McGarry Bowen meeting, Mr. Rice's reference to "leverag[ing] their marketing" in Mr. Rice's e-mail and his trial testimony concerning the potential value of that opportunity could have reasonably persuaded the jury that Mr. Rice's statement, as a whole, was not *materially* false or misleading, *see Latta v. Rainey*, 202 N.C. App. 587, 599, 689 S.E.2d 898, 909 (2010) (stating that "[a] misrepresentation or omission is 'material' if, had it been known to the party, it would have influenced the party's judgment or decision to act" (quoting *Godfrey v. Res-Care, Inc.*, 165 N.C. App. 68, 75-76, 598 S.E.2d 396, 402, *disc. rev. denied*, 359 N.C. 67, 604 S.E.2d 310 (2004))), while defendant's failure to make a similar statement during his own communications with Dr. Piazza might have caused a reasonable jury to reach a contrary result.

Finally, Dr. Piazza testified that he spoke to defendant on the telephone approximately seventy times between 30 April 2010 and 2 June 2010. According to Dr. Piazza, these phone calls were "more often than not" placed by defendant and included discussions of

> the Verizon opportunity with me primarily . . . describ[ing] it consistently with his e-mail, that because of a meeting that John Cummings had in New York and McGarry Bowen, and an opportunity to have met with a Verizon executive for new technologies, that John had an opportunity to explain what was going on at Neogence and what we were doing with Mirascape, and was intrigued enough to invite John back to Verizon to present a demo, a demo App, an application. And if that were acceptable to Verizon, we had an opportunity to be OEMed or featured AR or preinstalled on every Verizon – Verizon Droid phone.

Although Mr. Rice communicated with Dr. Piazza by e-mail on several occasions concerning the opportunities that had been discussed at the McGarry Bowen meeting, the e-mails evidencing these communications were primarily focused upon the steps that Neogence needed to take to prepare for the upcoming meeting with Verizon and to accomplish goals that the company had been working toward before the McGarry Bowen meeting.[7] We hold that the trial court had a rational basis for concluding

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7. Although an examination of Dr. Piazza's cell phone bills indicated that he and Mr. Rice communicated via text message or telephone calls on several occasions between 2 May 2010 and 24 May 2010, the record does not contain any information concerning the nature and content of these communications.

that the jury could have reasonably determined that defendant, but not Mr. Rice, made materially false and misleading statements to Dr. Piazza based, at least in part, upon the frequency with which defendant and Mr. Rice told Dr. Piazza that there was a reasonable opportunity for Mirascape to be preloaded onto Verizon phones.

As a result, after carefully reviewing the record, we conclude that the jury heard evidence from which it could reasonably conclude that defendant made more direct, less nuanced, comments to Dr. Piazza concerning the extent to which Neogence had the opportunity to have Mirascape preloaded onto Verizon phones than Mr. Rice did; that defendant reiterated this contention to Dr. Piazza more frequently than Mr. Rice did; and that Mr. Rice's statements included more accurate descriptions of the opportunity that had become available to Neogence than those made by defendant. In light of this set of circumstances, we are unable to conclude that the trial court's decision to deny defendant's request for a new trial on the basis of allegedly inconsistent verdicts arising from the statements made to Dr. Piazza by defendant and Mr. Rice, respectively, was "so arbitrary that it could not have been the result of a reasoned decision," *White*, 312 N.C. at 777, 324 S.E.2d at 833, or that the Court of Appeals erred by declining to set aside the trial court's decision to that effect. As a result, we hold that defendant's challenge to the Court of Appeals' decision to uphold the denial of his motion for a new trial on the grounds that the jury's verdicts concerning the relative liability of defendant and Mr. Rice to Dr. Piazza were impermissibly inconsistent lacks merit.

2. Statements to Lampuri

Mr. Lampuri did not receive the e-mails that defendant and Mr. Rice sent out on 30 April 2010. Instead, Mr. Lampuri first learned of the opportunity that had been discussed at the McGarry Bowen meeting on 25 May 2010, when Mr. Lampuri and his wife went to defendant's office for an obstetrical appointment. As he examined Ms. Lampuri, defendant

> proceeded to have a conversation with [Mr. Lampuri] about this exciting new opportunity that Neogence, his company had. . . . we've got something really exciting going on, our director of sales just got back from New York City at a meeting. There were Verizon executives there, and they were absolutely blown away by our technology that we needed – Neogence – excuse me, Neogence needed to go back, create this demo, come back and show Verizon, you know, what they've been talking about, what they've been

> showing about this technology and they're going [to] get OEMed. They're going pre-installed on all Verizon phones.

Similarly, Ms. Lampuri testified that defendant had stated during the medical appointment "that his company had an opportunity to be featured on Verizon phones directly installed on the phone."

Mr. Rice made statements to Mr. Lampuri concerning the opportunity that had arisen at the McGarry Bowen meeting during a conference at the Neogence headquarters in mid-July 2010 that was attended by Mr. Lampuri, Mr. Rice, Mr. Cummings, and Mr. Kirkbride. At that meeting, Mr. Cummings stated

> that he was in New York in a meeting with an advertising company, and that there were Verizon executives in the room. And they were, again, absolutely wowed by the technology, that we need – they needed to go back, create a demo, go back to Verizon in a couple weeks and if they – if they wowed Verizon, I like to say, then they have the opportunity to be preloaded, OEMed on all phones.

During the meeting, Mr. Rice said that "the deal was very much real," that "[i]t was a real opportunity," and that "the funds that they were seeking were to get this demo up and doing – up and coming to show Verizon." At another meeting held at the Neogence headquarters in early August, which Mr. Lampuri attended along with other members of his family, Mr. Cummings said "the exact same thing" that he had said at the prior meeting and Mr. Rice reiterated "that the deal was very much real."

Defendant contends that, given defendant's limited "interactions with [Mr.] Lampuri" and the fact that this interaction "did not occur near in time to [Mr.] Lampuri's actual investment in Neogence" and given that the two meetings in which Mr. Rice was involved occurred closer in time to the making of Mr. Lampuri's investment and that "the opportunity was described [to Mr. Lampuri] in similar terms as those presented by" defendant, the jury's verdicts that defendant, but not Mr. Rice, had made materially false and misleading statements to Mr. Lampuri were impermissibly inconsistent. A careful review of the record reflects, however, that defendant and Mr. Rice made substantially different statements to Mr. Lampuri concerning the nature of the opportunity that had become available to Neogence during the McGarry Bowen meeting. Simply put, defendant told Mr. Lampuri that Neogence had the opportunity to be preloaded onto Verizon's phones while Mr. Rice never made any such statement. Although the jury could have determined that Mr. Rice's statements during the meetings at which Mr. Lampuri was in attendance

that "the deal was very much real" constituted a reference to the same opportunity that was described by Mr. Cummings during those meetings and by defendant during Ms. Lampuri's medical appointment, a reasonable jury could have also interpreted this statement in a different manner.[8] As a result of the fact that the record discloses ample justification for a jury decision to treat defendant and Mr. Rice differently with respect to the issue of whether either of them had made materially false and misleading statements to Dr. Piazza and Mr. Lampuri, we hold that the Court of Appeals correctly determined that the trial court did not abuse its discretion by denying defendant's request for a new trial based upon the existence of allegedly impermissible inconsistencies in the jury's verdicts with respect to the "materially false and misleading" statement issue.

B. Safe Harbor Instruction

[2] In his second challenge to the correctness of the Court of Appeals' decision, defendant contends that the trial court erred by failing to instruct the jury in accordance with N.C.G.S. § 55-8-30(b)(1),[9] which provides that a corporate director cannot be held liable "for any action taken as a director, or any failure to take any action," N.C.G.S. § 55-8-30(d), if he or she "rel[ies] on information, opinions, reports, or statements . . . prepared or presented by . . . [o]ne or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented." N.C.G.S. § 55-8-30(b)(1) (Supp. 2018). According to defendant, the Court of Appeals should have construed the reasonable care standard enunciated in N.C.G.S. § 55-8-30(a)(2) *in pari materia* with N.C.G.S. § 78A-56(a)(2) or applied the rule of lenity to determine that the "safe harbor" defense delineated in N.C.G.S. § 55-8-30(b) precludes a finding of liability based upon the making of allegedly false and misleading statements pursuant to N.C.G.S. § 78A-56(a)(2), citing, *inter alia*, *Meza v. Division of Social Services*, 364 N.C. 61, 66, 692 S.E.2d 96, 100 (2010) (reading the language of N.C.G.S. § 108A-79(k) *in pari materia* with Article 4 of the Administrative

8. The jury might have also deemed it significant that the parties had stipulated to the fact that, "[i]n mid-July 2010, [Mr.] Lampuri was invited to Neogence to preview a demonstration of Mirascape" at which Mr. "Cummings told [Mr.] Lampuri that Neogence had a chance for an opportunity with Mirascape to become an 'OEM' product for installation on Verizon smartphones based upon his prior meeting(s) and/or conversations with Verizon employees or agents" while entering into no similar stipulation concerning the statements that Mr. Rice made to Mr. Lampuri.

9. Defendant has not advanced any argument in reliance upon the common law business judgment rule in the proceedings before this Court.

Procedure Act); *Dellastatious v. Williams*, 242 F.3d 191, 195 (4th Cir. 2001) (relying upon provisions of Virginia's corporate governance statutes in determining whether the defendants used reasonable care to prevent a state law securities violation); and *Vogel v. Reed Supply Co.*, 277 N.C. 119, 131, 177 S.E.2d 273, 281 (1970) (applying the rule of lenity in a civil case when construing a statute that potentially imposed civil and criminal liability). In view of the fact that defendant was a Neogence director who claimed to have merely repeated information that he had received from Mr. Cummings and that he reasonably believed Mr. Cummings to be reliable and competent, defendant argues that the Court of Appeals erred by holding that he was not entitled to have the jury instructed concerning the "safe harbor" provisions of N.C.G.S. § 55-8-30. Plaintiffs, on the other hand, argue that defendant agreed to the trial court's instruction concerning the circumstances under which he could be held liable pursuant N.C.G.S. § 78A-56(a)(2) and never properly requested delivery of the "director safe harbor" instruction to which he now claims to have been entitled.

"This Court has long held that '[w]hen charging the jury in a civil case it is the duty of the trial court to explain the law and to apply it to the evidence on the substantial issues of the action.' " *Yancey v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001) (alteration in original) (first quoting *Cockrell v. Cromartie Transp. Co.*, 295 N.C. 444, 449, 245 S.E.2d 497, 500 (1978); then citing *Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc.*, 288 N.C. 213, 218, 217 S.E.2d 566, 571 (1975); and then citing *Inv. Props. of Asheville, Inc. v. Norburn*, 281 N.C. 191, 197, 188 S.E.2d 342, 346 (1972)).[10] As a result, "[i]f a party contends that certain acts or omissions constitute a claim for relief or a defense against another, the trial court must submit the issue with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted." *Cockrell*, 295 N.C. at 449, 245 S.E.2d at 500 (first citing *Vernon v. Crist*, 291 N.C. 646, 231 S.E.2d 591 (1977); and then citing *Atkins v. Moy*e, 277 N.C. 179, 176 S.E.2d 789 (1970)).

On the other hand, "[r]equests for special instructions must be in writing, entitled in the cause, and signed by the counsel or party submitting them." N.C.G.S. § 1A-1, Rule 51(b) (2017); *see also Hanks v. Nationwide Mut. Fire Ins. Co.*, 47 N.C. App. 393, 404, 267 S.E.2d 409,

10. "To the extent these cases suggest the court must apply the law to the evidence, they have been overruled by the 1985 amendments to [N.C.G.S. § 1A-1,] Rule 51." 2 G. Gray Wilson, *North Carolina Civil Procedure* § 51-3, at 51-8 n.52 (3d ed. 2007).

415 (1980) (citing *King v. Powell*, 252 N.C. 506, 512, 114 S.E.2d 265, 269-70 (1960), and stating that "[i]t is the duty of the party desiring instructions on a subordinate feature of the case or greater elaboration on a particular point to aptly tender request for special instructions"). In the event that a party fails to "comply with the requirements of [N.C.G.S. § 1A-1,] Rule 51(b), the trial court act[s] properly within its discretion in denying the request." *Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 379, 542 S.E.2d 689, 694 (2001) (citing *Hord v. Atkinson*, 68 N.C. App. 346, 351, 315 S.E.2d 339, 342 (1984) (holding that the trial court could properly refuse to instruct the jury concerning its right to consider the physical evidence in a motor vehicle negligence case on the grounds that "the plaintiff's request went beyond the trial judge's general duty of explaining the law arising on the evidence with respect to the substantial features of the case" and that, with respect to this "subordinate feature," "the plaintiff did not comply with the requirements of Rule 51(b)")); *see also Koutsis v. Waddel*, 10 N.C. App. 731, 733-34, 179 S.E.2d 797, 799 (1971) (stating that, "[w]here the court adequately charges the law on every material aspect of the case arising on the evidence," "the charge is sufficient and will not be held error for failure of the court to give instructions on subordinate features of the case, since it is the duty of a party desiring instructions on a subordinate feature, or greater elaboration, to aptly tender a request therefor" (quoting 7 Strong's North Carolina Index 2d: *Trial* § 33, at 329 (1968) (footnotes omitted))). Assuming that a proper "request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least," with "the failure [to do so] constitut[ing] reversible error." *Minor v. Minor*, 366 N.C. 526, 531, 742 S.E.2d 790, 793 (2013) (first quoting *Calhoun v. State Highway & Pub. Works Comm'n*, 208 N.C. 424, 426, 181 S.E.2d 271, 272 (1935); then citing *State v. Davis*, 291 N.C. 1, 13-14, 229 S.E.2d 285, 293-94 (1976); and then citing *Bass v. Hocutt*, 221 N.C. 218, 219-20, 19 S.E.2d 871, 872 (1942)).

The only written request for instructions that defendant submitted for the trial court's consideration that was at all relevant to the "safe harbor" issue consisted of a verbatim recitation of N.C.P.I. Civil 807.50, a pattern jury instruction intended for use in cases in which a director is sought to be held liable for breach of his or her duty to the corporation and which provides that:

> The (*state number*) issue reads:
>
> "Was the plaintiff damaged by the failure of the defendant to discharge *his* duties as a corporate director?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, four things:

First, that the defendant failed to act in good faith. Good faith requires a director to discharge *his* duties honestly, conscientiously, fairly and with undivided loyalty to the corporation. Errors in judgment alone do not constitute a failure to act in good faith; however, unless a director honestly believes *he* is making a reasonable business decision, *he* fails to act in good faith.

Second, that the defendant failed to act as an ordinarily prudent person in a like position would have acted under similar circumstances. (Unless *he* has actual knowledge to the contrary, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by

> [one or more employees of the corporation who the director reasonably believes to be reliable and competent in the matter(s) presented]
>
> [[a lawyer] [a public accountant] [*name other outside advisor*] as to the matter(s) the director reasonably believes are within such [professional's] [advisor's] competence]
>
> [a committee of the board of directors of which the director is not a member if *he* reasonably believes the committee merits confidence].)

Third, that the defendant failed to act in a manner *he* reasonably believed to be in the best interests of the corporation.

And Fourth, that the defendant's [acts] [omissions] proximately caused damage to the plaintiff. Proximate cause is a cause which in a natural and continuous sequence produces a person's damage and is a cause which a reasonable and prudent person could have foreseen would probably produce such damage or some similar injurious result. There may be more than one proximate cause of damage. Therefore, the plaintiff need not prove that the defendant's acts were the sole proximate

> cause of the damage. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's acts were a proximate cause.
>
> Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff was damaged by the failure of the defendant to discharge *his* duties as a corporate director, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.
>
> If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

(Footnotes omitted.) The parties discussed whether the trial court should instruct the jury in accordance with defendant's request at length during the jury instruction conference.

When the "safe harbor" defense initially came up for discussion, defendant's trial counsel argued that N.C.G.S. § 55-8-30 "trumps, if you will, [N.C.G.S. § 78A-56(c)] and that [N.C.G.S. § 78A-56(c)] dovetails back to it" because "(c) is saying that" "our duty is to ensure that they acted reasonably in their capacities and so forth." In view of the fact that "there are no pattern instructions on this," defendant's trial counsel stated that he "simply went back to the breach of corporate duties with respect to [N.C.G.S. §] 55-8-30, and this is the pattern jury instruction that came from that" and "needs to be inserted."

After noting that N.C.G.S. § 78A-56 "specifically is dealing with the sale of securities as opposed to just your general obligations as a director of a corporation," the trial court asked defendant's trial counsel "[w]hy does [Chapter] 55 [of the North Carolina General Statutes] apply to this at all?" In response, defendant's trial counsel stated that, "of course, the allegation is" "a breach of [N.C.G.S. § 78A-56(a)(2)]," which "talks about so long as the defendants sustain the burden of proving that their actions were reasonable and so forth," with N.C.G.S. § 78A-56(c) "specifically talk[ing] about directors being responsible" "for these kinds of sales activity" unless the director was "riding herd over and making sure [sales employees] didn't do something they weren't supposed to do." According to defendant's trial counsel, directors would not be liable as long as "they conduct themselves in the manner that a reasonable—a[n] ordinary care director should do," with N.C.G.S. § 55-8-30 being "where that is articulated."

At that point, the trial court interjected that "my reading of" N.C.G.S. § 55-8-30 "will place the burden [of] proof on the plaintiff," while his "reading of [Chapter 78A of the General Statutes] puts the burden of proof on you." In response, defendant's trial counsel stated that "[t]hen what we might need to do is" provide "something [to] read to the jury members that talks about that burden and the fact that these defendants would be relieved from this offense if [ ] they acted accordingly" and that "if [N.C.P.I. Civil] 807.50 imposes too harsh, perhaps we can craft something." When the trial court pointed out that defendant's proposed liability-related special instructions appeared to be an "accurate statement of the law as far as the defenses available to [defendant] under" N.C.G.S. § 78A-56(a)(2) are concerned "[b]ecause it accurately states that the burden of proof is on you," defendant's trial counsel said "[r]ight"; noted that he "was just trying to get an option that the jury says, okay, we find that they carry that burden of proof; therefore we can't find them culpable"; and added that "I'm certainly in agreement with you relative to the statute and the reliance issues, but on the other hand, relative to the defenses of reasonable behavior and the fact that they're corporate directors, it certainly is my opinion that they get off if that's the—if that turns out to be the case."

After agreeing that defendants "get off" "if they sustained their burden of proof that they did not know, and in the exercise of reasonable care could not have known, of the untruth or omission," plaintiffs' counsel argued that the jury simply needed "those two elements" and suggested that "we give them one sentence of what it means to exercise reasonable care" from N.C.P.I. Civil 800.10, which addresses the tort of negligent misrepresentation. Once defendant's trial counsel had agreed that a definition of "reasonable care" would be appropriate "because that is the standard that is in" N.C.G.S. § 55-8-30, the trial court "rule[d] that [defendants] have the burden of proof on that issue" and agreed with plaintiffs' counsel that the appropriate language would be: "First, the defendant did not know of the untruth or omission in offering or sale of a security to the plaintiffs; or, second" "that the defendant in the exercise of reasonable care could not have known of the untruth or omission." At that point, the trial court and counsel for the parties discussed the wording of the issues to be submitted to the jury, with defendant's trial counsel agreeing with the wording of the "reasonable care" issue and with the placement of the burden of proof with respect to that issue upon defendants as proposed by the trial court and plaintiffs' counsel. At the conclusion of the day's proceedings, the trial court agreed to prepare a set of draft instructions and to provide them to counsel for both parties on the understanding that "we'll have a brief hearing Monday morning"

and "get that hammered out" so "you'll know what the instructions are before you make your closings."

At the time that the proceedings convened on the following Monday, the trial court afforded defendant's trial counsel an opportunity "to put [his] objections [ ] on the record" before noting that "you have submitted to the Court written requests for instructions and I have denied those." In response to the trial court's invitation, defendant's trial counsel stated that:

> If Your Honor, please, the defendants have requested then in the instruction from the Court that pertains or arises out of Chapter 55 pertaining to members of the board of directors and the various responsibilities they have in performing their duties, and one of which that we specifically requested related to the fact that board of director members could rely upon statements that are made to them and they would, therefore, not be held responsible.
>
> Let me find the particular reference so that I can state this accurately. And where this comes from is [N.C.G.S. §] 55-8[-]30, and the request that we had made was in regard to [N.C.G.S. §] 55-8[-]30(b)(1), suggesting that in discharging his duties, a director is entitled to rely on information, opinions, reports, or statements including in financial—including financial statements and other financial data if prepared by or presented by one or more officers of—or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented.
>
> As I said to the Court, I think that [N.C.G.S. §] 55-8[-]30(c) is parallel to [N.C.G.S. §] 78[A]-56(c)(1) which then goes on to say the director is not entitled to the benefit of this section if he has actual knowledge concerning the matter in question that makes reliance otherwise permitted by [N.C.G.S. §] 55-8[-]30(b) unwarranted. And then of course what that would require is the same instructions that his Honor has anticipated which will be that—to instruct the jury that if the director himself had knowledge, actual knowledge, concerning the matter, then he would not enjoy the benefit of this particular provision of [N.C.G.S. §] 55-8[-]30(b)(1).

> That is in essence, if Your Honor, please, what we had requested of the Court and it's our understanding that you have denied that previously. But again, we just simply want to put that on the record.
>
> I do not have, if Your Honor, please, a copy at this moment in time of the provisions, but I thought we had them the other day, but I have not filed them relative to the proposed jury instruction that I had crafted.

At the conclusion of this statement, the trial court noted that "you handed me up a pleading that was a proposed jury instruction, and feel free to file that until you find another copy" and ruled that "your request for jury instructions as well as your objections to the instructions are noted for the record and are denied." The trial court instructed the jury with respect to the "reasonable care" defense set out in N.C.G.S. § 78A-56(a)(2) that:

> The second issue[ ] reads: Did the defendant Gregory Brannon not know and in the exercise of reasonable care could not have known of the untruth or omission in his offer or sale of a security to the plaintiff Lawrence Piazza.
>
> On this issue, the burden of proof is on the defendant Gregory Brannon. This means that he must prove by the greater weight of the evidence two things:
>
> First, that the defendant Gregory Brannon did not know of the untruth or omission in the offering or sale of a security to the plaintiff Lawrence Piazza; and, second, that the defendant Gregory Brannon in the exercise of reasonable care could not have known of the untruth or omission in the offering or sale of a security to the plaintiff Lawrence Piazza.
>
> Reasonable care means that degree of care, knowledge, intelligence, or judgment which a prudent person would use under the same or similar circumstances. Thus, on this second issue on which the defendant Gregory Brannon bears the burden of proof, if you find by the greater weight of the evidence, first, that Gregory Brannon did not know of the untruth or omission in the offering or sale of a security to the plaintiff Lawrence Piazza; and, second, that Gregory Brannon in the exercise of reasonable care could not have known of the untruth or omission in the offering or sale of a security to the

> plaintiff Lawrence Piazza, then it would be your duty to answer the second issue yes in favor of the defendant Gregory Brannon.
>
> If on the other hand you find that the defendant Gregory Brannon has failed to prove each of these requirements by the greater weight of the evidence, then it would be your duty to answer this issue no in favor of the plaintiff Lawrence Piazza.[11]

Defendant's trial counsel did not lodge any additional objections when given an opportunity to do so at the conclusion of the trial court's instructions to the jury.

After carefully reviewing the record, we are not satisfied that defendant properly preserved his challenge to the trial court's refusal to give an explicit "safe harbor" instruction to the jury for purposes of appellate review. As an initial matter, we believe that the "safe harbor" defense, assuming, without deciding, that it is applicable to cases like this one,[12] was a subordinate feature of the present case given that N.C.G.S. § 78A-56(a)(2) absolves individuals alleged to have taken reasonable care from liability for the making of materially false and misleading statements and given that reasonable care could obviously include appropriate reliance upon information supplied by other corporate officials. As this case was presented to the jury, the extent to which defendant was or was not acting as a director when he made the disputed statements to plaintiffs was not an essential element of plaintiffs' claims against defendant. Instead, both parties consented to the submission of this case to the jury on the implicit theory that the capacity in which defendant acted when he made the allegedly false and misleading statements was not relevant to the jury's liability-related decision. In light of that fact, the relevant issue was whether defendant was able to persuade the jury that "he did not know, and in the exercise of reasonable care could not have known, of the untruth or omissions," N.C.G.S. § 78A-56(a)(2), regardless of the capacity in which he was acting when he made the allegedly false statements to plaintiffs. The trial court discussed the "reasonable care" issue in detail in the instructions that were given to

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11. The trial court delivered an essentially identical "reasonable care" instruction with respect to the issue of defendant's liability to Mr. Lampuri.

12. We should not, of course, be understood as expressing any opinion concerning the extent to which the trial court would have erred had defendant submitted a proper written request for instructions concerning the director safe harbor issue for the trial court's consideration.

the jury, using both the relevant statutory language and additional language drawn from the pattern jury instruction relating to negligent misrepresentation claims, upon which the parties seemed to agree. Given that the trial court's instructions with respect to the "reasonable care" issue explained the nature of the decision that the jury was required to make and the basic legal principles that the jury was required to apply in deciding whether defendant should be absolved from liability on "reasonable care" grounds, we are persuaded that the requested "safe harbor" instruction, which would only become relevant if the jury made a separate determination that defendant was acting as a director at the time that he made the challenged statements to plaintiffs, involved a subordinate feature of the case. As a result, unless defendant made an adequate written request for the delivery of a "safe harbor" instruction, the trial court did not err by omitting any reference to the "safe harbor" principles enunciated in N.C.G.S. § 55-8-30 from its instructions to the jury in this case.

Moreover, we are unable to conclude that defendant submitted an adequate written request for the delivery of a "safe harbor" instruction for the trial court's consideration. The written instruction that defendant submitted for the trial court's consideration contained a great deal of information that was totally irrelevant to the issues that were actually before the trial court and jury in this case. In addition, even if one overlooks the differing context that defendant's written request for instructions was intended to address and the extraneous material that it contained, defendant's proposed instruction placed the burden of proof upon plaintiffs rather than upon defendant even though defendant's trial counsel appears to have conceded (or at least did not explicitly object to the trial court court's determination) during the jury instruction conference that defendant, rather than plaintiffs, bore the burden of proof with respect to this issue. Moreover, defendant never appeared to acknowledge during the jury instruction conference that, for the "safe harbor" protection to be available to defendant, the jury would have had to make a preliminary determination that defendant was acting as a director, rather than in some other capacity, when he made the challenged statements to plaintiffs. As a result, for all of these reasons, we cannot conclude that defendant submitted a sufficiently accurate written request for the delivery of a "safe harbor" instruction to properly preserve the issue of the trial court's failure to deliver such an instruction to the jury for purposes of appellate review.

Although defendant did attempt to clarify the nature of his request for the delivery of a "safe harbor" instruction during the jury instruction

conference, his efforts in that regard do not suffice to overcome his failure to submit an adequate written request for the trial court's consideration. Instead of submitting a written request for instructions that excluded extraneous information, required the jury to find that defendant was acting in his capacity as a director as a prerequisite for the availability of the "safe harbor" defense, and accurately inserted the relevant "safe harbor" language into the context of the "reasonable care" defense recognized by N.C.G.S. § 78A-56(a)(2), defendant simply provided the trial court with a written request for instructions that surrounded a limited amount of potentially relevant information with a great deal of irrelevant information and placed the burden of proof on plaintiffs despite defendant's trial counsel's apparent concession during the jury instruction conference to the contrary during the jury instruction conference. Although defendant's trial counsel attempted to orally explain how his requested instruction could be modified to make it correct during the course of the charge conference, he never submitted a proposed modification in writing. The entire purpose of the written request requirement relating to subordinate features of the case contained in N.C.G.S. § 1A-1, Rule 51(b) is to prevent trial judges from having to do what defendant sought to have the trial court do in this case—create a new instruction based upon general language contained in a much more extensive instruction that needed to be changed in a number of significant ways. As a result, for all of these reasons, we hold that the trial court was entitled to reject defendant's request for the delivery of a "safe harbor" instruction to the jury on the grounds that defendant failed to submit a proper written request for such an instruction.

C. Primary Liability and Scienter

[3] Finally, defendant argues that he is entitled to a new trial on the grounds that the jury's verdict finding him liable to plaintiffs pursuant to N.C.G.S. § 78A-56(a)(2) is contrary to law given that a finding of liability under that statutory provision requires proof that he either owned the securities that plaintiffs purchased or acted with scienter when he solicited funds from plaintiffs for Neogence. In support of his argument, defendant relies upon the plain statutory language, which imposes liability upon a person who "[o]ffers or sells" that security by means of false or misleading statements. In defendant's view, allowing the imposition of liability under N.C.G.S. § 78A-56(a)(2) upon a non-owner would conflict with the language in which the statute is couched, including the provision requiring a successful plaintiff to tender the relevant security to the defendant as a precondition for recovering the purchase price. According to defendant, allowing recovery against a non-owner would

be "nonsensical" given that a successful plaintiff would be required to tender the relevant security to a person from whom it was not procured.

In the event that plaintiffs sought to have defendant held liable for their Neogence-related losses, defendant contends that they should have proceeded against him pursuant to N.C.G.S. § 78A-8(2), which imposes liability on "any person, in connection with the offer, sale or purchase of any security, directly or indirectly," who made fraudulent representations upon which plaintiffs relied in deciding to invest in Neogence. In the alternative, defendant suggests that plaintiffs should have sought to have him held "secondarily liable" as a "control person" pursuant to N.C.G.S. § 78A-56(c), an approach that would have required plaintiffs to establish Neogence's "primary liability" pursuant to N.C.G.S. § 78A-56(a). Defendant believes that he "cannot be primarily liable under" N.C.G.S. § 78A-56(a)(2) in the absence of a determination that Neogence, "[t]he only person who could be primarily liable under the statute — and who could be a proper party to make good through the rescission required under Section 56(a)(2)," was primarily liable.

Finally, defendant contends that a finding that he was liable to plaintiffs pursuant to N.C.G.S. § 78A-56(a)(2) required a determination that he acted with scienter. Defendant reaches this conclusion by reference to decisions construing Section 12(2) of the Securities Act of 1933, upon which N.C.G.S. § 78A-56(a)(2) was based and which requires a finding that the defendant acted with scienter in offering or selling the securities in question, citing *Pinter v. Dahl*, 486 U.S. 622, 647, 108 S. Ct. 2063, 2078, 100 L. Ed. 2d 658, 682 (1988). Although defendant acknowledges that neither the United States Supreme Court nor this Court has definitively identified the elements that had to be established for purposes of a claim asserted pursuant to either Section 12(2) of the Securities Act or N.C.G.S. § 78A-56(a)(2), he contends, in further reliance upon the rule of lenity, that "the jury should have been required to find that Dr. Brannon was either a securities owner *or* 'motivated at least in part by a desire to serve his own financial interests or those of the securities owner,' " citing *Pinter*, 486 U.S. at 647, 108 S. Ct. at 2078, 100 L. Ed. 2d at 658, and *State v. Williams*, 98 N.C. App. 274, 279, 390 S.E.2d 746, 749, *disc. rev. denied*, 327 N.C. 144, 394 S.E.2d 184 (1990), in support of this assertion.

In response, plaintiffs argue that defendant waived his right to advance this argument on appeal given that his trial "counsel requested the very instruction" of which he now complains and is now "complain[ing] of the action which he induced," quoting *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994). In addition, plaintiffs contend that, because defendant failed to raise this argument

until after the trial had been completed, he is not entitled to advance it on appeal from the denial of his new trial motion given that N.C.G.S. § 1A-1, Rule 59(a)(8), limits a trial court's authority to award a new trial to situations involving "[e]rror in law occurring at the trial and objected to by the party making the motion"; that North Carolina Rule of Appellate Procedure 10(a)(1) provides that an issue is not properly preserved for purposes of appellate review absent "a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" at trial; and that N.C. Rule App. P. 10(a)(2) prohibits a party from "mak[ing] 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."

In response, defendant argues that, because the issue of whether he had failed to properly preserve his challenge to the trial court's primary liability instructions and failure to require a finding of scienter for purposes of appellate review was not mentioned in the dissenting opinion at the Court of Appeals or advanced in a petition seeking discretionary review of additional issues, plaintiffs' non-preservation argument is not properly before us. In addition, defendant contends that the alleged error constitutes "a flaw that reaches beyond the instructions issued to the jury," "is a fundamental error," and is "simply inconsistent with the statutory scheme." As a result, defendant contends that his challenge to the trial court's primary liability instruction and the trial court's failure to require a finding of scienter was properly advanced by means of a motion for a new trial in reliance upon N.C.G.S. § 1A-1, Rule 59(a)(7), which permits the trial court to award a new trial in the event that the jury's "verdict is contrary to law."

During the trial,[13] defendant submitted a written request for instructions in which he asked the trial court to instruct the jury that:

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13. We are not persuaded by defendant's argument that plaintiffs are not entitled to challenge the extent to which defendant is entitled to raise his primary liability and scienter claims for purposes of appellate review because defendant invited any error that the trial court may have committed or waived the right to argue that issue because it was not addressed in either the majority or dissenting opinions before the Court of Appeals. In our view, the extent to which an issue that is before us by means of a dissent or the allowance of a discretionary review or certiorari petition involves invited error or has been properly preserved for purposes of appellate review is inherently intertwined with defendant's related substantive claim, *In re R.L.C.*, 361 N.C. 287, 290-91, 643 S.E.2d 920, 921-22, *cert. denied*, 552 U.S. 1024, 128 S. Ct. 615, 169 L. Ed. 2d 396 (2007), and is, for that reason, not the sort of separate and independent substantive claim that the Court refused to consider

> Issue 1 reads: Did the Defendants, in soliciting the Plaintiffs to pay money for a security, make a statement which was materially false or misleading, or which under the circumstances was materially false or misleading because of the omission of other facts, where the Plaintiffs were unaware of the true or omitted facts?
>
> . . . .
>
> [A]s to this issue on which the Plaintiffs bear the burden of proof, if you find by the greater weight of the evidence:
>
> First, that the Defendants made a statement to the Plaintiffs which was false or misleading, or which under the circumstances was false or misleading because of the omission of other facts;
>
> Second, that the statement made by the Defendants, or the facts omitted by the Defendants, were material;
>
> Third, that the Plaintiffs were unaware of the true or omitted facts prior to paying money for the security; and
>
> Fourth, that the Defendants made such statement in connection with soliciting the Plaintiffs to pay money for a security,
>
> then it would be your duty to answer this issue "Yes," in favor of the Plaintiffs. If, on the other hand, you find that the Plaintiffs have failed to prove each of these requirements by the greater weight of the evidence, then it would be your duty to answer this issue "No," in favor of the Defendants.

During the charge conference, counsel for both sets of parties indicated that they had proposed identical instructions concerning the question of whether defendants had made false and misleading statements to plaintiffs. As a result, the trial court stated "[s]o we all agree that that's a good instruction as to 56(a)(2)" and instructed the jury concerning the issue of whether defendants had made false or misleading statements

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in *North Carolina School Boards Ass'n v. Moore*, 359 N.C. 474, 506-07, 614 S.E.2d 504, 523-24 (2005). In view of this determination, plaintiffs' request for certiorari review of the issue of whether defendant invited any error that the trial court may have committed or properly preserved his primary liability and scienter claims for purposes of appellate review is dismissed as moot.

in violation of N.C.G.S. § 78A-56(a)(2) in accordance with the language that had been requested by the parties.

This Court has "consistently denied appellate review to [parties] who have attempted to assign error to the granting of their own requests." *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 383 (1996); *see also State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991) (stating that a litigant "will not be heard to complain of a jury instruction given in response to his own request" (citations omitted)).[14] Having urged the trial court to instruct the jury in exactly the manner that it instructed that body with respect to the "false and misleading" statement issue, defendant invited any erroneous finding of liability that might that have resulted from those instructions. *Frugard*, 338 N.C. at 512, 450 S.E.2d at 746 (stating that "[a] party may not complain of action which he induced"). As a result, defendant is not entitled to relief from the trial court's judgment and orders on the basis of his primary liability and scienter claims.[15]

III. Conclusion

As a result, for all of the reasons stated above, we hold that the Court of Appeals did not err by affirming the challenged judgment and orders.[16] As a result, the Court of Appeals' decision, as modified in this opinion, is affirmed.

MODIFIED AND AFFIRMED.

Justices EARLS and DAVIS did not participate in the consideration or decision of this case.

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14. The issue before the Court in *Justus v. Rosner*, 317 N.C. 818, 824-28, 821 S.E.2d 765, 769-72 (2018), was the appropriateness of the trial court's decision to grant a new trial on the grounds that the jury's verdict was contrary to the greater weight of the evidence pursuant to N.C.G.S. §1A-1, Rule 59(a)(7) rather than a challenge to the trial court's instructions to the jury.

15. In light of our decision to refrain from reaching the merits of defendant's contentions that he could not be held liable to plaintiffs because he was not the seller of the securities in question, that defendant could not be held primarily liable to plaintiffs, and that defendant could not be held liable to plaintiffs in the absence of a finding of scienter, we express no opinion concerning the merits of any of these contentions.

16. In view of the fact that defendant's challenge to the trial court's attorneys' fee award rested upon his contention that he was entitled to a new trial based upon the other alleged errors discussed in the text of this opinion and the fact that we have determined that defendant is not entitled to relief from the trial court's judgment and orders on the basis of those arguments, there is no need for us to discuss the attorneys' fee issue further in this opinion.

Justice NEWBY dissenting.

The majority's message to the business community is clear: Individuals serve as outside directors at their own peril! If a director makes an alleged misstatement to a potential investor, no matter how minute and regardless of whether the investor relied on it, the director may be personally liable. Today's decision eviscerates any protection for an outside director who uses information communicated by corporate officers to tell others of potential investment opportunities. In fact, the majority ratifies the outside director's liability, even though the corporate officers who made later-in-time statements were exonerated. While the majority's lengthy technical analysis may cloud its assault on fundamental business relationships, its ultimate result will decrease the number of people willing to serve as outside directors and severely limit start-up companies' access to angel investor capital.

Essentially, the majority holds that an outside director can be liable to an angel investor for repeating information he learned from corporate officers (1) even though the angel investor vetted the information through subsequent conversations with the corporate officers, and (2) the officers were absolved from liability for communicating the same information. Liability arises even though the investor does not rely on the alleged misstatement. To achieve this outcome, the majority withholds the director safe harbor protection that should be available to an outside director. The majority wrongly expands potential liability under the securities fraud statute while shrinking any protection under the director safe harbor provision. In doing so, the majority exposes outside directors who identify potential investors, even those who are astute and experienced angel investors, to potential liability as "sellers" for purposes of the securities fraud statute. The liability extends here even though the outside director does not personally benefit directly from the sale, receiving neither funds from a direct sale of an interest nor a commission. Such an expansive reading could expose to liability anyone who discusses a potential investment opportunity with a friend. The majority wrongly holds that the securities fraud statute supplants director safe harbor protection. The majority's unwarranted analysis will have significant chilling effects in the business community.

Furthermore, the verdicts in this case are a miscarriage of justice because of their inconsistency regarding Rice, the Chief Executive Officer and director, and Brannon, the outside director. Brannon's representations to plaintiffs were not "materially" different from those of Rice. The majority's analysis diminishes the required "materiality" of an alleged misrepresentation to, in effect, any misrepresentation, no matter

how "nuanced." The majority ignores the plain fact that, as experienced angel investors, plaintiffs thoroughly discussed the Verizon potential with the only person actually present at the meeting, Cummings, the director of sales. The evidence is uncontroverted that plaintiffs did not invest after communicating with Brannon but only after multiple conversations with Cummings as well as Rice and Kirkbride, another corporate officer. Through these conversations, plaintiffs clarified the "true" nature of the Verizon opportunity. If Rice's statements to plaintiffs were accurate, then plaintiffs knew the "truth" about the opportunity before investing. Because of the dangerous removal of the director safe harbor protection and the miscarriage of justice arising from the inconsistent verdicts, I dissent.

I. Relevant Facts

In 2007 defendants Rice and Kirkbride founded a technology start-up, Neogence, to develop graphical software, which could be loaded onto smartphones. Rice (the Chief Executive Officer and a director) and Kirkbride (an investor, director, the de facto Chief Financial Officer, a licensed attorney, and later the Chief Executive Officer) served as the initial board members. In 2009, as the corporation grew, Rice invited Brannon, an OB-GYN physician and investor, to join the Neogence board as an outside director.[1] Brannon had originally met Rice years before, and they had worked together on a prior venture. Kirkbride stated that Brannon was asked to serve on the board because of, *inter alia*, his "abilities on strategic directions," including obtaining "financing, investors, et cetera." Rice stated that Brannon "would make introductions to people that might have an interest in what [Neogence was] doing." As Brannon characterized it, as a director he would "expos[e] this company to friends that may want to invest into it."

During Neogence's initial months as a start-up corporation, the board met informally and often. The company had elected to raise operating capital by issuing promissory notes, which were convertible to common stock. Neogence engaged legal counsel to draft the convertible notes and related documentation. Neogence, acting through its board of directors, then approached various "accredited" "angel investors"[2] to obtain

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1. Generally, an "outside director" is "[a] nonemployee director with little or no direct interest in the corporation." *Director*, *Black's Law Dictionary* (10th ed. 2014).

2. An "angel investor" is "[a] person—usu[ally] an experienced and successful entrepreneur, professional, or entity—that provides start-up or growth financing to a promising company." *Investor*, *Black's Law Dictionary* (10th ed. 2014). In general, an "accredited investor" is a person with a minimum net worth of over $1,000,000 or annual income in

funding. Each director helped identify and solicit investors throughout the ongoing fund-raising process.

In late 2009 Neogence hired John Cummings as an officer to serve as "director of sales." Cummings had worked for a company in which Brannon had previously invested, and they had become business acquaintances. Cummings's role "was focused on sales and business development."

In early 2010, during the process of raising capital and identifying investors, at Brannon's suggestion Rice reconnected with plaintiff Piazza, a previous investment partner from a prior venture, to discuss Neogence. In February 2010, Piazza loaned Neogence $50,000 in exchange for two convertible promissory notes, convertible to Neogence stock at various points in time. Incorporated within the promissory notes executed by Piazza was a note purchase agreement, wherein Piazza represented that, *inter alia*, he "is an accredited investor," is "able to fend for [himself]," and "has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of [his] investments, and has the ability to bear the economic risks of [his] investments."[3] The purchase agreement and February promissory notes are signed by Rice as CEO of Neogence. Also in February 2010, Brannon introduced plaintiff Lampuri to Rice "as a potential investor."

The critical event, which led to this litigation, occurred on 30 April 2010 when Cummings informally met with a representative from Verizon, a national telecommunications company, and discussed Neogence's software technology and its development status. The meeting took place in New York at the offices of Verizon's marketing agency. The parties "brainstorm[ed]" about the possibility of including the Neogence software as a smartphone application for Verizon's upcoming summer campaign. The Verizon representative indicated that "if [the software] lived up to the things [Cummings] had presented in the meeting," and Neogence was "able to demonstrate it properly and functionally, that [Verizon's marketing agency] would consider [the software] as part of their marketing for" certain smartphones and a "future potential business relationship" with Neogence.

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excess of $200,000, 17 C.F.R. § 230.501(a)(5), (6) (2017), and is treated as "being knowledgeable and sophisticated about financial matters," *investor*, *Black's Law Dictionary* (10th ed. 2014). Herein an "accredited angel investor" is referred to as simply an "angel investor."

3. The purchase agreement also discloses that the promissory notes and any underlying securities "have not been registered under the Securities Act of 1933" and that the sale and issuance of securities are "exempt" from such registration.

Excited about this prospect, Cummings communicated the "Verizon opportunity" to Neogence board members Rice, Kirkbride, and Brannon, noting that if Neogence could "come back with a demo, . . . we would have a lot of possibilities of what we could do with the company and how great that that would be for Neogence. But the priority was to get the [software application] developed."

That same day, Brannon quickly e-mailed several people, including Piazza, copying Rice, stating:

> Guys John Cummings just had a meeting in NY with Verizon. We need $100K - $200K ASAP , [sic] in 3-4 weeks we go back to Verizon we have an oppurtnity [sic] to be their featured [software]. [*Rice*] *is going to send out a summary later today*. I know all of you are BUSY!!! I need you to give a few minutes to look at this potential.

(Emphasis added.) As promised, Rice followed up with the more detailed e-mail that same evening, stating:

> Gentlemen,
>
> John Cummings met with [the marketing agency] and *the director of new technologies at Verizon* (I believe that was his title) this afternoon in New York. *John can give you more details directly*.
>
> John basically laid out our [software] strategy of meeting consumer demand by providing the first social media marketplace that enables people to buy, sell, and trade virtual goods for use in mobile and augmented reality. . . .
>
> . . . .
>
> Verizon responded extremely well to this and asked how we differentiate ourselves from others . . . . [W]e are the first launching a virtual goods marketplace (tapping into one of the newest and fastest growing multi-billion dollar markets).
>
> While we have been seeking $200k in additional angel funding to meet our [existing] milestones and deliverables . . . , we now have an opportunity to go back to Verizon in about three weeks to blow their minds with a demo that shows everything we are doing . . . . *The opportunity here is to become the featured [ ] application for Verizon*,

> OEM'd on [certain smartphones], and leverage their marketing. Even bigger, if we can pull this off with Verizon, it puts us squarely in the limelight of catching the eyes of other Fortune 100 companies for marketing, promotions, and strategic partnerships.
>
> The challenge here, is that we have to jump to warp speed to accelerate development . . . not only to meet our milestones, but to WOW Verizon. This is a one-shot opportunity. As things currently are, we are crawling along to meeting the milestones, but there is no way we can deliver the perfect demo for Verizon without immediate funding. . . . We need help finding additional angel capital that can make a decision and move quickly.
>
> We need $200k.

(Emphases added.) (Internal quotation marks omitted.)

On 1 May 2010, the next day, Piazza spoke by telephone directly with Cummings, inquiring further about the details of his New York meeting and the potential opportunity with Verizon. Cummings clarified that any opportunity with Verizon was merely a possibility and that their "in" was through Verizon's marketing agency. Piazza testified that during that phone conversation,

> [Cummings] was very excited that he had just gotten out of a meeting the day before, that he had held -- that was held at [Verizon's advertising agency], and he had met a Verizon executive of new technologies. And that -- that particular person was intrigued enough to invite him back to Verizon with an app, a demo app, such that, if they liked this we had an amazing opportunity to be on every Verizon Droid phone as a pre-installed application, OEMed, featured AR, I'm not sure.

Brannon was not a part of the call.

Beginning on 3 May, Rice sent a series of e-mails to Kirkbride, Brannon, Cummings, and Piazza specifying the technology development timeline and the need to have additional capital. On 25 May, Rice e-mailed Piazza saying,

> I'll do whatever it takes to get you on board. At this point, I can't move this company forward without you.

> Without you investing, right now, we are going to lose our momentum, development is going to stall, and we are likely going to lose some people that have to deal with economic realities of their own. If this does happen, I'll keep fighting and rebuild, but we will have lost our chance to be a player in the industry this year. . . . It will take me months to recover if we fall apart right now.
>
> On the other hand, if you invest now, you are effectively breathing new life back into the company, and empowering me (and us) to stop crawling along and start running the race. . . .
>
> I can do all of this with your investment this week and I can deliver. Granted some of the timelines and milestones have shifted, and will always continue to shift as we move forward. . . .
>
> You know I have been completely open and transparent with you from day one, even to my disadvantage in negotiating, and quite frankly we are at a crossroads right now. We need your investment, and we need it yesterday.
>
> Please believe in me and the team. We can't do this without you.

Afterwards, Rice told Kirkbride to "[d]o what you feel is necessary to close" Piazza.

On 26 May 2010, Cummings and Kirkbride flew to Maine to meet with Piazza and further discuss the "potential of" Neogence and to solicit his "interest in making an investment." Brannon was not present. After visiting with Cummings and Kirkbride and having talked with Rice, on 28 May Piazza loaned an additional $150,000 to Neogence in exchange for a convertible promissory note.

While Lampuri had met Rice and learned of Neogence in February 2010, he had not yet become an investor. Brannon told him in person of the potential Verizon opportunity on 25 May 2010. Thereafter, Lampuri met with Cummings who, along with Rice and Kirkbride, later met with Lampuri twice over the summer to discuss his loaning funds to Neogence and the potential for its "technology [to] be used in a number of different ways with a number of different brands," as well as the potential opportunity to present a demo to Verizon through its marketing agency. Lampuri testified that he

> was given a presentation that John Cummings was the lead on, and he discussed and reiterated basically what Greg [Brannon] had said, that he was in New York in a meeting with an advertising company, and that there were Verizon executives in the room. And they were, again, absolutely wowed by the technology, that we need -- they needed to go back, create a demo, go back to Verizon in a couple weeks and if they -- if they wowed Verizon, I like to say, then they have the opportunity to be preloaded, OEMed on all phones.

When specifically asked, "How did what John Cummings told you at that meeting compare with what Dr. Brannon had told you on May 25th 2010 . . . ," Lampuri replied, "Essentially they were the exact same thing, very similar conversations," and "[b]oth had the same outcome that, you know, they met with a Verizon executive." Lampuri mentioned that in his conversation with Brannon "there was no word of advertising," but it was "essentially the exact same conversation." When asked during direct examination at trial what Rice contributed to discussions at the meeting, Lampuri testified that Rice "said the deal was very much real. It was a real opportunity, and the funds that they were seeking were to get this demo up and doing--up and coming to show Verizon." Lampuri left Cummings's presentations without making an investment.

Neogence missed its anticipated July deadline to demonstrate its software to the marketing agency and Verizon. Cummings rescheduled for "another 30, 60 days," ultimately for the fall of 2010. Again in August 2010, Lampuri met with Rice, Kirkbride, and Cummings at Neogence's headquarters. During those meetings, Lampuri alleges he was told that Neogence was preparing "to follow through on an opportunity Verizon had provided Neogence for Mirascape to become a featured AR application pre-installed on all Verizon DROID smartmobiles." Brannon did not attend any of these meetings.

Nonetheless, on 24 September 2010, well after the initial July deadline and months after his 25 May 2010 conversation with Brannon, and after having spoken with Cummings, Kirkbride, and Rice, Lampuri loaned Neogence $100,000 in exchange for a convertible promissory note. In that note purchase agreement, Lampuri, like Piazza, represented that he "is an accredited investor," is "able to fend for [himself]," and "has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of [his] investments, and has the ability to bear the economic risks of [his] investments." The purchase agreement is signed by Kirkbride as CEO of Neogence.

Neogence continued to miss deadlines. That fall, Cummings flew to New York again to meet with Verizon and its advertising agency to present the software technology, but Cummings "had to cancel the meeting while in front of the [office] building because" the software "would not function" on his smartphone. Ultimately, Neogence failed to create a functioning demo of its software.

Neogence went into a decline and was "having a very difficult time raising funds." Nonetheless, plaintiffs, as well as Brannon, invested additional money in Neogence in 2011, well after any opportunity with Verizon had passed. By the summer of 2011, Neogence was past due on its rent. On 7 July 2011, counsel for Piazza sent a formal demand letter seeking repayment of Piazza's promissory notes, which had matured and were past due. Shortly thereafter, Neogence closed its doors and went out of business.

On 13 July 2011, plaintiff Piazza filed his complaint against the corporation, Neogence Enterprises, Inc., for breach of contract stemming from Neogence's failure to repay his promissory notes upon their reaching maturity, seeking return of principal plus accrued interest. Piazza obtained a default judgment.

On 10 October 2012, plaintiffs filed their complaint against defendant officers and directors, Kirkbride, Rice, and Brannon, personally, for, *inter alia*, "securities fraud" under the North Carolina Securities Act, seeking money damages for the selling of a security by means of any untrue statement of a material fact or any omission.[4] These claims were based on alleged misrepresentations made by defendants to plaintiffs arising from the 30 April 2010 meeting between Cummings and Verizon. Specifically, plaintiffs complained

> [t]he representations made by Brannon, Rice, and Kirkbride to both Piazza and Lampuri regarding the opportunity for Mirascape to become a featured AR application pre-installed on all Verizon DRIOD smartphones were false and misleading. At no time did any person associated with Verizon ever discuss with John Cummings or any other Neogence officer, director, or employee any opportunity for Mirascape or Neogence technology to become a featured AR application pre-installed on all—or any—Verizon DRIOD smartphones.

4. Plaintiffs voluntarily dismissed without prejudice their other claims against all defendants for common law fraud, negligent misrepresentation, and unfair and deceptive trade practices.

Plaintiffs directed their allegations of fraudulent misrepresentation at defendants as a group; plaintiffs did not differentiate regarding the alleged misrepresentations by any individual defendant. Cummings, who was the director of sales, was not a named defendant in the complaint even though he was the only Neogence officer at the 30 April 2010 meeting, had communicated about the meeting with the directors, and had discussed the meeting and the potential opportunity in detail with both plaintiffs before either plaintiff invested in the company.

Despite having spoken directly and at length with Cummings regarding the possible opportunity with Verizon, and despite having invested money in Neogence well after it had lost that opportunity, plaintiffs asserted that they would not have loaned money to Neogence but for defendant directors' "false and misleading" representations, namely that the Neogence software potentially could "become a featured [ ] application pre-installed on all Verizon [ ] smartphones." Plaintiffs stated that "[a]t all relevant times material to this action, Kirkbride, Brannon, and Rice served on Neogence's board of directors."

Brannon unsuccessfully moved to dismiss plaintiffs' claims under Civil Procedure Rule 12(b)(6) based on plaintiffs' representations in their promissory note purchase agreements attesting to their ability to independently evaluate "the merits and risks" of their investments "through simple inquiries" beforehand. Brannon answered that, in his capacity as a director, he was entitled to rely on the statements and representations made to the board by the director of sales, Cummings. Specifically, Brannon answered that "[i]f the Plaintiff Piazza relied upon any misrepresentations made by Neogence directors or officials, he would have relied upon what was told to him by Kirkbride or Cummings on or about May 26, 2010," the date of the Maine solicitation meeting, just two days before Piazza loaned an additional $150,000 to Neogence. As to Lampuri's claims, Brannon answered that when he

> spoke with Lampuri, he stated, based upon what Cummings reported to the Neogence board members, that Neogence had an opportunity of becoming a featured AR application with Verizon, but the conversation was broader and [he] also advised Lampuri that a prototype or demo of the software had to be created and a presentation would need to be made to have the chan[ce] to have an "opportunity" fulfilled . . . .

Before trial Kirkbride moved for summary judgment in his favor as a matter of law, arguing

> (1) the alleged representations of Kirkbride were true; (2) the statements allegedly made were too contingent and vague to be a material misrepresentation of a past or existing fact or reasonably relied upon; (3) Plaintiffs failed to make the required showing of a reasonable inquiry necessary to show reasonable reliance; and (4) Mr. Kirkbride did nothing but rely on Mr. Cummings in repeating Mr. Cummings' statements.

Likewise, Rice and Brannon moved for summary judgment, similarly arguing that the representations made were "literally true":

> 1. Plaintiff Piazza was equally or possibly a more sophisticated investor than was either of the Defendants and hence he could not have reasonably relied upon either of them; Plaintiff Lampuri invested long after the "opportunity with Verizon" complained of was an immediate and/or achievable goal and hence his reliance upon either of the Defendants with respect to emails months before his investment is unreasonable as a matter of law.
>
> 2. Further, the representations allegedly made by [Cummings, Kirkbride, Brannon, and Rice] were literally true and insufficiently definite to be false or reasonably relied upon as a matter of law.
>
> 3. There were no legally material misrepresentations of fact made by either Defendant to the Plaintiffs.
>
> 4. Plaintiffs failed to make any reasonable inquiry or perform even minimal due diligence as to the basis or meaning of any alleged representations made to them prior to investing in Neogence.

On 25 November 2013, the trial court found no genuine issue of material fact with regard to plaintiffs' claim of securities fraud against Kirkbride and granted his motion for summary judgment but denied the motions of Rice and Brannon. The trial court did not give a specific reason for granting summary judgment for Kirkbride but denying it for Rice and Brannon. The claims against Rice and Brannon proceeded to trial.

At different stages of trial, Brannon moved to dismiss the claims against him based on an outside director's reliance upon representations of corporate officers (director safe harbor). The trial court denied the motions.

At the charge conference, counsel requested pattern instruction 807.50, noting that "this statute," N.C.G.S. § 55-8-30 and its protections referenced in Brannon's answer, "needs to be inserted" in the jury instructions. The protection, described as the "Director Safe Harbor," states:

> (b) In discharging *the duties of a director's office*, *a director is entitled to rely on information*, opinions, reports, or statements, including financial statements and other financial data, *if prepared or presented by* any of the following:
>
> (1) *One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent* in the matters presented.

N.C.G.S. § 55-8-30(b)(1) (Supp. 2018) (emphases added). Brannon included in his proposed jury instructions North Carolina Pattern Instruction Civil 807.50, titled "Breach of Duty-Corporate Director." The proposed instruction included the following language:

> "Was the plaintiff damaged by the failure of the defendant to discharge his duties as a corporate director?"
>
> On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence . . . :
>
> . . . .
>
> . . . that the defendant failed to act as an ordinarily prudent person in a like position would have acted under similar circumstances. (Unless he has actual knowledge to the contrary, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by
>
> [one or more employees of the corporation who the director reasonably believes to be reliable and competent in the matter(s) presented]

(Footnote call numbers and italics omitted.) The trial court denied the proposed instruction on the basis that the instruction wrongly placed the burden of proof on plaintiffs instead of Brannon, at which time

Brannon's counsel suggested attempting to craft a different instruction. Apparently, no special instruction incorporating the director safe harbor protection was ultimately produced. Brannon reasserted his request for the pattern jury instructions regarding director safe harbor, N.C.G.S. § 55-8-30. The trial court denied the request.

The jury received four copies of the following issue to determine whether Rice and Brannon had made any misrepresentations to plaintiffs that would subject these defendants to individual liability under the securities fraud statute, N.C.G.S. § 78A-56(a)(2):

> Did Defendant, [name], in soliciting the Plaintiff, [name], to pay money for a security, make a statement which was materially false or misleading, or which under the circumstances was materially false or misleading because of the omission of other facts, where the Plaintiff, [name], was unaware of the true or omitted facts?

The trial court instructed the jury that, "[o]n this issue, the burden of proof is on the plaintiff." The trial court also instructed the jury to answer: "Did the defendant [Brannon] not know and in the exercise of reasonable care could not have known of the untruth or omission in his offer or sale of a security to the plaintiff [name]. On this issue, the burden of proof is on the defendant [Brannon]."

The jury found Brannon had made representations to both Piazza and Lampuri that were materially false or misleading and that plaintiffs were unaware of the true facts but found that there was either no such misrepresentation on Rice's part or that plaintiffs were aware of the truth.[5] Therefore, logically, the jury determined one of the following: (1) Rice was truthful that Cummings met with a Verizon representative and discussed the "opportunity" for Neogence technology "to become the featured [ ] application for Verizon" smartphones, or (2) plaintiffs knew the meeting did not take place or the "opportunity" did not exist.

Thus Brannon, the outside director without technical expertise, was the only defendant held liable. The jury found Brannon liable even

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5. If the jury found that either defendant had made materially false or misleading representations to either plaintiff, the jury was also asked to determine: "Did the Defendant, [name], not know and in the exercise of reasonable care, could not have known of the untruth or omission in his offer or sale of a security to the Plaintiff, [name]?" The jury answered no as to Brannon and each plaintiff, but it did not reach the question regarding Rice because it had not found that Rice made any statement which was materially false or misleading.

though Rice, Kirkbride, and Cummings met with each plaintiff several times before either invested. The trial court then adjudged that defendant was liable to Piazza for $150,000.00 plus prejudgment interest of $45,000.00, that Brannon was liable to Lampuri for $100,000.00 plus prejudgment interest of $27,333.33, and that plaintiffs could recover, jointly and severally, from Brannon $123,804.00 in attorneys' fees and $8,493.79 in court costs.

Brannon unsuccessfully moved for "judgment notwithstanding the verdict [JNOV] or in the alternative a new trial," arguing, *inter alia*, that the verdicts as to Rice and himself were inherently inconsistent given that

> Plaintiffs' evidence at trial tended to show that Defendant Brannon, an unpaid director, told Plaintiffs orally the same things that Defendant Robert Rice, a paid officer, communicated. The jury, however, found that the communicated information was a misrepresentation when communicated by Defendant Brannon, but was not a misrepresentation when communicated by Defendant Rice.

In the same motion, Brannon unsuccessfully argued that he, as a corporate director, "was entitled to rely on the information he received from John Cummings and repeated to plaintiffs as a matter of law under [the director safe harbor statute]" and that the trial court erred by instructing instead "on the general standard of reasonableness." Given that "[o]ne of the duties of a director is seeking capital investment in the company," Brannon argued he "requested and was entitled to an instruction under N.C.G.S. [§] 55-8-30(b)(1) and (b)(2)," the "specific safe harbor with respect to the discharge of a director's duty." According to Brannon, "[t]he uncontroverted evidence was that John Cummings was the only employee of Neogence . . . who had direct knowledge of the 'Verizon opportunity' and that defendants relied upon Mr. Cummings' statements regarding this opportunity." Brannon argued that sufficient evidence was presented to allow the jury to conclude that he "reasonably believed" Cummings "to be reliable and competent regarding the Verizon opportunity." The trial court denied the motion.

II. Inconsistent Verdicts

The trial court abused its discretion by not granting a new trial because of inconsistent verdicts. "The trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand; and, if no question of law or legal inference is involved in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion." *Selph v. Selph*, 267 N.C. 635,

637, 148 S.E.2d 574, 575-76 (1966). Therefore, an appellate court will only disturb a trial court's order on a Rule 59 motion when the court "is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *In re Will of Buck*, 350 N.C. 621, 625, 516 S.E.2d 858, 861 (1999) (quoting *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997)). North Carolina Rule of Civil Procedure 59 designates "[a]ny irregularity by which any party was prevented from having a fair trial" as grounds for a new trial. N.C.G.S. § 1A-1, Rule 59(a)(1) (2017). For example, when a jury renders its verdicts, but "the answers to the issues are so contradictory as to invalidate the judgment, the practice of the Court is to grant a new trial, or *venire de novo*." *Palmer v. Jennette*, 227 N.C. 377, 379, 42 S.E.2d 345, 347 (1947) (citations omitted).

Both Brannon and Rice relied on the information they received from Cummings and both made the same substantive representations to Piazza and Lampuri regarding the Verizon opportunity. Moreover, both plaintiffs talked to Cummings multiple times *after* their conversations with Brannon, providing them the opportunity to clarify any confusion. Neither plaintiff invested in the company until after he spoke with Cummings.

Under the securities fraud statute, the trial court instructed the jury that, to hold a defendant liable, it must find that (1) the defendant made "a statement which was materially false or misleading," and (2) the plaintiff was "unaware of the true or omitted facts." Only one person, Cummings, attended the meeting on 30 April 2010. Neither defendant Rice nor defendant Brannon was present. Both plaintiffs knew that Cummings was the only person at that meeting. Four people—Cummings, Rice, Kirkbride, and Brannon—knew what Cummings communicated to the directors about the meeting immediately after it occurred. The evidence indicates that Cummings, Rice, Kirkbride, and Brannon all communicated essentially the same message:

- A meeting occurred;
- a Verizon representative was present; and
- the Mirascape concept favorably impressed the Verizon representative, who was open to considering it further *if* Neogence could produce a working demo in a timely fashion.

The opportunity was time-sensitive, and, to meet the deadlines, the company needed more capital to afford additional technical staff. In sum, Cummings, Rice, Kirkbride, and Brannon all indicated that the potential opportunity was contingent on producing a working demo quickly. Even

with a working demo, the opportunity was still only a potential opportunity; nothing had been finalized with Verizon.

At trial Piazza, already an angel investor, testified that he first learned of the potential opportunity with Verizon through an e-mail sent by Brannon to him and others on 30 April 2010. Brannon copied Rice with the email. That e-mail stated, in pertinent part, "John Cummings just had a meeting in NY with Verizon. We need $100K - $200K ASAP , [sic] in 3-4 weeks we go back to Verizon we have an oppurtnity [sic] to be their featured [software]. [Rice] is going to send out a summary later today." Piazza summarized the relevant substance of Brannon's representations as Neogence's having an opportunity to present a demo to Verizon, "[a]nd if that were acceptable to Verizon," then there would be "an opportunity to be OEMed or featured AR or pre-installed on every Verizon – Verizon Droid phone." As for his communications with Rice, Piazza testified that on the evening of 30 April 2010, he also received the forecast e-mail from Rice, which reiterated: "The opportunity here is to become the featured AR application for Verizon, OEM'd on all of the DROID smartmobiles, and leverage their marketing."

After receiving the e-mails from Brannon and Rice, Piazza immediately talked with Cummings about what had occurred at the 30 April 2010 meeting. Before investing on 28 May 2010, Piazza spoke directly with Cummings, communicated with Rice, and met in person with Cummings and Kirkbride to discuss the same Verizon opportunity first mentioned by Brannon in the 30 April 2010 e-mail. Even though Cummings, Rice, Kirkbride, and Brannon communicated materially the same message to plaintiffs, interestingly, Cummings was not a named defendant here, and the trial court granted summary judgment to Kirkbride. Thus, the precise question regarding inconsistent verdicts is whether Brannon communicated a materially different message about the Verizon opportunity than Rice or whether plaintiffs had different opportunities to become "aware of the true . . . facts."

In evaluating these two e-mails, it is important to appreciate the dramatically different roles of Rice and Brannon and therefore, the reasonable weight or "materiality" of each communication: Rice was the founder and CEO of Neogence, whereas Brannon was a physician serving as an outside board member without technical expertise. Part of Brannon's role as a director was to help identify potential angel investors. Both plaintiffs knew of Brannon's limited role. In his short 30 April 2010 e-mail, Brannon quickly summarized the possible Verizon opportunity and asked the recipients to take time to read the more detailed e-mail to follow from Rice. By copying Rice with the email,

Brannon provided Rice had an opportunity to correct any misstatement. Further, any ambiguities created by the Brannon e-mail were clarified by the more detailed Rice e-mail, which Brannon referenced and urged the recipients of his email to read.

Upon reaching its verdict regarding Piazza, to the extent that the jury found that Brannon misrepresented that Neogence had an opportunity to become Verizon's featured AR software provider, the jury reached that decision in the face of evidence that Rice made the same express representation. Nevertheless, the majority contends that Brannon "made more direct, less nuanced, comments" and gave less "accurate descriptions" to Piazza "concerning the extent to which Neogence had the opportunity to have Mirascape preloaded onto Verizon phones than Mr. Rice did." Because of this alleged distinction, the majority concludes that the jury could have reasoned that Rice did not make any misrepresentations to Piazza but that Brannon did so based on an "omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." N.C.G.S. § 78A-56(a)(2) (2017).

The majority's distinction is one without a difference. Brannon's e-mail specifically stated that the more detailed (nuanced) information about the potential opportunity would come from Rice. Brannon's short e-mail is exactly the kind of e-mail one would expect a busy physician to send to other busy people. Rice received a copy of the email and, as the CEO, had the opportunity to correct any misstatement. Furthermore, Rice's longer, detailed communications conveyed additional information needed by the potential investors, such as the statement that Neogence might have an opportunity to "leverage [Verizon's] marketing." Regardless of the comparative length of or detail in the e-mails, Rice expressly represented that Neogence had a real chance "to become the featured AR application for Verizon, OEM'd on all of the DROID smartmobiles."

Regarding Lampuri's claims, Lampuri learned of the potential Verizon opportunity from Brannon at Brannon's medical office on 25 May 2010 when the two had a brief conversation during a prenatal appointment for Lampuri's wife. This setting was not one in which a person expects to receive precise details of an investment opportunity. According to Lampuri, Brannon represented that "our director of sales just got back from New York City at a meeting"; "[t]here were Verizon executives there, and they were absolutely blown away by our technology," and "Neogence needed to go back, create this demo, come back and show Verizon, you know, what they've been talking about, what

they've been showing about this technology and they're going [to] get OEMed. They're going pre-installed on all Verizon phones." Afterwards, Lampuri pursued the opportunity by meeting with Cummings, Kirkbride, and Rice at Neogence's headquarters in July 2010 to learn the details of the investment opportunity directly from Cummings. Cummings confirmed the essence of Brannon's statements. According to Lampuri, Rice "reiterated to them that the [Verizon] deal was very much real. They were seeking funds to, you know, create that demo and finish it so they could do--you know, give a live demo to Verizon."

The majority argues that Rice's representations to Lampuri were obviously different than Brannon's in that Rice did not specifically detail the nature of the Verizon opportunity. Though Rice's statements to Lampuri were comparatively vague, they were no different than Brannon's given the context in which they were made. According to Lampuri's testimony, immediately preceding Rice's statement at their first meeting, Cummings had relayed that the result of his initial meeting in New York was that Verizon was "absolutely wowed by the technology, that we need--they needed to go back, create a demo, go back to Verizon in a couple weeks and if they--if they wowed Verizon, . . . then they have the opportunity to be preloaded, OEMed on all phones." Just before an additional interaction with Rice, Lampuri heard from Cummings that Cummings had been in New York to meet with an advertising agency "and it just so happened Verizon executives were in the meeting, blown away by the technology. You guys need to go back, create this demo, come back to us and you guys have a possibility of being our featured AR application OEMed on all phones."

As such, Cummings's descriptions of the Verizon "deal" as reiterated by Rice were substantively indistinguishable from Brannon's representations. Indeed, the jury heard from Lampuri that Cummings "discussed and reiterated basically what Greg [Brannon] had said." Rice then effectively affirmed and adopted this description of the Verizon opportunity when he represented to Lampuri on both occasions that the "deal" was "very much real" without offering any other information to correct or modify Cummings's representations. While the majority ignores the timing of the various representations to Lampuri, it is crucial. At the time of Brannon's May statement, the Verizon opportunity deadline was weeks away. That deadline, however, passed. During this critical time, Lampuri had several discussions with Rice and Cummings. Significantly, Lampuri did not provide funds until 24 September 2010, well past the initial deadlines, and many months after Brannon's alleged misrepresentation.

Also, the majority ignores the second aspect of the jury's verdict of liability that each plaintiff "was unaware of the true or omitted facts." Even if there were a "material" difference in the representations made by Rice and Brannon, neither plaintiff can show he did not learn of the true details of the Verizon opportunity by talking directly to the one Neogence person who was present at the meeting, Cummings. Before plaintiffs invested in the company, both had multiple conversations with Cummings as well as Rice and Kirkbride. These direct conversations with these corporate officers would have corrected any possible confusion Brannon, the physician without technical expertise and an outside board member, may have created regarding the potential opportunity with Verizon. No person would have reasonably relied on the statement of one *absent* from a meeting after consulting with one *actually present*.

The timing of the investments makes clear that neither plaintiff relied on Brannon but only invested after extensive conversations with Cummings as well as Rice and Kirkbride. Piazza first loaned money to Neogence in February 2010, but, after talking directly with Cummings and being visited by Rice and Kirkbride, on 28 May 2010, Piazza loaned the additional $150,000 to Neogence. Even though his in-person communication with Brannon took place on 25 May 2010, Lampuri did not invest until 24 September 2010, four months after his brief conversation with Brannon and after he had spoken several times to Cummings, Kirkbride, and Rice about the same Verizon opportunity, and well after Neogence had missed the initial July deadline with Verizon.

Given the evidence, it is impossible to reconcile the jury's verdicts that Brannon made misrepresentations to plaintiffs, thus subjecting him to securities fraud liability, while Rice made no such misrepresentations. Given the evidence, it is likewise impossible that plaintiffs did not know of the true details of the opportunity after discussing it with the only Neogence officer present at the 30 April 2010 meeting as well as corporate officers, Rice and Kirkbride. If Rice accurately stated the potential opportunity, as the majority suggests, Rice would have simultaneously informed plaintiffs of the "true" opportunity. Because these verdicts absolve one defendant from liability and subject the other to liability based on substantively indistinguishable statements, it would be a substantial miscarriage of justice to allow these verdicts to stand. Therefore, the trial court abused its discretion by denying Brannon's motion for a new trial.

III. Director Safe Harbor Jury Instruction

The trial court erred by failing to give the requested director safe harbor jury instruction; accordingly, Brannon is entitled to a new trial

on this ground as well. Whether a jury instruction correctly explains the law is reviewable de novo. *E.g.*, *Moss v. Brown*, 199 N.C. 189, 192, 154 S.E. 48, 49 (1930); *see also Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000) (A motion for new trial involving a question of law is reviewed de novo. (citation omitted)); *McNeill v. McDougald*, 242 N.C. 255, 259, 87 S.E.2d 502, 504 (1955). An erroneous jury instruction of the law regarding "a substantive phase of the case is prejudicial error," *White v. Phelps*, 260 N.C. 445, 447, 132 S.E.2d 902, 904 (1963) (per curiam), "even though given in stating the contentions of the parties," *Blanton v. Carolina Dairy, Inc.*, 238 N.C. 382, 385, 77 S.E.2d 922, 925 (1953). An instruction placing the burden of proof on the wrong party is prejudicial. *E.g.*, *Banks v. Shepard*, 230 N.C. 86, 91, 52 S.E.2d 215, 218 (1949).

This Court has stated:

> [W]hen a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done . . . the failure will constitute reversible error.

Minor v. Minor, 366 N.C. 526, 531, 742 S.E.2d 790, 793 (2013) (alterations in original) (quoting *Calhoun v. State Highway & Pub. Works Comm'n*, 208 N.C. 424, 426, 181 S.E. 271, 272 (1935)). "Accordingly, we consider whether the instruction requested is correct as a statement of law and, if so, whether the requested instruction is supported by the evidence." *Id.* at 531, 742 S.E.2d at 793 (citing *Calhoun*, 208 N.C. at 426, 181 S.E. at 272); *see also Gwyn v. Lucky City Motors, Inc.*, 252 N.C. 123, 127, 113 S.E.2d 302, 305 (1960) (The quantum of proof required to support a requested instruction is "more than a scintilla.").

a. Preservation

The first question is whether Brannon preserved the safe harbor jury instruction issue by making an adequate request to the trial court. Contrary to the majority's view, Brannon's counsel plainly raised the defense before, during, and after trial, and preserved for review the proposed jury instruction, by asserting Brannon acted within the scope of his corporate director duties in his communications with plaintiffs. The majority concludes that the pattern jury instruction incorrectly states the law by placing the burden of proof on plaintiffs and, as a result, the requesting party should have produced a special written instruction. The statute, however, places the burden of proof on plaintiffs; thus, the

requested pattern jury instruction correctly states the law, and the trial court should have instructed the jury accordingly.

A party may not appeal a jury instruction, or lack thereof, unless the party objects and states 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." N.C. R. App. P. 10(a)(2). Here in accordance with Rule 10(a)(2), Brannon did make a timely objection to the trial court's decision to deny the requested jury instruction at issue.

In the pretrial order, counsel defined the jury issue as, *inter alia*, "Were the Plaintiffs . . . damaged by the failure of [defendant Brannon] to discharge his duties as a corporate director? (N.C.G.S. §[ ]55-8-30)." At the close of plaintiffs' evidence, counsel argued for dismissal in that, "as [a] director," Brannon is "shielded from liability . . . in compliance with General Statute 55-8-30." At the charge conference, defense counsel requested the corresponding pattern instruction 807.50, noting again that "this statute," section 55-8-30 and its protections, "needs to be inserted" in the jury instructions. Defense counsel included in his proposed jury instructions North Carolina Pattern Instruction Civil 807.50, titled "Breach of Duty-Corporate Director." During the charge conference, defense counsel proposed N.C.P.I. Civil 807.50 to invoke the defense for a director who relies on information provided by a corporate officer pursuant to N.C.G.S. § 55-8-30. The trial court denied the proposed instruction on the basis that the instruction placed the burden of proof on plaintiffs instead of on Brannon, at which time Brannon's counsel suggested crafting a different instruction. Apparently, no acceptable instruction was presented.

Therefore, before the conclusion of the charge conference, Brannon renewed his objection to the instructions and argued the propriety of the pattern jury instructions based on N.C.G.S. § 55-8-30. The trial court noted the objection and denied the requested jury instructions. In his post-trial motions, counsel argued that Brannon, as a corporate director, "was entitled to rely on the information he received from John Cummings and repeated to plaintiffs as a matter of law," that "[o]ne of the duties of a director is seeking capital investment in the company," and that the trial court erred by instructing instead "on the general standard of reasonableness." Brannon certainly raised, and plainly preserved, this issue for appeal. *See State v. Maske*, 358 N.C. 40, 53, 591 S.E.2d 521, 530 (2004); *see also* N.C. R. App. P. 10(b)(2).

b. Correct Statement of the Law

The next question is whether the proposed jury instruction was a correct statement of the law. The majority, agreeing with the trial court, holds that the requested instruction incorrectly stated the law because of the allocation of the burden of proof. A proper analysis requires consideration of two statutes, those addressing the director safe harbor and securities fraud.

i. Director Safe Harbor

The statutory director safe harbor necessarily protects directors in the midst of "[t]he growing complexity of business affairs," which requires "directors to rely on other corporate personnel as well as outside experts in discharging their responsibilities." Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.05 (7th ed. 2014). In recognition of the important policy of encouraging individuals to serve as corporate directors, the General Assembly created the statutory director safe harbor to supplement the common law protection of the business judgment rule. Section 55-8-30 of our General Statutes, which governs the general conduct of corporate directors, recognizes the safe harbor as a defense for a director discharging his duties:

> (a) A director shall discharge the director's duties as a director . . . in accordance with all of the following:
>
> (1) In good faith.
>
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
>
> (3) In a manner the director reasonably believes to be in the best interests of the corporation.
>
> (b) In discharging the duties of a director's office, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by any of the following:
>
> (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented.

N.C.G.S. § 55-8-30(a)-(b) (Supp. 2018). "A director is not entitled to the benefit of subsection (b)," that is relying on information provided by

corporate officers, "if the director has *actual knowledge* concerning the matter in question that makes reliance otherwise permitted by subsection (b) of this section unwarranted." *Id.* § 55-8-30(c) (Supp. 2018) (emphasis added). Otherwise, "[a] director is not liable for [ ] any action taken as a director, or any failure to take any action, if the director performed the duties of the director's office in compliance with this section." *Id.* § 55-8-30(d) (Supp. 2018). Thus, under the statute, a director discharging his corporate duties is entitled to rely in good faith on a corporate officer's representation without incurring personal liability, absent actual knowledge that the statement is false.[6]

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6. Providing further insight into the importance of the director safe harbor statute, North Carolina's common law business judgment rule likewise protects corporate directors from personal liability stemming from the performance of their corporate duties. *Braswell v. Pamlico Ins. & Banking Co.*, 159 N.C. 628, 631, 75 S.E. 813, 814 (1912) ("Directors of corporations are not guarantors . . . . They do not insure the corporation against loss arising either from their own honest mistakes or from the mistakes of subordinate officers."). Injured parties are generally free to sue the corporation itself, but "[d]irectors must have the freedom to take risks and the power to manage the business without undue interference from . . . the courts. That freedom is achieved by protection from liability for good faith errors in judgment and deference from the courts in business decisions." *First Union Corp. v. Suntrust Banks, Inc.*, Nos. 01-CVS-10075, 01-CVS-8036, CIV. A. 01-CVS-4486, 2001 WL 1885686, at *4 (N.C. Super. Ct. Aug. 10, 2001).

Likewise, other states echo these fundamental principles embodied in the "business judgment rule," *State ex rel. Comm'r of Ins. v. Custard*, No. 06 CVS 4622, 2010 WL 1035809, at *20-21 (N.C. Super. Ct. Wake County (Bus. Ct.) Mar. 19, 2010), which operates both procedurally and substantively, *Emerald Partners v. Berlin*, 787 A.2d 85, 90-91 (Del. 2001); *see also In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 123 (Del. Ch. 2009) ("[I]f the directors employed a rational process and considered all material information reasonably available—a standard measured by concepts of gross negligence"—no personal liability extends. Moreover, "a showing of bad faith is a *necessary condition* to . . . liability.").

Substantively similar to N.C.G.S. § 55-8-30(b), the common law business judgment rule provides directors a "safe harbor" which allows them to rely in good faith upon the representations of their corporation's officers. *See Arthur v. Griswold*, 55 N.Y. 400, 406 (1874) ("The mere fact of being a director . . . is not *per se* sufficient to hold a party liable for the frauds and misrepresentations of the active managers of the corporation. Some knowledge of . . . the act claimed to be fraudulent must be brought home to the [director] charged." (citation omitted)); *see also*, *e.g.*, *Utley v. Hill*, 155 Mo. 232, 242-47, 273-76, 55 S.W. 1091, 1092-93, 1103-04 (1900) (Bank directors were not liable for deceit because they relied in good faith on financial reports of cashier.).

Like N.C.G.S. § 55-8-30(c), absent actual knowledge of the falsity of the officer's representation, the business judgment rule shields directors from personal liability in this context. *See Brehm v. Eisner*, 746 A.2d 244, 261-62 (Del. 2000) (en banc); *see also Graham v. Allis-Chalmers Mfg. Co.*, 41 Del. Ch. 78, 85, 188 A.2d 125, 130 (Del. 1963) ("[D]irectors are entitled to rely on the honesty and integrity of their subordinates until something occurs to put them on suspicion that something is wrong.").

Though similar, the statutory protection is separate from the business judgment rule and does not supplant its common law protections. *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 601, 513 S.E.2d 812, 821 (1999) ("[Section 55-8-30] does not abrogate the

To assert this defense Brannon requested North Carolina Pattern Instruction Civil 807.50, titled "Breach of Duty-Corporate Director." The proposed instruction included the following language:

> "Was the plaintiff damaged by the failure of the defendant to discharge his duties as a corporate director?"
>
> *On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove*, by the greater weight of the evidence . . . :
>
> . . . .
>
> . . . that the defendant failed to act as an ordinarily prudent person in a like position would have acted under similar circumstances. (Unless he has actual knowledge to the contrary, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by
>
> [one or more employees of the corporation who the director reasonably believes to be reliable and competent in the matter(s) presented]

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common law of the business judgment rule."); *see* N.C.G.S. § 55-8-30 official cmt. (1991) ("[T]he business judgment rule and the circumstances for its application are . . . developed by the courts. . . . [S]ection 8.30 does not . . . codify the business judgment rule . . . ."). "The possible application of the business judgment rule need only be considered if compliance with the standard of conduct set forth in . . . section 8.30 is not established." N.C.G.S. § 55-8-30 official cmt. sec. 4. Therefore, "proper analysis requires examination of defendant's actions in light of [both] the statutory protections . . . and the business judgment rule, either or both of which could potentially insulate him from liability." *ILA Corp.*, 132 N.C. App. at 601-02, 513 S.E.2d at 821.

As a procedural hurdle, a plaintiff must "rebut the presumptive applicability of the business judgment rule" to pursue a personal claim against a corporate director. *Emerald Partners*, 787 A.2d at 91; *accord Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1374 (Del. 1995); *ILA Corp.*, 132 N.C. App. at 602, 513 S.E.2d at 821-22 (citation omitted). The rule thus "places the initial burden of proof on the plaintiff," *Emerald Partners*, 787 A.2d at 91 (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995)), by requiring an affirmative showing that "the board of directors, in reaching its challenged decision, violated" the board's directorial duties, *id.*; *see also Unitrin, Inc.*, 651 A.2d at 1374 ("[T]he plaintiff has the initial burden of proof and the ultimate burden of persuasion."); *ILA Corp.*, 132 N.C. App. at 602, 513 S.E.2d at 821-22 (same). The presumption "is rebutted [only] in those rare cases where the decision under attack is 'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.' " *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1246 (Del. 1999) (en banc) (quoting *In re J.P. Stevens & Co. S'holders Litig.*, 542 A.2d 770, 780-81 (Del. Ch. 1988)).

(Emphasis added.) (Footnote call numbers and italics omitted.) Defense counsel submitted the proposed instruction to the trial court, which declined to give it because the proposed instruction placed the burden of proof on plaintiffs. This decision was error because the trial court misapplied, and now the majority misapplies, the securities fraud statute in light of the director safe harbor provision.

ii. Securities Fraud

The securities fraud statute, N.C.G.S. § 78A-56(a)(2), pled by plaintiffs, states that a person who:

> (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission,
>
> is liable to the person purchasing the security from him . . . upon the tender of the security . . . .

N.C.G.S. § 78A-56(a)(2) (2017). This statute is directed at those who are personally and financially profiting from the transaction. *See Pinter v. Dahl*, 486 U.S. 622, 654, 108 S. Ct. 2063, 2082, 100 L. Ed. 2d 658, 687 (1988) ("Typically, a person who solicits the purchase will have sought or received a personal financial benefit from the sale, such as . . . a brokerage commission." (citation omitted)). The express language says liability extends to the person "purchasing the security from him." Here, while as a director, Brannon encouraged plaintiffs to invest in Neogence, plaintiffs "purchased" the securities from the company with the prompting of the corporate officers, Rice, Kirkbride, and Cummings.

There are real questions regarding the applicability of this statute to an outside director who, acting for the corporation, seeks investments without receiving any personal gain. The actual seller of the security was Neogence, not Brannon. Brannon had no authority to accept the loans from investors or to sign the promissory note agreements. And if Brannon is a seller, what degree of knowledge (scienter) is required? Further, securities fraud is not a strict liability offense, and a plaintiff must prove that he would not have purchased the security absent the

material misrepresentation. Finally, does this statute make an outside director who did not issue the note primarily liable, or would N.C.G.S. § 78A-8(2) or N.C.G.S. § 78A-56(c) be correct statutes to assess an outside director's liability? *See* N.C.G.S. § 78A-8(2) (2017) (imposing liability on "any person, in connection with the offer, sale or purchase of any security, directly or indirectly," who made a material misrepresentation or omission "in light of the circumstances" and upon which a plaintiff relied); N.C.G.S. § 78A-56(c)(1) (2017) (providing for potential secondary joint and several liability for an implicated "director").[7] Regardless, the necessary analysis here does not require resolution to these significant questions.

Reading the director safe harbor statute *in para materia* with the securities fraud statute, the Court must resolve the conflict regarding which party bears the burden of proof, or in other words, which party must show whether the director exercised reasonable care. The trial court concluded, and now the majority affirms, that the securities fraud statute places the burden of proof on defendant, eliminating the significant protections of the director safe harbor statute. I disagree. In light of the significant public policy considerations that clearly favor the need for outside directors and their protection, the correct reading of the statute requires plaintiff to prove that the director acted without reasonable care in relying on the representations of a corporate officer. Thus, the requested pattern jury instruction is correct; there was no need for a written special instruction. The majority's assertion that defendant's director safe harbor defense "was a subordinate feature of the present case" ignores the fact that Brannon raised the defense at every opportunity.

As a director discharging his corporate duties by introducing potential angel investors to Neogence, Brannon is entitled to rely in good faith on the corporate officers' representations without incurring personal liability, absent actual knowledge that those statement were false. Plaintiffs bear the burden of proving otherwise. The director safe harbor instruction was appropriate because there was sufficient evidence that Brannon's conduct falls within the scope of its protection. The trial court erred in denying Brannon's request for that jury instruction.

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7. The majority states, "This Court has 'consistently denied appellate review to [parties] who have attempted to assign error to the granting of their own requests.' " (quoting *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 383 (1996)). Just recently, however, this Court allowed and upheld a challenge to an instruction submitted by the party who subsequently objected. *See Justus v. Rosner*, ___ N.C. ___, ___, 821 S.E.2d 765, 769-72 (2018); *id.* at ___, 821 S.E.2d at 780-81 (Newby, J., dissenting).

Plaintiffs' own complaint, as well as the parties' stipulations in the pretrial order, recognize and affirm that "at all relevant times material to this action, Kirkbride, Brannon, and Rice served on Neogence's board of directors." *See Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 340, 777 S.E.2d 272, 282 (2015) ("[A] plaintiff's . . . assertions cannot overcome his own evidence to the contrary."). Brannon presented ample evidence that the solicitation of start-up funds for Neogence falls squarely within the scope of his duties as a corporate director. *See State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993) ("If a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction . . . ."). In fact, Neogence recruited Brannon as an outside director precisely for this purpose. *See Burlington Indus. v. Foil*, 284 N.C. 740, 758, 202 S.E.2d 591, 603 (1974) ("The business and affairs of a corporation are ordinarily managed by its board of directors." (citation omitted)); *see also* N.C.G.S. § 55-8-30 official cmt. (2017) (noting "the board may delegate or assign to appropriate [representatives] of the corporation the authority or duty to exercise [certain] powers"). Kirkbride invited Brannon to the board to secure "financing, investors, et cetera." Rice stated that Brannon "would make introductions to people that might have an interest in what [Neogence was] doing." As Brannon characterized it, he would "expos[e] this company to friends that may want to invest into it."

Brannon received no commissions or independent compensation for his solicitation efforts. *See Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985) (en banc) (Generally, a director only acts outside of those corporate duties when he or she acts for his or her own personal gain, or in bad faith or self-interest.), *overruled on other grounds by Gantler v. Stephens*, 965 A.2d 695, 713 n.54 (Del. 2009) (en banc); *see also Pinter*, 486 U.S. at 654, 108 S. Ct. at 2082, 100 L. Ed. 2d at 687 ("Typically, a person who solicits the purchase will have sought or received a personal financial benefit from the sale, such as . . . a brokerage commission." (citation omitted)). By stating his understanding of the Verizon opportunity, Brannon encouraged, but did not otherwise participate in, the investments.

Moreover, Brannon presented ample evidence that he relied on Cummings's statements to the directors. *See Harvell*, 334 N.C. at 364, 432 S.E.2d at 129. The complaint itself reveals that Brannon did so, stating, "On or about April 30, 2010, Brannon sent an e-mail to . . . investors stating that Neogence's chief sales officer, John Cummings ('Cummings'), 'just had a meeting in NY with Verizon . . . .' " Only after Cummings reported to the board and directors regarding the Verizon opportunity did the directors, not just Brannon, solicit funds from plaintiffs.

Moreover, plaintiffs made their loans to Neogence following their in-person meetings with Cummings, which Brannon did not even attend.

Brannon's directorial conduct is precisely at issue, which plaintiffs' own complaint contemplates and in support of which defense counsel presented evidence and argued before the trial court. If Brannon acted as a director and did not know the statement was false or misleading, he was entitled to rely in good faith upon it. *See* N.C.G.S. § 55-8-30 official cmt. ("[A] director is not liable for injury or damage . . . , no matter how unwise or mistaken . . . , if in performing his duties he met the [conduct] requirements of section 8.30."). Plaintiffs bear the burden of establishing either that Brannon was not acting within the scope of his directorial duties, and hence the safe harbor protection does not apply, or, to rebut the good faith presumption, that he acted with gross negligence or with actual knowledge that Cummings's representations were false. In fact, the trial court further misstated the law by instructing the jury that "a defendant is liable for making a false or misleading statement in soliciting the purchase of a security *even if he did not know* that [Cummings's] statement was false or misleading."

Providing adequate protection for outside directors is a fundamental consideration in the corporate context. Brannon did not waive his statutory rights under the director safe harbor, *see State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 602, 513 S.E.2d 812, 821 (1999); *see also* N.C.G.S. § 55-8-30 official cmt. sec. 4, and is entitled to a proper jury instruction on his role as a corporate director.

> The majority's unnecessarily restrictive reading of the Safe Harbor provision will discourage qualified persons from agreeing to serve as unpaid, independent outside directors for corporate governance. If a director, particularly an independent outsider, cannot rely upon the statements of company employees, officers, and consultants in soliciting funds without being subject to securities fraud liability the majority imposes here, there is little incentive to serve at all.

Piazza v. Kirkbride, 246 N.C. App. 576, 623, 785 S.E.2d 695, 724 (2016) (Tyson, J., concurring in part and dissenting in part).

IV. Conclusion

Brannon's statements to plaintiffs were materially the same as those of Rice. Plaintiffs did not solely or primarily rely on Brannon's statements about the Verizon opportunity but consulted directly with the one

person who was present at the meeting, Cummings, as well as corporate officers Rice and Kirkbride. The verdicts holding Brannon responsible, but not Rice, are irreconcilable and result in a substantial miscarriage of justice. Furthermore, Brannon, as a corporate director, was entitled to the director safe harbor instruction, which was properly preserved and erroneously denied by the trial court. As a result, Brannon should be granted a new trial. Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JOSEPH CHARLES BURSELL

No. 124A18

Filed 10 May 2019

Appeal and Error—objection below—constitutional issue—Rule 2

Defendant did not preserve for appeal the question of whether the search imposed by satellite-based monitoring was reasonable where defendant's objection below questioned the sufficiency of the evidence and did not clearly raise the constitutional issue. However, the State conceded that the trial court committed an error relating to a substantial right and the Court of Appeals did not abuse its discretion by invoking Appellate Rule 2.

Justices EARLS and DAVIS did not participate in the consideration or decision of this case.

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. ___, 813 S.E.2d 463 (2018), vacating an order for satellite-based monitoring entered on 10 August 2016 by Judge Ebern T. Watson III in Superior Court, New Hanover County. Heard in the Supreme Court on 28 August 2018.

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

Meghan Adelle Jones for defendant-appellee.

NEWBY, Justice.

On its merits, this case asks whether the trial court erred when it failed to determine if the lifetime satellite-based monitoring (SBM) imposed upon defendant constitutes a reasonable search under the Fourth Amendment. Contrary to the Court of Appeals' conclusion, however, defendant failed to specifically object to the imposition of SBM on constitutional grounds, thereby waiving his ability to raise that issue on appeal. Nonetheless, where the State concedes that the trial court committed error relating to a substantial right, the Court of Appeals did not abuse its discretion when it invoked Appellate Rule 2 to review the unpreserved constitutional issue. Accordingly, we reverse in part and affirm in part the decision of the Court of Appeals.

On 10 August 2016, defendant Joseph Charles Bursell pled guilty to statutory rape and taking indecent liberties with a minor. At the sentencing hearing, the State requested that the court find that defendant committed an aggravated, sexually violent offense and order lifetime registration as a sex offender and lifetime SBM. Defendant's counsel objected to the State's request concerning the imposition of lifetime sex offender registration and lifetime SBM:

> [Defense Counsel]: . . . I would object on two grounds. I know the status of the law is pretty clear as to the [sex offenders] register, but for purposes of preserving any record if that were to change, I would submit that it is insufficient under Fourth Amendment grounds and due process grounds to place him on the registry in its entirety. Alternatively, that the lifetime requirement be a little excessive in this case and would ask you to alternatively consider putting him on the 30-year list.
>
> As to satellite-based monitoring, I think the Court needs to hear some additional evidence other than the [recitation] of the facts from the attorney or from the district attorney as to satellite-based monitoring. And since that evidentiary issue has not been resolved, there [aren't] any statements from the victim or otherwise from law enforcement that you ought not to order satellite-based monitoring in this case, and that the registry alternative would satisfy those concerns. And we leave it at that, your Honor.

The trial court responded:

> All noted exceptions made on the record by [defense counsel] on behalf of the defendant as to his constitutional

> standing, as to the standing of the current law, and as to the future references in implication that you have made in your arguments. All those are noted for the record. All of those at this point in time are taken under consideration by the Court.

The trial court sentenced defendant to 192 to 291 months of imprisonment. Finding that he had committed an aggravated, sexually violent offense, the court further ordered defendant to register as a sex offender for life and enroll in SBM for life upon his release from prison unless monitoring is terminated under N.C.G.S. § 14-208.43. Defendant appealed from the trial court's order regarding the registry and SBM.

Before the Court of Appeals, defendant argued that the trial court improperly imposed lifetime SBM because it failed to determine whether the monitoring effectuated a reasonable search under the Fourth Amendment. *See Grady v. North Carolina*, ___ U.S. ___, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015) (per curiam) (holding that the State's SBM program "effects a Fourth Amendment search" that implicates the privacy expectations of the defendant and therefore must be reasonable to withstand constitutional scrutiny). The State asserted that defendant failed to preserve this Fourth Amendment challenge below, thereby waiving his ability to challenge the issue on appeal. The State noted, however, that if defendant properly preserved this argument, it would concede that the SBM order should be vacated and remanded for a determination of reasonableness consistent with *Grady*.

In a divided decision, the Court of Appeals concluded that defendant had properly preserved the issue of whether his SBM was reasonable under the Fourth Amendment. *State v. Bursell*, ___ N.C. App. ___, ___, 813 S.E.2d 463, 468 (2018). Alternatively, the Court of Appeals majority determined that "[a]ssuming, *arguendo*, this objection was inadequate to preserve a constitutional *Grady* challenge for appellate review, in our discretion we would invoke Rule 2 to relax Rule 10's issue-preservation requirement and review its merits." *Id.* at ___, 813 S.E.2d at 466-67. As a result, the Court of Appeals vacated the SBM order "without prejudice to the State's ability to file a subsequent SBM application." *Id.* at ___, 813 S.E.2d at 468. The dissent argued that defendant failed to properly preserve the constitutional issue for appeal and further asserted that the court should have declined to invoke Rule 2 to review it. *Id.* at ___, 813 S.E.2d at 468 (Berger, J., dissenting). The State appealed to this Court as of right based upon the dissenting opinion.

At the outset, we reiterate that "failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance

therewith, may impede the administration of justice." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 193, 657 S.E.2d 361, 362 (2008). Accordingly, "the Rules of Appellate Procedure are 'mandatory and not directory.' " *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007) (first quoting *Reep v. Beck*, 360 N.C. 34, 38, 619 S.E.2d 497, 500 (2005); and then quoting *Pruitt v. Wood*, 199 N.C. 788, 789, 156 S.E.2d 126, 127 (1930)). Our appellate rules state that "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 context." N.C. R. App. P. 10(a)(1). Furthermore, the objecting party must "obtain [from the trial court] a ruling upon the party's request, objection, or motion." *Id.*

The specificity requirement in Rule 10(a)(1) prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required. *Dogwood Dev.*, 362 N.C. at 195, 657 S.E.2d at 363 (citations omitted). Moreover, a specific objection "discourages gamesmanship," *State v. Meadows*, 371 N.C. 742, 746, 821 S.E.2d 402, 405-06 (2018), and prevents parties from "allow[ing] evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assign[ing] error to them if the strategy does not work," *id.* at 746, 821 S.E.2d at 406 (quoting *State v. Canady*, 330 N.C. 398, 402, 410 S.E.2d 875, 878 (1991)). Practically speaking, Rule 10(a)(1) contextualizes the objection for review on appeal, thereby enabling the appellate court to identify and thoroughly consider the specific legal question raised by the objecting party. N.C. R. App. P. 10 drafting committee note, cmt., para. 2, *reprinted in* 287 N.C. 698, 700-01 (1975) (After an objection at trial, "the fact that error will be asserted on appeal in respect of particular judicial action must be noted in the record on appeal, first for the benefit of the adverse party, then for the reviewing court.").

"It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Bell*, 359 N.C. 1, 28, 603 S.E.2d 93, 112 (2004) (quoting *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002), *cert. denied*, 537 U.S. 1117, 123 S. Ct. 882, 154 L. Ed. 2d 795 (2003)), *cert. denied*, 544 U.S. 1052, 125 S. Ct. 2299, 161 L. Ed. 2d 1094 (2005). As a result, even constitutional challenges are subject to the same strictures of Rule 10(a)(1). *See State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003) ("The failure to raise a constitutional issue before the trial court bars appellate review."); *State v. Smith*, 352

N.C. 531, 557, 532 S.E.2d 773, 790 (2000) (opining that the defendant waived his right to appellate review of an alleged due process violation "because he failed to raise it as constitutional error before the court"), *cert. denied*, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

The transcript from the sentencing hearing reveals that defendant did not clearly raise the constitutional issue of whether the lifetime SBM imposed on him constituted a reasonable search under the Fourth Amendment. Though defense counsel specifically objected to imposition of lifetime SBM, this objection questioned the sufficiency of the evidence supporting the SBM order. Thus, given the absence of any reference to the Fourth Amendment, *Grady* or other relevant SBM case law, privacy, or reasonableness, it is "not apparent from the context," N.C. R. App. P. 10(a)(1), that defense counsel intended to raise a constitutional issue. As a result, defendant failed to object to the SBM order on Fourth Amendment constitutional grounds with the requisite specificity, thereby waiving the ability to raise that issue on appeal. *See State v. Benso*n, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) ("Defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal."); *see also State v. McPhail*, 329 N.C. 636, 640-41, 406 S.E.2d 591, 594-95 (1991) (requiring a defendant to raise the same constitutional theory on appeal as argued in his objection at trial).

Accordingly, we reject the Court of Appeals' determination that defendant properly preserved for appeal the constitutional issue of whether the search imposed by the SBM order was reasonable. Nonetheless, we must now consider whether the Court of Appeals, in its discretion, appropriately invoked Appellate Rule 2 to review defendant's unpreserved argument.

On its own motion or the motion of a party, an appellate court of North Carolina may employ Rule 2 and suspend any part of the appellate rules "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest" except when prohibited by other Rules of Appellate Procedure. N.C. R. App. P. 2. "Rule 2 must be applied cautiously," and it may only be invoked "in exceptional circumstances." *Hart*, 361 N.C. at 315, 644 S.E.2d at 205. A court should consider whether invoking Rule 2 is appropriate "in light of the specific circumstances of individual cases and parties, such as whether 'substantial rights of an appellant are affected.' " *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis omitted) (quoting *Hart*, 361 N.C. at 316, 644 S.E.2d at 205).

As a result, a decision to invoke Rule 2 and suspend the appellate rules "is always a discretionary determination." *Id.* at 603, 799 S.E.2d at 603 (citations omitted). Because a court only employs Rule 2 in limited instances depending on the specific facts and circumstances of the case, "precedent cannot create an automatic right to review via Rule 2." *Id.* at 603, 799 S.E.2d at 603. Thus, we review each application of Rule 2 for abuse of discretion regardless of whether the Court of Appeals invokes it or declines to invoke it. *See Steingress v. Steingress*, 350 N.C. 64, 67, 511 S.E.2d 298, 300 (1999).

In the present case the Court of Appeals majority did not abuse its discretion by invoking Rule 2. The Court of Appeals suspended the appellate rules after examining "the specific circumstances of [the] individual case[ ] and parties." *Campbell*, 369 N.C. at 603, 799 S.E.2d at 602 (citations and emphasis omitted). The Court of Appeals first noted that a constitutional right, such as the Fourth Amendment right implicated here, is a substantial right. The Court of Appeals deemed the invocation of Rule 2 appropriate "when considering defendant's young age, the particular factual bases underlying his pleas, and the nature of those offenses, combined with the State's and the trial court's failures to follow well-established precedent in applying for and imposing SBM, and the State's concession of reversible *Grady* error." *Bursell*, ___ N.C. App. at ___, 813 S.E.2d at 467 (majority opinion). While Rule 2 should be invoked "cautiously," *Dogwood Dev.*, 362 N.C. at 196, 657 S.E.2d at 364, when, as here, the State concedes that the trial court committed error relating to a substantial right, the Court of Appeals did not abuse its discretion by invoking Rule 2.

Accordingly, we reverse the Court of Appeals' conclusion that defendant preserved the constitutional issue when he failed to specifically object to the imposition of SBM on constitutional grounds but nonetheless affirm its decision in the alternative to review the issue under Rule 2 and to vacate the trial court's SBM order without prejudice to the State's ability to file another application for SBM.

REVERSED IN PART; AFFIRMED IN PART; REMANDED.

Justices EARLS and DAVIS did not participate in the consideration or decision of this case.

STATE v. DANIEL

[372 N.C. 202 (2019)]

STATE OF NORTH CAROLINA
v.
DAVID WOODARD DANIEL

No. 164A18

Filed 10 May 2019

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. ___, 814 S.E.2d 618 (2018), reversing an order granting defendant's motion to suppress entered on 8 June 2017 by Judge Patrice A. Hinnant in Superior Court, Wilkes County and remanding for further proceedings. Heard in the Supreme Court on 8 April 2019.

Joshua H. Stein, *Attorney General*, *by Christopher W. Brooks*, *Special Deputy Attorney General*, *for the State.*

Vannoy, *Colvard*, *Triplett & Vannoy*, *PLLC*, *by Jay Vannoy*, *for defendant-appellant.*

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
J.C.

No. 405PA17

Filed 10 May 2019

Appeal and Error—criminal record expunction—appeal by State—not provided in statute

Where petitioner was granted an expunction of records from a prior criminal conviction and from previously dismissed charges pursuant to N.C.G.S. §§ 15A-145.5 and 15A-146, the State did not have a right to appeal the order granting expunction. Neither N.C.G.S. § 15A-145.5 nor 15A-1445 provided the State a right to appeal.

Justice NEWBY dissenting.

Justices ERVIN and DAVIS 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, ___ N.C. App. ___, 808 S.E.2d 154 (2017), dismissing the State's appeal from an order of expunction entered on 10 August 2016 by Judge Mary Ann Tally in Superior Court, Onslow County. Heard in the Supreme Court on 9 April 2019.

Joshua H. Stein, Attorney General, by William P. Hart, Jr., Assistant Attorney General, and Adren L. Harris, Special Deputy Attorney General, for respondent-appellant.

Yoder Law PLLC, by Jason Christopher Yoder, for petitioner-appellee.

EARLS, Justice.

The petitioner, J.C., was granted an expunction of arrest, trial, and conviction records from a prior conviction and from previously dismissed charges pursuant to N.C.G.S. §§ 15A-145.5 and 15A-146, respectively. The statute authorizing expunction of his dismissed charges was first enacted in 1979 "to provide for the expunction of arrest and trial records of youthful offenders when charges are dismissed or when there are findings of not guilty." *See* Act of Feb. 20, 1979, Ch. 61, 1979 N.C. Sess. Laws 34. At issue here is the proper application of the statute

authorizing expunction of his conviction, N.C.G.S. § 15A-145.5. This law was enacted in 2012 "to allow for expunction of nonviolent felonies or nonviolent misdemeanors after fifteen years for persons who have had no other convictions for felonies or misdemeanors other than traffic violations under the laws of the United States, this State, or any other jurisdiction, as recommended by the Legislative Research Commission." *See* Act of July 2, 2012, Ch. 191, 2011 N.C. Sess. Laws 901 (Reg. Sess. 2012).[1] The statute authorizes a court to order that a person "be restored, in the contemplation of the law, to the status the person occupied before such arrest or indictment or information." N.C.G.S. § 15A-145.5(c) (Supp. 2018).

Previously the State has sought appellate review of expunction orders through petitions for writ of certiorari, which the Court of Appeals has allowed on several occasions. *See State v. Frazier*, 206 N.C. App. 306, 697 S.E.2d 467 (2010) (reversing grant of expunction when trial court erroneously applied statute to a conviction occurring before the effective date of the statute); *In re Expungement for Kearney*, 174 N.C. App. 213, 620 S.E.2d 276 (2005) (reversing order granting expunction of conviction and affirming expunction of dismissed charge); *In re Robinson*, 172 N.C. App. 272, 615 S.E.2d 884 (2005) (reversing erroneous expunction of multiple, unrelated offenses occurring over a period of years); *In re Expungement for Spencer*, 140 N.C. App. 776, 538 S.E.2d 236 (2000) (reversing order granting expunction to defendant who was over the age of twenty-one at the time of the offense).

For the first time, in this case the State seeks to appeal as a matter of right the trial court's order granting J.C.'s expunction with respect to his conviction for the offense of indecent liberties with a child. The Court of Appeals dismissed the State's appeal, holding the State had no right to appeal the expunction order. The State filed a petition for discretionary review with this Court, as well as a petition for writ of certiorari. We granted the State's petition for discretionary review to determine whether the Court of Appeals erred in dismissing the State's appeal

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1. "In its 2012 report recommending the addition of a new expunction category for certain non-violent felonies and misdemeanors, which would later form the basis for the original section 145.5 expunction statute, the North Carolina General Assembly's Criminal Record Expunction Committee noted that '[e]xpunction is a process that can and should be used to give people who have committed minor crimes a clean slate and a fresh start, especially when a significant amount of time has passed without further trouble.' " Charles J. Johnson, *Automatic (Expunctions) for the People: For A Court-Initiated Expunction Right in North Carolina for Charges Not Resulting in Conviction*, 96 N.C. L. Rev. 573, 591 (2018) (alteration in original) (footnotes omitted).

from an order granting expunction under N.C.G.S. § 15A-145.5. Because we conclude that the State does not have a right of appeal in orders granting expunctions under N.C.G.S. § 15A-145.5, we affirm the Court of Appeals' decision.

Factual and Procedural Background

On 11 June 1987, petitioner pleaded guilty in Superior Court, Onslow County to one count of indecent liberties which occurred on 24 May 1986. In exchange for J.C.'s guilty plea, the State dismissed a second indecent liberties charge, as well as an incest charge. The trial court sentenced J.C. to a three-year term, which was suspended for three years subject to supervised probation. On 11 June 2015, J.C. filed a petition in Onslow County under N.C.G.S. § 15A-145.5 seeking expunction of the offense to which he pleaded guilty. J.C. also filed a petition seeking an expunction under N.C.G.S. §§ 15A-145(a) and 15A-146 regarding the two charges against him that were dismissed.

According to section 15A-145.5, a person who has been previously convicted of a "nonviolent felony" as defined in the statute may "file a petition, in the court of the county where [he] was convicted, for expunction of [the] . . . conviction from the person's criminal record if [he] has no other misdemeanor or felony convictions, other than a traffic violation." N.C.G.S. § 15A-145.5(c). The statute contains a number of conditions, including that the qualifying offense not have been:

> (1) A Class A through G felony . . . .
>
> (2) An offense that includes assault as an essential element of the offense.
>
> (3) An offense requiring registration pursuant to Article 27A of Chapter 14 of the General Statutes, whether or not the person is currently required to register.
>
> (4) Any of the following sex-related or stalking offenses: G.S. 14-27.25(b), 14-27.30(b), 14-190.7, 14-190.8, 14-190.9, 14-202, 14-208.11A, 14-208.18, 14-277.3, 14-277.3A, 14-321.1.
>
> . . . .
>
> (7) An offense under G.S. 14-401.16.
>
> . . . .
>
> (8) Any felony offense in which a commercial motor vehicle was used in the commission of the offense.

Id. § 15A-145.5(a)(1)-(8) (Supp. 2018). In the affidavit accompanying his petition, J.C. asserted that the felony for which he was convicted "[wa]s a Class H felony" which "did not include assault as an essential element of the offense" and "does not require registration pursuant to Article 27A of Chapter 14." Petitioner averred that his conviction also did not fall under N.C.G.S. § 15A-145.5(a)(4), (a)(7), or (a)(8).

On 8 August 2016, Judge Mary Ann Tally granted both petitions for expunction pursuant to N.C.G.S §§ 15A-145.5 and 15A-146 and ordered that the offenses be removed from J.C.'s record. On 23 August 2016, Judge Tally entered both orders for expunction, after which the State appealed the order expunging J.C.'s conviction records to the Court of Appeals. On 19 September 2017, the Court of Appeals dismissed the State's appeal. *County of Onslow v. J.C.*, ___ N.C. App. ___, 805 S.E.2d 360 (2017). The court then allowed the State's petition for rehearing and on 7 November 2017, issued an opinion dismissing the State's appeal and denying the State's petition for writ of certiorari. *County of Onslow v. J.C.*, ___ N.C. App. ___, 808 S.E.2d 154, 155-56 (2017). On appeal, the State challenged only the order granting defendant an expunction for his conviction pursuant to N.C.G.S. § 15A-145.5 and made no argument regarding the expunction under N.C.G.S. § 15A-146. *Id.* at ___, 808 S.E.2d at 155. In its opinion the Court of Appeals unanimously concluded that the State had no statutory right to appeal the expunction order and that when the State fails to demonstrate its right to appeal, the appellate court lacks jurisdiction over the matter. *Id.* at ___, 808 S.E.2d at 155. On 27 November 2017, the State petitioned this Court for discretionary review and for writ of certiorari. This Court issued a special order allowing the State's request for discretionary review on 14 August 2018.

Analysis

This case of first impression requires us to apply the plain language of the statutory framework established by the General Assembly for the expunction of certain criminal record information. Questions of statutory interpretation, like questions of law, are reviewed de novo. *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010) (citation omitted). "As a general rule the prosecution cannot appeal or bring error proceedings from a judgment in favor of the defendant in a criminal case, in the absence of a statute clearly conferring that right." *State v. Harrell*, 279 N.C. 464, 466, 183 S.E.2d 638, 640 (1971) (quoting *State v. Vaughan*, 268 N.C. 105, 108, 150 S.E.2d 31, 33 (1966)).

The statute at issue here designates a petition for an expunction as "a motion in the cause in the case wherein the petitioner was convicted." N.C.G.S. § 15A-145.5(c)(3). Considering the statute's plain language, an

expunction petition is part of the underlying criminal proceeding, making expunctions criminal matters. "The right of the State to appeal in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed." *State v. Elkerson*, 304 N.C. 658, 669, 285 S.E.2d 784, 791 (1982) (citations omitted). This Court has recognized that "[t]he only statutory authority we find which permits an appeal by the State in a criminal case is contained in G.S. 15A-1445." *Id.* at 669, 285 S.E.2d at 791. In a criminal case the State may appeal only under the following circumstances:

> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
>
> (2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.
>
> (3) When the State alleges that the sentence imposed:
>
> a. Results from an incorrect determination of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
>
> b. Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level;
>
> c. Contains a term of imprisonment that is for a during not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> d. Imposes an intermediate punishment pursuant to G.S. 15A-1340.13(g) based on findings of extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation.
>
> (b) The State may appeal an order by the superior courtgranting a motion to suppress as provided in G.S. 15A-979.

N.C.G.S. § 15A-1445 (2017). Because section 15A-1445 is to be strictly construed, any deviations from or additions to the orders or rulings

appealable by the State must be authorized by the legislature, not the courts. *Elkerson*, 304 N.C. at 670, 285 S.E.2d at 792 ("If the State's right to appeal is to be enlarged, it must be done by the legislature."). It is not the province of the courts to rewrite statutes absent some constitutional defect or conflict with federal law. *See State ex rel. McCrory v. Berger*, 368 N.C. 633, 661, 781 S.E.2d 248, 266 (2016) (Newby, J., concurring in part and dissenting in part) ("When one branch interferes with another branch's performance of its constitutional duties, it attempts to exercise a power reserved for the other branch."). Judicial restraint requires us to defer to the will of the General Assembly. *State v. Whitehurst*, 212 N.C. 300, 303, 193 S.E. 657, 659-60 (1937) ("Criminal statutes are not to be extended by implication or equitable construction to include those not within their terms, for the very obvious reason that the power of punishment is vested in the legislative and not in the judicial department. It is the General Assembly which is to define crimes and ordain their punishment.")

In this case our task is straightforward because "[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978). The statute governing the State's right to appeal, N.C.G.S. § 15A-1445, does not contain language allowing the State to appeal an expunction order. The statute governing defendant's expunction, N.C.G.S. § 15A-145.5, allows for the State to object to a petition for an expunction before the hearing takes place; however, the statute does not afford the State the right to appeal an expunction order.

The State contends that expunction hearings are civil proceedings, similar to hearings conducted to determine an individual's eligibility for satellite-based monitoring, and therefore, the State's right to appeal should be governed by N.C.G.S. § 7A-27, which generally allows any party an appeal of right to the Court of Appeals from a final judgment of a superior court. N.C.G.S. § 7A-27(b)(1) (2017). Because the court's order granting petitioner an expunction of his criminal history record essentially disposed of the matter, the State argues it is a final order appealable under section 7A-27.

The legislature stated that a petition for an expunction "is a motion in the cause in the case wherein the petitioner was convicted." N.C.G.S. § 15A-145.5(c)(3). The plain effect of that provision is that an expunction order is one arising in a criminal proceeding. As further support for the proposition than an expunction is part of a criminal proceeding, it

is significant that the legislature placed the expunction statute, N.C.G.S. § 15A-145.5, in the chapter addressing criminal procedure. Here again, as this Court has held consistently, clear statutory language must be given its plain meaning. *See, e.g.*, *State ex rel. Utilities Com. v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977) (reversing the Utilities Commission's approval of a surcharge because it violated clear statutory language and thereby was unauthorized). An expunction proceeding is part of a criminal case.

Moreover, the State's contention that expunction proceedings are similar to satellite-based monitoring (SBM) proceedings is incorrect based on the plain language of the SBM statutes. This Court addressed SBM in *State v. Bowditch*, 364 N.C. 335, 342, 700 S.E.2d 1, 6 (2010), and determined that the legislature intended SBM to be "a nonpunitive, regulatory program." The Court looked to the legislature's purpose in placing SBM in the same chapter as the sex offender registration laws and concluded that SBM was one part of a larger framework involving the sex offender registration program, stating that the "legislative objective [was] to make the SBM program one part of a broader regulatory means of confronting the unique 'threat to public safety posed by the recidivist tendencies of convicted sex offenders.' " *Id.* at 343, 700 S.E.2d at 7 (quoting *State v. Abshire*, 363 N.C. 322, 323, 677 S.E.2d 444, 446 (2009)). The expunction statutes are distinct from SBM statutes in that expunction provisions are located in Chapter 15A, the Criminal Procedure Act, and not in Chapter 14, which contains the SBM and sex offender registration statutes. Considering that a petition for an expunction "is a motion in the cause in the case wherein the petitioner was convicted," an expunction petition is one part of the broader criminal procedure applicable to offenders and consequently, is governed by N.C.G.S. § 15A-1445 and not N.C.G.S. § 7A-27. N.C.G.S. § 15A-145.5(c)(3).

It is also important to note that after the Court of Appeals issued its opinion in this case, the General Assembly amended section 15A-145.5 but did not include a right to appeal on the part of the State. *See* Act of June 27, 2017, Ch. 195, Sec. 1, 2017 N.C. Sess. Laws 1387, 1387-88. We can find good reasons to support the policy judgment made by the General Assembly to not give the State an absolute right to appeal any expunction order. Based on the statute, the process for an expunction is straightforward and more ministerial than deliberative. As long as the petitioner meets the relevant criteria, he may be granted an expunction. Unlike a trial where evidence is weighed, in an expunction proceeding a petitioner either meets the criteria or does not. This approach is also reflected in recently introduced bills in the General Assembly that

provide for the automatic expunction of certain records and remove the requirement for a hearing on the petition. *See* H. 132, 154th Gen. Assemb., Reg. Sess. (N.C. 2019); S. 82, 154th Gen. Assemb., Reg. Sess. (N.C. 2019). Nevertheless, whatever future changes to the process might be made, those are for the legislature to determine, not this Court.

Our decision today in no way forecloses the opportunity to correct errors of law that may occur at the trial court level. As it has done in the past, the State may seek review of an expunction order by writ of certiorari. Considering that the vast majority of expunction proceedings do not invoke the court's discretion when deciding whether to grant or deny such an order, an unjust outcome that would invoke certiorari review should rarely arise. Since N.C.G.S. § 15A-145.5 is "clear and unambiguous," we must "give effect to the plain and definite meaning of the language," *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (quoting *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993)), which fails to give the State the right to appeal.

Although not binding on this Court, it is worth noting that other jurisdictions have followed the same reasoning as ours to conclude there was no statutory right to appeal an expunction order under their state statutes. *See*, *e.g.*, *Bell v. State*, 217 So.3d 962 (Ala. Crim. App. 2016) ("There is no provision in Chapter 27 of Title 15, 'Expungement,' for a direct appeal of the denial of a petition for expungement."). Likewise, in *State v. Alder*, 92 S.W.3d 397, 401 (Tenn. 2002) the Tennessee Supreme Court stated: "Because of the plain and unambiguous language of Rules 3(b) and 3(c), we conclude that neither the State nor a criminal defendant has the authority to appeal as of right an unfavorable ruling concerning an expungement order under Rule 3." *Alder* was later superseded by statute to allow a defendant to appeal a final expunction order as of right. *State v. Rowland*, 520 S.W.3d 542, 545 (Tenn. 2017) (citing N.C. R. App. P. 3(b)) (amended 2003).

Conclusion

The legislature did not give the State the right to appeal an expunction order in N.C.G.S. § 15A-145.5 and did not amend section 15A-1445 to include this right. It is not the Court's role to now expand N.C.G.S. § 15A-145.5 to include this right, or to construe N.C.G.S. § 7A-27 as governing procedure in a criminal matter not clearly brought under that statute's provisions authorizing appeals of right from the trial courts. Therefore, the Court of Appeals' decision holding that the State does not have a right to appeal an order granting an expunction is affirmed.

AFFIRMED.

Justice NEWBY dissenting.

The rule of law requires equal treatment to everyone similarly situated. Our appellate process assures uniform application of the law. Today the majority's decision deprives the parties to an expunction proceeding of a right to appeal, opening the door to inconsistent expungement decisions and depriving the trial bench of needed guidance. This case decides whether a party may appeal a trial court's final order from an ancillary expunction proceeding under N.C.G.S. § 15A-145.5. Contrary to the majority's conclusion, a straightforward application of N.C.G.S. § 7A-27, which outlines the right to appeal final judgments generally, affords either party a right to appellate review of an expunction decision. I respectfully dissent.

On 11 June 1987, petitioner pled guilty to felony indecent liberties under N.C.G.S. § 14-202.1, a Class H felony at the time, and received a three-year sentence, suspended subject to three years of supervised probation. The State dismissed a second charge of indecent liberties and a charge of incest. In June 2015, after the required statutory time had elapsed, petitioner petitioned the Superior Court, Onslow County to expunge all records of the conviction under N.C.G.S. § 15A-145.5, the statute that allows a person who has been previously convicted of certain felonies to file a petition for expunction of a conviction from the person's criminal record if certain conditions are met. *See* N.C.G.S. § 15A-145.5 (Supp. 2018). Petitioner alleged he met all of the stated statutory conditions. Given that N.C.G.S. § 15A-145.5 precludes certain classes of felonies from expunction, at trial the State questioned whether the statute allows the trial court to "look back" at the felony's classification at the time it was committed or whether the court should consider the felony's current classification.

Noting the State's objection, the trial court granted the petition entering an order of expunction on 8 August 2016. The trial court found the underlying offense was a Class H felony at the time of conviction, but was elevated to a Class F felony in 1993, and that the same offense would not qualify for expunction if committed after 1995. The trial court concluded as a matter of law that, "having considered the elements as they existed at the time of the offense and conviction," "the [p]etitioner is entitled and does qualify for expunction in both petitions." The court thus ordered that all three offenses, including the two criminal charges the State dismissed, be removed from petitioner's record.

The State appealed the expunction order only as to the conviction for indecent liberties.

On appeal the State raised a purely legal issue of whether the expunction statute allows the trial court to consider the felony's classification at the time of the offense as the trial court did here. For its appeal of right, the State relied on N.C.G.S. § 7A-27, which generally governs appeals of right from judgments of the superior court, including those "from which an appeal is authorized by statute." N.C.G.S. § 7A-27(b)(4) (2017). The Court of Appeals concluded that section 7A-27 did not authorize the appeal, applying N.C.G.S. § 15A-1445 instead because the expunction statute and N.C.G.S. § 15A-1445 are both part of Chapter 15A, the Criminal Procedure Act. *State v. J.C.*, ___ N.C. App. ___, ___, 808 S.E.2d 154, 155 (2017). The Court of Appeals thus concluded that expunction proceedings are "part of a 'criminal proceeding,' and, therefore, N.C. Gen. Stat. § 15A-1445—and not N.C. Gen. Stat. § 7A-27—is the relevant statute in determining the State's right to appeal in this case." *Id.* at ___, 808 S.E.2d at 155. The court added that "[r]elief from errors committed in criminal trials and proceedings . . . may be sought by . . . [a]ppeal, as provided in Article 91," in which section 15A-1445 is codified. *Id.* at ___, 808 S.E.2d at 155 (alterations in original) (quoting N.C.G.S. § 15A-1401 (2015)).

The court further opined that "because N.C. Gen. Stat. § 15A-1445 clearly does not include any reference to a right of the State to appeal from an order of expunction," "the General Assembly did not intend to bestow such a right at the time the statute was adopted." *Id.* at ___, 808 S.E.2d at 155. Ultimately concluding the State had no right to appeal under section 7A-27, the panel dismissed the State's appeal and, in its discretion, denied the State's associated petition for writ of certiorari. *Id.* at ___, 808 S.E.2d at 156. The majority of this Court agrees with the Court of Appeals' analysis.

"Judgments and orders of the Superior Court are divisible into these two classes: (1) Final judgments; and (2) interlocutory orders." *Veazey v. City of Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381 (1950) (citing N.C.G.S. § 1-208). Unlike an interlocutory order, "[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." *Id.* at 361-62, 57 S.E.2d at 381 (citations omitted). Because a final judgment disposes of the whole case, it is therefore "immediately appealable." *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 13, 155 S.E.2d 772, 783 (1967) (citing 4 Am. Jur. 2d, *Appeal and Error* § 53 (1962)). Generally, final judgments from the trial court are subject to appellate review. *Veazey*,

231 N.C. at 362, 57 S.E.2d at 381 ("An appeal lies to the [appellate court] from a final judgment of the Superior Court.").

Section 7A-27, entitled "Appeals of right from the courts of the trial divisions," affords any party the right to appeal a final judgment directly to the Court of Appeals:

> (1) From *any final judgment of a superior court*, other than one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, except for a final judgment entered upon review of a court martial under G.S. 127A-62.

N.C.G.S. § 7A-27(b)(1) (2017) (emphasis added). Thus, based on the plain language of N.C.G.S. § 7A-27, a party may appeal any final judgment of a superior court. *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 381 ("[A]n appeal can be taken only from such judgments and orders as are designated by the statute regulating the right of appeal."). Indisputably, the expungement order is a final judgment. Notably, this statute includes criminal cases by implication, excluding the right to appeal criminal convictions based on guilty pleas.

The State's right to appeal may be statutorily limited to prevent double jeopardy issues in a criminal case. *See State v. Elkerson*, 304 N.C. 658, 669, 285 S.E.2d 784, 791 (1982) ("The right of the State to appeal in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed." (citing N.C.G.S. § 15A-1445)); *see also* N.C.G.S. § 15A-1445 (2017) ("Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division . . . a decision or judgment dismissing criminal charges as to one or more counts . . . [or] the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law" and may appeal to challenge the propriety of certain criminal sentences and punishments and grants of motions to suppress.).

Even though petitioner's underlying criminal conviction is relevant here, the State's appeal in the instant case arises from a motion in a later-in-time ancillary expunction proceeding, rather than a case involving a criminal conviction. *See* N.C.G.S. § 15A-145.5. Like other ancillary proceedings conducted under Chapters 14, 15, and 15A, the instant case is not a criminal appeal that triggers the statutory limitations put in place to prevent criminal double jeopardy. *See*, *e.g.*, *In re Timberlake*, ___ N.C. App. ___, ___, 792 S.E.2d 525, 527 (2016) (noting that the State

"fail[ed] to appeal from the trial court's order" terminating the petitioner's sex offender registration requirement, "as allowed in N.C. Gen. Stat. § 7A-27"); *State v. Singleton*, 201 N.C. App. 620, 625, 689 S.E.2d 562, 565 (A satellite-based monitoring hearing "is not a 'criminal trial or proceeding' " under N.C.G.S. § 15A-1442 or N.C.G.S. § 15A-1444, and the Court of Appeals may consider appeals from SBM determinations.), *disc. rev. improvidently allowed*, 364 N.C. 418, 700 S.E.2d 226 (2010) (per curiam); *id.* at 626, 689 S.E.2d at 566 (recognizing the State's right to appeal under N.C.G.S. § 7A-27, noting that, "[f]or all practical purposes there is an unlimited right of appeal . . . from any final judgment of the superior court or the district court in civil and criminal cases" (first alteration in original) (quoting *State v. Black*, 7 N.C. App. 324, 327, 172 S.E.2d 217, 219 (1970) (citing N.C.G.S. § 7A-27))). The issues listed in N.C.G.S. § 15A-1445(a) as appealable by the State are the types of issues that arise in traditional criminal trials, suggesting that the statute which the majority deems controlling may well not apply outside the context of a traditional criminal trial. Nonetheless, the majority classifies "an expunction [as] part of a criminal proceeding" because it arises from a "motion in the cause in the case wherein the petitioner was convicted," quoting N.C.G.S. § 15A-145.5, and then appears to simply assume that N.C.G.S. § 15A-1445(a) applies in the present context.

Like expunction petitions, however, motions relating to a defendant's obligation to register as a sex offender or enroll in SBM also arise from the underlying criminal case and yet, N.C.G.S. § 7A-27 affords the State an appeal in those cases. The majority's classification of this ancillary proceeding as "a criminal proceeding" would operate to bar the State's appeal in sex offender registry and SBM cases. Moreover, the majority's approach, in all probability, would likewise deny a petitioner seeking an expunction an appeal as of right even if the trial court denied his expunction petition as the result of a legal error.

The majority assumes that the placement of the expunction statutes in Chapter 15A suggests that expunction motions are governed by the criminal appeals statute; however, one would not expect to find appeal-related provisions in the substantive expunction statutes. Chapter 14 is entitled "Criminal Law" and, unlike Chapter 15A, contains the bulk of the statutory provisions dealing with substantive criminal offenses to be found in the General Statutes. The majority mistakenly relies on *State v. Whitehurst*, 212 N.C. 300, 193 S.E. 657 (1937), to support its conclusion when that case involved the construction of a substantive criminal statute relating to embezzlement rather than to ancillary proceedings such as expunction motions.

Contrary to the majority's view that "the process for an expunction is straightforward and more ministerial than deliberative," a final expunction decision involves both legal analysis and an exercise of discretion. N.C.G.S. § 15A-145.5(c) (stating that, if the trial court finds the petitioner has satisfactorily met the statutory requirements, "it *may* order that such person be restored, in the contemplation of the law, to the status the person occupied before such arrest" (emphasis added)). When the trial court exercises discretion, those decisions are reviewed for abuse of discretion; however, here the State raises a purely legal issue which appears to be one of first impression regarding the applicability of the expunction statute to various convictions. Furthermore, the cases cited by the majority in which appellate review occurred demonstrate the need for appellate guidance. In all cited cases, the trial court's decision was reversed. *See State v. Frazier*, 206 N.C. App. 306, 697 S.E.2d 467 (2010) (reversing the trial court's grant of expunction); *In re Robinson*, 172 N.C. App. 272, 615 S.E.2d 884 (2005) (same); *In re Expungement for Spencer*, 140 N.C. App. 776, 538 S.E.2d 236 (2000) (same); *see also In re Expungement for Kearney*, 174 N.C. App. 213, 620 S.E.2d 276 (2005) (reversing in part and affirming in part an order granting expunction). Appellate review brings consistency to expunction decisions.

This case in particular highlights the need for appellate review when the trial court grappled with an issue of statutory interpretation that appears to be one of first impression. Section 7A-27 provides the statutory authorization for such review. Therefore, I dissent.

Justices ERVIN and DAVIS join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
RAMELLE MILEK LOFTON

No. 143PA18

Filed 10 May 2019

Indictment and Information—manufacture of marijuana—intent to distribute

The indictment charging defendant with manufacture of marijuana was sufficient where it alleged that defendant manufactured marijuana by "producing, preparing, propagating and processing" but did not allege that defendant acted with an intent to distribute. While one of the alleged means of manufacture required a showing of intent to distribute, the other three did not.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 816 S.E.2d 207 (2018), finding no error in part and vacating in part a judgment entered on 20 July 2016 by Judge Martin B. McGee in Superior Court, Wayne County. Heard in the Supreme Court on 5 March 2019.

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

William D. Spence for defendant-appellee.

ERVIN, Justice.

The issue before the Court in this case is whether an indictment returned for the purpose of charging defendant Ramelle Milek Lofton with manufacturing marijuana is fatally defective because it fails to allege that defendant acted with an "intent to distribute." After careful consideration of the record in light of the applicable law, we reverse the Court of Appeals' decision to vacate defendant's manufacturing marijuana conviction and remand this case to the Court of Appeals for consideration of defendant's challenge to the sufficiency of the evidence to support that conviction.

On 20 January 2015, officers of the Goldsboro Police Department obtained the issuance of a warrant authorizing a search of defendant's residence. While executing this search warrant, investigating officers discovered loose marijuana seeds and stems, a marijuana grinder, a digital scale, cigar wrappers, and clear plastic bags with green residue in a dresser and aluminum foil-lined walls and a light hanging from a hanger above a blue plastic container that had dirt in its corners, a container lid into which circular holes had been cut, and a stack of perforated Styrofoam cups in a closet. In addition, investigating officers seized a bag of fertilizer, planting rocks, and a book containing instructions for growing marijuana from the closet. After these items had been discovered, defendant admitted to the investigating officers that he had created the growing facility, that the materials discovered in the residence belonged to him, and that he had attempted to grow marijuana five or six years earlier.

On 2 May 2016, the Wayne County grand jury returned a bill of indictment charging defendant with manufacturing marijuana, possession of drug paraphernalia, and possession of marijuana. In the indictment returned against defendant for the purpose of charging him with manufacturing marijuana, the grand jury alleged that defendant "unlawfully, willfully and feloniously did manufacture [marijuana] . . . by producing, preparing, propagating and processing a controlled substance." The charges against defendant came on for trial before the trial court and a jury at the 18 July 2016 criminal session of Superior Court, Wayne County. On 20 July 2016, the jury returned a verdict convicting defendant of attempting to manufacture marijuana and possessing marijuana and acquitting defendant of possessing drug paraphernalia. Based upon the jury's verdict, the trial court consolidated defendant's convictions for judgment and sentenced defendant to a term of six to seventeen months imprisonment, suspended defendant's sentence, and placed him on supervised probation for a period of twenty-four months. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued that the trial court had erred by denying his motion to dismiss the manufacturing marijuana charge for insufficiency of the evidence. On 1 May 2018, the Court of Appeals filed an opinion finding no error in defendant's conviction for possessing marijuana and vacating defendant's attempted manufacturing marijuana conviction on the grounds that the indictment underlying that conviction was fatally defective given the failure of the manufacturing marijuana indictment to allege that defendant had acted with an "intent to distribute." *State v. Lofton*, ___ N.C. App. ___, ___, 816 S.E.2d 207, 211 (2018).

In reaching this result, the Court of Appeals relied upon this Court's decision in *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984) (citing *State v. Childers*, 41 N.C. App. 729, 732, 255 S.E.2d 654, 656-57, *disc. rev. denied*, 298 N.C. 302, 259 S.E.2d 916 (1979)), which stated that a conviction for manufacturing a controlled substance "does not require an intent to distribute unless the activity constituting manufacture is preparation or compounding." *Lofton*, ___ N.C. App. at ___, 816 S.E.2d at 210 (emphasis omitted) (quoting *Brown*, 310 N.C. at 568, 313 S.E.2d at 588). In view of the fact that the indictment returned against defendant for the purpose of charging him with manufacturing marijuana "included preparation as a basis" for its contention that defendant had unlawfully manufactured marijuana, the Court of Appeals concluded that the indictment "failed to allege a required element—intent to distribute." *Id.* at ___, 816 S.E.2d at 211. As a *result*, "because the State chose to allege four separate bases pursuant to which it could attempt to prove [d]efendant's guilt of the single count of manufacturing a controlled substance," the Court of Appeals concluded that "it was necessary that *all four* of those bases were alleged with sufficiency" in the indictment in order "to confer jurisdiction on the trial court for the manufacturing charge," with "[t]he omission of the element of intent from the indictment charging [d]efendant of manufacturing a controlled substance constitut[ing] a fatal defect." *Id.* at ___, 816 S.E.2d at 211.

On 24 May 2018, the State filed a petition seeking discretionary review of the Court of Appeals' decision. In its petition, the State argued that "[a]n indictment alleging a violation of Section 90-95(a)(1) need not contain allegations negating every statutory exclusion," citing *State v. Land*, 223 N.C. App. 305, 311, 733 S.E.2d 588, 592 (2012), *aff'd*, 366 N.C. 550, 742 S.E.2d 803 (2013) (holding that an indictment charging the unlawful delivery of marijuana did not need to allege that the defendant had received no remuneration on the grounds that, since the defendant's guilt could be proved by either evidence of a transfer of more than five grams or a transfer for remuneration and since, as stated in *Land*, "the methods of proof set out in [Section] 90-95(b)(2) are mere evidentiary matters, they need not be included in the indictment" (alterations in the petition)). In addition, the State contended that "it was not necessary to specify the manner of manufacturing, and the terms 'producing, preparing, propagating, and processing' may be disregarded as surplusage," citing *State v. Miranda*, 235 N.C. App. 601, 607, 762 S.E.2d 349, 354 (2014). According to the State, even though "intent to distribute is an 'element' of manufacturing, in the sense that the State has to disprove preparation for personal use at trial," "it does not follow that intent to distribute is an element, in the sense that an indictment which omits it

is fatally defective." As a result of the fact that this case represents the first occasion upon which "the Court of Appeals [found] an indictment for manufacturing defective for failure to allege intent to distribute" and "created an entirely new rule for indictments without notice or hearing from either of the parties on appeal," the State urged us to grant further review in this case.[1] On 5 December 2018, the Court granted the State's discretionary review petition.

In seeking to persuade us to reverse the Court of Appeals' decision in this case, the State begins by arguing that "[a]n indictment need not contain 'allegations of an evidentiary nature,' " citing N.C.G.S. §15A-924(a)(5) (2015), with such unnecessary allegations "includ[ing] methods of proving such crimes." Although an indictment must, "[e]xcept where a short form is authorized," "allege all the essential elements of the offense," citing *State v. Jerrett*, 309 N.C. 239, 259, 307 S.E.2d 339, 350 (1983), "[e]videntiary matters need not be alleged," quoting *State v. Coker*, 312 N.C. 432, 437, 323 S.E.2d 343, 347 (1984). In addition, the State asserts that "[t]he use of a conjunctive . . . does not require the State to prove various alternative matters alleged," quoting *State v. Montgomery*, 331 N.C. 559, 569, 417 S.E.2d 742, 747 (1992) (alterations in original). As a result, the State contends that "[a]n indictment is not fatally defective so long as one of the alternatives stated sufficiently alleges an offense," citing *State v. Ellis*, 368 N.C. 342, 347, 776 S.E.2d 675, 679 (2015).

As the Court of Appeals concluded in *Childers*, 41 N.C. App. at 732, 255 S.E.2d at 656-57, and this Court concluded in *Brown*, 310 N.C. at 568, 313 S.E.2d at 588, "the offense of manufacturing a controlled substance does not require an intent to distribute unless the activity constituting manufacture is preparation or compounding," *id.* at 568, 313 S.E.2d at 588. Arguing in reliance upon the Court of Appeals' decision in *Land*, 223 N.C. App. at 310-11, 733 S.E. 2d at 592, the State contends that, since the "ultimate fact" that the State must establish to support a manufacturing marijuana conviction is "manufacture" and since the various methods of manufacture "are evidentiary matters that need not be included in the indictment," citing *Coker*, 312 N.C. at 437, 323 S.E.2d at 347 (stating that "[e]videntiary matters need not be alleged"), there was no need for the indictment returned for the purpose of charging defendant with manufacturing marijuana in this case to allege that defendant acted with an "intent to distribute."

Although the indictment returned against defendant for the purpose of charging him with manufacturing marijuana did allege that he

1. Defendant did not file a response to the State's discretionary review petition.

committed the offense in question "by producing, preparing, propagating and processing" marijuana, the State contends that these allegations are "harmless surplusage and may properly be disregarded," citing *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997). Even if alleging that defendant acted with the "intent to distribute" was necessary to charge defendant with manufacturing marijuana by "preparing," the absence of such an "intent to distribute" allegation did "not invalidate the indictment" given that "[a]lleging various methods of proof did not obligate the State to prove each one," citing *Montgomery*, 331 N.C. at 569, 417 S.E.2d at 747, and *Ellis*, 368 N.C. at 347, 776 S.E.2d at 679. As a result, since "[t]he Court of Appeals' . . . assertion that the State must prove each alternative method of proof alleged in the indictment is flatly contradicted by this Court's binding precedent," citing *Montgomery*, 331 N.C. at 569, 417 S.E.2d at 747, and *State v. Birdsong*, 325 N.C. 418, 422, 384 S.E.2d 5, 8 (1989), the State contends that the "Court of Appeals erred in finding the omission [of an 'intent to distribute' allegation] 'tainted' the indictment, which sufficiently alleged manufacture by other means."

In arguing that the Court should affirm the Court of Appeals' decision to vacate his attempted manufacturing marijuana conviction, defendant contends that, "if 'intent to distribute' is an element of the crime of manufacturing marijuana by preparation, and the State chooses to allege manufacturing by preparation, then 'with intent to distribute' must also be alleged within the bill of indictment." In light of this Court's decision in *Brown*, 310 N.C. at 569, 313 S.E.2d at 588, that "intent to distribute is an essential element of the felony of manufacturing marijuana by preparation" and the fact that "preparation is included within the manufacturing indictment," defendant contends that an " 'intent to distribute' must also be included." In defendant's view, the State's reliance upon the Court of Appeals' decision in *Land*, 223 N.C. App. at 310-11, 733 S.E. 2d at 592, is misplaced given that *Land* "involved delivery of a controlled substance rather than manufacturing[.]" After conceding that the Court of Appeals' logic appears to conflict with this Court's decision in *Montgomery*, 331 N.C. at 569, 417 S.E.2d at 747, concerning the effect of the use of disjunctive language in indictments, defendant contends that this apparent error does not necessitate a decision to overturn the Court of Appeals' decision in light of the Court of Appeals' express statement that the language in question "d[id] not impact [its] jurisdictional analysis." As a result, given that the State chose "to word the indictment as it did," defendant asserts that the Court of Appeals correctly held that "the jury was allowed to convict [d]efendant on a theory of manufacturing a controlled substance that was not supported by a valid indictment."

According to well-established North Carolina law, "a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony."[2] *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (quoting *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted)). N.C.G.S. § 15A-924(a)(5) requires that a criminal pleading contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5) (2017). Thus, "an indictment 'must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.' " *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (citation omitted), *cert. denied*, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003). Put another way, an indictment suffices to charge a defendant with a criminal offense if the defendant would be guilty of committing a crime if the jury found beyond a reasonable doubt that the defendant had acted in the manner described in the indictment. "A valid indictment, among other things, serves to 'identify the offense' being charged with certainty, to 'enable the accused to prepare for trial,' and to 'enable the court, upon conviction, to pronounce [the] sentence.' " *State v. Rankin*, 371 N.C. 885, 886, 821 S.E.2d 787, 790 (2018) (quoting *State v. Saults*, 294 N.C. 722, 726, 242 S.E.2d 801, 805 (1978)). The facial validity of an indictment "should be judged based solely upon the language of the criminal pleading in question without giving any consideration to the evidence that is ultimately offered in support of the accusation contained in that pleading." *Ellis*, 368 N.C. at 347, 776 S.E.2d at 679. "The alleged failure of a criminal pleading to charge the essential elements of a stated offense is an error of law that this Court reviews de novo." *State v. Williams*, 368 N.C. 620, 622, 781 S.E.2d 268, 270 (2016) (citing *Sturdivant*, 304 N.C. at 308-11, 283 S.E.2d at 729-31). As a result, the ultimate issue for our consideration in this case is whether the allegations contained in the indictment returned against defendant for the purpose of charging him with manufacturing marijuana, if sustained by proof, suffice to establish his guilt of the offense in question.

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2. As a result of the fact that an indictment will support a conviction "of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime," N.C.G.S. § 15-170 (2017), defendant's conviction for the attempted manufacture of marijuana rested upon the indictment returned against him for the purpose of charging him with manufacturing marijuana.

N.C.G.S. § 90-95(a)(1) makes it unlawful "[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance," N.C.G.S. § 90-95(a)(1) (Supp. 2018), with "manufacture" being defined as including "the production, preparation, propagation, compounding, . . . or processing of a controlled substance by any means," but excluding "the preparation or compounding of a controlled substance by an individual for his own use," *id.* § 90-87(15) (2017). In light of the relevant statutory language, this Court held in *Brown* that "the offense of manufacturing a controlled substance does not require an intent to distribute unless the activity constituting manufacture is preparation or compounding." *Brown*, 310 N.C. at 568, 313 S.E.2d at 588. As a result, this Court has clearly held that, to establish a defendant's guilt of manufacturing a controlled substance by "preparing" or "compounding" that controlled substance, the State must prove beyond a reasonable doubt that the defendant "prepared" or "compounded" the controlled substance in question with the "intent to distribute" it.

Although the State argues that the ultimate fact that the State must prove to establish defendant's guilt of manufacturing a controlled substance in violation of N.C.G.S. § 90-95(a)(1) is that defendant "manufactured" the controlled substance in question and that the specific manner in which defendant "manufactured" that controlled substance need not be alleged in a valid indictment, we need not determine whether this argument is or is not valid to properly decide this case. As we have already noted, the indictment returned against defendant for the purpose of charging him with manufacturing marijuana alleged the defendant "did manufacture [marijuana] . . . by producing, preparing, propagating and processing" it. Thus, the indictment at issue in this case alleged that defendant manufactured marijuana in four different ways, one of which required a showing of an "intent to distribute" in order for the State to obtain a conviction and three of which did not.

After acknowledging that certain of the ways in which defendant allegedly manufactured marijuana did not require proof that defendant acted with an "intent to distribute," the Court of Appeals concluded that "it was necessary that all four of those bases were alleged with sufficiency to confer jurisdiction on the trial court for the manufacturing charge." *Lofton*, ___ N.C. App. at ___, 816 S.E.2d at 211 (emphasis omitted). The result reached by the Court of Appeals with respect to this issue is, however, precluded by our prior indictment-related jurisprudence, which, as the State notes, establishes that "[t]he use of a conjunctive in the indictment does not require the State to prove various alternative matters alleged," *Montgomery*, 331 N.C. at 569, 417 S.E.2d at 747 (citing

State v. Williams, 314 N.C. 337, 356, 333 S.E.2d 708, 721 (1985)), and that "[t]he use of the conjunctive form to express alternative theories of conviction is proper," *Birdsong*, 325 N.C. at 422-23, 384 S.E.2d at 7-8 (first citing *State v. Swaney*, 277 N.C. 602, 612, 178 S.E.2d 399, 405, *cert. denied*, 402 U.S. 1006, 91 S. Ct. 2199, 29 L. Ed. 2d 428 (1971); then citing *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986) (stating that, while "the indictment may allege more than one purpose for the kidnapping, the State has to prove only one of the alleged purposes in order to sustain a conviction of kidnapping"); and then citing *State v. Gray*, 292 N.C. 270, 293, 233 S.E.2d 905, 920 (1977) (opining that, "[w]here an indictment sets forth conjunctively two means by which the crime charged may have been committed, there is no fatal variance between indictment and proof when the state offers evidence supporting only one of the means charged")). In the same vein, we recently held, in a case in which the State alleged that "injury to personal property was committed against multiple entities, at least one of which is capable of owning property," that the "pleading is not facially invalid." *Ellis*, 368 N.C. at 347, 776 S.E.2d at 679. Assuming, without in any way deciding, that a valid indictment charging that a defendant manufactured a controlled substance by "preparing" or "compounding" must allege that the defendant acted with an intent to distribute, the indictment returned against defendant for the purpose of charging him with manufacturing a controlled substance in this case sufficed to give the trial court jurisdiction to enter judgment against defendant based upon his conviction for manufacturing marijuana given that it also alleged that defendant manufactured marijuana by "producing," "propagating," and "processing" it.

Although both the Court of Appeals and defendant assert that a decision to uphold the facial validity of the indictment returned against defendant for the purpose of charging him with manufacturing marijuana would allow the jury "to convict [d]efendant on a theory of manufacturing a controlled substance that was not supported by a valid indictment," *Lofton*, ___ N.C. App. at ___, 816 S.E.2d at 211, this concern rests upon a failure to recognize the difference between a challenge to the facial validity of an indictment, which raises a jurisdictional issue, and a challenge to the trial court's instructions, which does not. Simply put, the concern expressed by the Court of Appeals and defendant is properly raised by challenging the trial court's decision to instruct the jury that it could convict defendant on the basis of a theory not supported by the indictment rather than on the basis of a challenge to the facial validity of the indictment. However, given that the issue before us in this case is whether the indictment returned against defendant for the purpose of charging him with manufacturing marijuana was fatally

defective rather than whether the trial court erroneously instructed the jury on the basis of a theory that had not been alleged in the relevant indictment, the concern expressed by both the Court of Appeals and defendant has no bearing upon the proper resolution of the issue that is before us in this case.

Thus, for all of these reasons, we hold that the indictment returned against defendant for the purpose of charging him with manufacturing marijuana was not fatally defective and that the Court of Appeals erred by reaching a contrary conclusion. As a result, the Court of Appeals' decision is reversed and this case is remanded to the Court of Appeals for consideration of defendant's challenge to the sufficiency of the evidence to support his attempted manufacturing marijuana conviction.

REVERSED AND REMANDED.

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

STATE v. MILLS

[372 N.C. 225 (2019)]

STATE OF NORTH CAROLINA
v.
TIMOTHY GLEN MILLS

No. 526A13-2

Filed 10 May 2019

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 813 S.E.2d 478 (2018), reversing an order denying defendant's motion for appropriate relief entered on 13 September 2016 by Judge Marvin P. Pope, Jr. in Superior Court, McDowell County, and remanding for a new trial. Heard in the Supreme Court on 8 April 2019.

Joshua H. Stein, Attorney General, by Sherri Horner Lawrence, Assistant Attorney General, for the State-appellant.

N.C. Prisoner Legal Services, Inc., by Mary E. McNeill, for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

STATE OF NORTH CAROLINA
v.
WILLOUGHBY HENEREY MUMMA

No. 90PA18

Filed 10 May 2019

1. Evidence—photographs—reviewed in jury room—no prejudicial error

While the trial court erred in a domestic second-degree murder prosecution by allowing the jury to examine in the jury room without defendant's consent 179 photographs that had been admitted into evidence, that error was not prejudicial given the extensive evidence of defendant's guilt and the weakness of defendant's claim of self-defense when considered in conjunction with the other evidence in the record. The relevant inquiry was not the impact of the photographs on the jury, but whether viewing the photographs in the jury room adversely affected defendant's chances for a more favorable outcome at trial.

2. Criminal Law—self-defense—aggressor instruction

There was no plain error in a trial court giving an aggressor instruction in a domestic second-degree murder prosecution in which defendant claimed self-defense. Defendant's claim rested on his otherwise unsupported testimony and the record contained ample justification for questioning the credibility of defendant's account of events.

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

Justice EARLS concurring part and dissenting in part.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a divided decision of the Court of Appeals, ___ N.C. App. ___, 811 S.E.2d 215 (2018), finding no prejudicial error upon appeal from a judgment entered on 10 June 2016 by Judge Marvin P. Pope, Jr. in Superior Court, Swain County. Heard in the Supreme Court on 4 March 2019.

Joshua H. Stein, Attorney General, by Sherri Horner Lawrence, Assistant Attorney General, for the State.

Meghan Adelle Jones for defendant-appellant.

ERVIN, Justice.

The issues before us in this case concern whether the Court of Appeals erred by determining that the trial court did not commit prejudicial error by allowing the jury, without the consent of the parties, to review certain photographs that had been admitted into evidence in the jury room and did not commit plain error by instructing the jury concerning the effect of a determination that defendant Willoughby Henerey Mumma was the "aggressor" upon defendant's right to act in self-defense. After carefully considering the record in light of the applicable law, we hold that defendant was not prejudiced by the trial court's decision to allow the jury to review the photographs in the jury room without his consent and that the trial court's decision to include an "aggressor" instruction in its discussion of the law of self-defense did not constitute plain error. As a result, we modify and affirm the decision of the Court of Appeals.

I. Factual Background

A. Substantive Facts

On 9 November 2011, defendant lived with his wife, Amy Chapman, and her fifteen-year-old son, Christopher Robinson. At approximately 5:30 p.m. on that date, when Mr. Robinson came home after visiting his girlfriend following school, he discovered that defendant and his mother were consuming Clonopin and drinking alcohol. Between 8:00 and 8:30 p.m., Ms. Chapman got a ride to the store, where she purchased more alcohol.

From 8:11 until 8:21 p.m., defendant had a text message exchange with his friend, Dewayne Bradley, during which defendant stated that:

> Defendant: Im goin 2 kil her.
>
> Mr. Bradley: Please dont.
>
> Defendant: Im goin 2 I cant take.
>
> Mr. Bradley: Man just walk down the road.
>
> Defendant: Do u have ne lime?
>
> Mr. Bradley: Noooooo just chill.
>
> Defendant: No Im over it I cant take no more I luv u bro.

Mr. Bradley: Please lessen to me.

Defendant: Im sorry I have 2.

Mr. Bradley: Man, Ill come and get 2morr my word.

Defendant: Line wil get rid of the body.

Subsequently, Ms. Chapman purchased additional pills from an acquaintance who came to the residence in which she, defendant, and Mr. Robinson resided.

At approximately 9:45 p.m., Mr. Robinson awoke; heard an argument between defendant and Ms. Chapman; entered their bedroom, in which the couple was sitting adjacent to each other on the bed; urged them to stop arguing; and then went back to bed himself. Defendant claimed that, later on the same evening, Ms. Chapman, who had taken a shower while he was still sitting on the bed, emerged from the bathroom with a knife and attacked him with it. After gaining control of the knife, defendant stabbed Ms. Chapman to death.

The next morning, defendant sent several text messages to Mr. Bradley in which he requested Mr. Bradley to drive Mr. Robinson to school. After Mr. Bradley and his wife, who was driving the couple's vehicle, arrived, Mr. Bradley entered the house. At that time, defendant showed Mr. Bradley the body of Ms. Chapman, which was lying on the floor of a closet in the bedroom that the two of them had shared. Upon seeing Ms. Chapman's body, Mr. Bradley quickly left the residence, reentered his vehicle, and told his wife and Mr. Robinson to lock the doors to prevent defendant from accessing the vehicle. After his wife had driven away from the residence, Mr. Bradley informed Mr. Robinson that his mother was dead and called for emergency assistance. Defendant, who had entered the woods behind the residence, was taken into custody at approximately 5:18 p.m.

B. Procedural History

1. Trial Court Proceedings

On 22 November 2011, the Swain County grand jury returned a bill of indictment charging defendant with first-degree murder. The charge against defendant came on for trial before Judge Marvin P. Pope, Jr., and a jury at the 23 May 2016 criminal session of the Superior Court, Swain County. At least one hundred and seventy-nine photographs were admitted into evidence during the trial, all but one of them without any objection from defendant. At the conclusion of the trial, the trial court, without any objection from defendant, instructed the jury

concerning the issue of self-defense. On a number of occasions during its self-defense instruction, the trial court stated that defendant would not be excused of murder or manslaughter on self-defense grounds if he "was the aggressor with the intent to kill or inflict serious bodily harm upon the deceased."

While the jury deliberated, it sent a note to the trial court in which it requested "Evidence – ALL PHOTOS PLEASE." After noting that "it's in the Court's discretion," defendant's trial counsel objected to allowing the jury to review the photographs in the jury room and stated his preference "for [the jurors] to rely on the testimony and recollection." The trial court responded that, "In my discretion, I'm going to allow them to have all the photographs that have been introduced into evidence" and then had the photographs delivered to the jury room.

After it had deliberated for approximately two hours, the jury sent the trial court a note indicating that it was divided eleven to one and was unable to reach a verdict. In response to the jury's note, and at defendant's request, the trial court instructed the jury in accordance with the United States Supreme Court's decision in *Allen v. United States*, 164 U.S. 492, 501-02, 17 S. Ct. 154, 157, 41 L. Ed. 528, 530-31 (1896). Following further deliberations, the jury returned a verdict convicting defendant of second-degree murder. Based upon the jury's verdict, the trial court entered a judgment sentencing defendant to a term of 180 to 225 months imprisonment. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

2. Appellate Proceedings

In seeking relief from the trial court's judgment before the Court of Appeals, defendant contended that the trial court had "violated a statutory mandate or committed plain error by giving erroneous jury instructions on self-defense" and "erred by sending inflammatory photographs of the decedent's body to the jury deliberation room." *State v. Mumma*, ___ N.C. App. ___, ___, 811 S.E.2d 215, 218 (2018). In determining that "the trial court did not err in instructing the jury on the aggressor doctrine where sufficient evidence supported the instruction," *id.* at ___, 811 S.E.2d at 220, the Court of Appeals noted that the "DVD recording of defendant's 10 November 2011 interview with law enforcement officers [that] was played for the jury in which he described how [Ms. Chapman] came at him with the knife, he took the knife away from her, and proceeded to get on top of her and stab her in the neck and then in the eye" showed that "defendant became the aggressor after he gained control of the knife and then proceeded to get on top of [Ms. Chapman] and

stab her," *id.* at ___, 811 S.E.2d at 219. Despite defendant's testimony that Ms. Chapman "kept trying to regain control of the knife," the Court of Appeals noted that "defendant not only maintained control of the knife throughout the remainder of the fight, but he also continued the fight until [Ms. Chapman] was killed." *Id.* at ___, 811 S.E.2d at 219. In view of the fact that defendant "had no visible injuries aside from a few scratches" while Ms. Chapman sustained multiple serious wounds and the fact that "defendant sent multiple text messages stating he was going to kill" Ms. Chapman, the Court of Appeals concluded that there was "sufficient evidence from which a jury could find that defendant was the aggressor." *Id.* at ___, 811 S.E.2d at 220.

In addition, the Court of Appeals held, in reliance upon this Court's decision in *State v. Cunningham*, 344 N.C. 341, 364, 474 S.E.2d 772, 783 (1996) (stating that, "[a]lthough the defendant did not object to the sending of the exhibits to the jury room, he did not consent to it as required by the statute"; however, "[i]n light of the strong evidence against the defendant, letting the jury have these items of evidence in the jury room could not have affected the outcome"), that, even if sending the photographic exhibits to the jury room constituted error, any such error "was harmless where defendant has failed to establish that he was prejudiced in light of the overwhelming evidence of [his] guilt." *Mumma*, ___ N.C. App. at ___, 811 S.E.2d at 221. In reaching this conclusion, the Court of Appeals determined that "the photographs of the injuries . . . were . . . relevant to show the type, severity, and number of injuries sustained by the deceased," "the extent and nature of her injuries," and "the location and position — inside a closet — in which she was found by law enforcement" officers, with these photographs constituting "the best evidence to help illustrate the responding officers' testimony." *Id.* at ___, 811 S.E.2d at 221. After noting that defendant had failed to object to the admission of the photographs that the jury viewed in the jury room into evidence, the Court of Appeals held that defendant "has not established how he was prejudiced by the trial court's decision to allow the jurors to review photographic exhibits which they had already seen" given that the record contained "more than sufficient evidence for a jury to find beyond a reasonable doubt that defendant committed second-degree murder and did not act in self-defense," including the expert testimony of the pathologist who testified for the State, defendant's own testimony, and the text messages that defendant had sent to Mr. Bradley. *Id.* at ___, 811 S.E.2d at 221.[1]

1. The Court of Appeals also held that the trial court did not err by failing to intervene *ex mero motu* during the State's closing argument; however, this issue has not been brought forward for our consideration. *Mumma*, ___ N.C. App. at ___, 811 S.E.2d at 223.

Judge Arrowood filed a dissenting opinion in which he stated that he would have held that "defendant has met his burden of establishing there is a reasonable possibility that," had the photographs of Ms. Chapman's body not been sent to the jury room without defendant's consent, a different result would have been reached at trial. *Id.* at ___, 811 S.E.2d at 223-24 (Arrowood, J., dissenting). In support of this determination, Judge Arrowood

> consider[ed] the circumstances of this case in their entirety, including: the large number of photographs (179), the fact that many of the photographs were graphic, the fact that only the photographic evidence was taken to the jury room, the fact that the improper photographs were in the jury room for almost the entire deliberation, and, particularly noteworthy, the facts that the jury was deadlocked . . . and that the court provided instructions and verdict sheets to the jury with various options to find defendant guilty[.]

Id. at ___, 811 S.E.2d at 223-24. As a result, Judge Arrowood would have awarded defendant a new trial.

After defendant's appellate counsel was unable to obtain written authorization from defendant to file a timely notice of appeal from the Court of Appeals' decision based upon Judge Arrowood's dissent or a timely petition seeking discretionary review of the Court of Appeals' decision, defendant filed a petition seeking the issuance of a writ of certiorari by this Court authorizing review of the Court of Appeals' opinion on 26 May 2018. In seeking further review before this Court, defendant contended that the record provided ample justification for a finding that the trial court's decision to allow the photographs that had been admitted into evidence to be reviewed in the jury room over defendant's objection constituted prejudicial error and that the Court of Appeals' decision to the contrary would have ordinarily been reviewable on the basis of Judge Arrowood's dissent and, in addition, argued that the Court of Appeals' decision to affirm the trial court's instructions to the jury with respect to the "aggressor" issue conflicted with prior decisions of this Court and involved significant legal principles. The State, on the other hand, argued that the Court should deny defendant's certiorari petition on the grounds that defendant had failed to adequately document his explanation for failing to note an appeal from or seek discretionary review of the Court of Appeals' decision in a timely manner, that the Court of Appeals had correctly held that the trial court's decision to allow the jury to review the photographs that had been admitted

into evidence at trial in the jury room during its deliberations did not prejudice defendant's chances for a more favorable outcome at trial, and that the trial court did not err, much less commit plain error, in instructing the jury concerning the "aggressor" doctrine. The Court allowed defendant's certiorari petition on 7 June 2018.

II. Legal Analysis

A. Allowing Review of the Exhibits in the Jury Room

[1] In seeking to persuade us to reverse the Court of Appeals' decision, defendant begins by contending that the Court of Appeals erred in determining that the trial court's decision to allow the members of the jury to review the photographs that had been admitted at trial in the jury room during its deliberations over defendant's objection did not constitute prejudicial error. Arguing in reliance upon *State v. Poe*, 119 N.C. App. 266, 274-75, 458 S.E.2d 242, 247-48, *disc. rev. denied*, 341 N.C. 423, 461 S.E.2d 765 (1995), in which the Court of Appeals determined that the jury's review of a witness statement in the jury room without the consent of all parties constituted prejudicial error, defendant contends that the photographs at issue in this case "may well have caused the jury to give greater weight to the State's version of" whether defendant acted in self-defense given that a side-by-side comparison of the photographs of the injuries sustained by defendant and Ms. Chapman would have tended to persuade the jury that defendant did not deserve to be acquitted on the grounds of self-defense. Defendant juxtaposes N.C.G.S. § 15A-1233(b), which permits juries, "with consent of all parties," to "take to the jury room exhibits and writings which have been received in evidence," with N.C.G.S. § 15A-1233(a), which allows the jury to review items that have been admitted into evidence in the courtroom regardless of whether the parties agree to such a review, and contends that these statutory provisions make it clear that the "inspection of evidence in the jury room is categorically different from inspection in the courtroom." In addition, defendant contends that our decision concerning whether the inspection of evidence in the jury room in the absence of consent from both parties constitutes prejudicial error should be informed by N.C.G.S. § 8C-1, Rule 403, which prohibits the admission of evidence when the probative value of that evidence is outweighed by the danger of unfair prejudice, with the application of that standard tending to indicate that the presence of the photographs that had been admitted into evidence, forty-one of which depict Ms. Chapman's corpse, for nearly three hours in the jury room "likely inflamed the jury's emotions" and led it to decide the case on an improper basis.

The State, on the other hand, asserts that any error that the trial court may have committed in allowing the jury to review the photographs that were admitted into evidence in the jury room without defendant's consent was harmless, with this contention resting, in part, upon the text messages that defendant sent to Mr. Bradley before Ms. Chapman's death, defendant's admission that he was able to obtain and keep control of the knife with which he stabbed Ms. Chapman, and the "very minor injuries" that defendant sustained in comparison to the multiple, severe injuries that defendant inflicted upon Ms. Chapman. The State notes, among other things, that defendant objected to only one of the photographs that was admitted into evidence and that the trial court allowed the jury to review in the jury room and that the photographs that the jury reviewed in the jury room in accordance with the trial court's decision were "relevant, illustrative, and non-inflammatory." Finally, the State points out that *Poe*, 119 N.C. App. 266, 458 S.E.2d 242, is not binding upon this Court and can, in any event, be distinguished from this case on the grounds that the photographs in this case, unlike the obviously incriminating witness statement at issue in *Poe*, did not "suggest a verdict" and instead "depicted what was shown in them and [were] not subject to any additional interpretation or inferences."

N.C.G.S. § 15A-1233(b) provides, in pertinent part, that, "[u]pon 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(b) (2017). This Court has held that permitting juries to take evidence to the jury room without the consent of the parties constitutes error. *Cunningham*, 344 N.C. at 364, 474 S.E.2d at 783 (assuming that the trial court erred by sending certain exhibits into the jury room for the jury's review when the defendant, who did not object, "did not consent to it as required by the statute"); *State v. Cannon*, 341 N.C. 79, 83, 459 S.E.2d 238, 241 (1995) (holding that the trial court erred by allowing the jury to review evidence in the jury room without the consent of all parties); *State v. Huffstetler*, 312 N.C. 92, 114, 322 S.E.2d 110, 124 (1984) (noting that this Court in *State v. Barnett*, 307 N.C. 608, 621, 300 S.E.2d 340, 347 (1983), in dicta, "interpreted [N.C.G.S. § 15A-1233(b)] to mean that the consent of all parties is required before the jury may take evidence to the jury room"), *cert. denied*, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985). In evaluating whether defendant was prejudiced by the trial court's erroneous decision to allow the members of the jury to review items that had been introduced into evidence in the jury room without his consent, we examine whether "there is a reasonable possibility that,

had the error in question not been committed, a different result would have been reached," N.C.G.S. § 15A-1443(a) (2017), with "[t]he burden of showing such prejudice under this subsection [placed] upon the defendant," *id.*; *see also Huffstetler*, 312 N.C. at 114-15, 322 S.E.2d at 124 (determining that the defendant had not met his burden of showing prejudice pursuant to N.C.G.S. § 15A-1443(a) when "[t]he photographs in question had been previously admitted into evidence and shown to the jury"; the trial court could, in its discretion, have allowed the jury to examine the photographs "closely and at length in the courtroom" pursuant to N.C.G.S. § 15A-1233(a); and "[o]ther evidence . . . linking the murder with the defendant was circumstantial, but compelling"). After carefully reviewing the record, we hold that, while the trial court erred by allowing the jury to examine the photographs that had been admitted into evidence in the jury room without defendant's consent, that error was not prejudicial given the extensive evidence of defendant's guilt and the weakness of defendant's claim of self-defense when considered in conjunction with the other evidence contained in the record.

We begin our analysis by noting that the extent, if any, to which any of the photographs in question were erroneously admitted into evidence in violation of N.C.G.S. § 8C-1, Rule 403 is irrelevant to the proper resolution of the prejudice issue. All but one of the photographs upon which defendant's claim relies were admitted into evidence and published to the jury without objection. In view of the fact that all of the photographs that the trial court allowed the jury to review in the jury room without defendant's consent were admitted into evidence and the fact that defendant has not challenged the trial court's decision to admit any of these photographs into evidence on appeal, we are necessarily required to assume that these photographs were properly admitted into evidence and to focus our prejudice analysis solely upon whether there is any reasonable possibility that the outcome of defendant's trial would have been different if, rather than erroneously allowing jurors to see these photographs in the jury room, the trial court had either refused to allow the jury to review these photographs at all, forcing the jury to rely upon their review of these photographs earlier in the trial, or allowed the jury to examine the photographs in open court. In other words, the relevant issue for prejudice purposes is not the impact of the photographs themselves upon the jury's deliberations; instead the relevant issue is whether it is reasonably possible that the fact that the jury had an opportunity to review the photographs in the jury room, separate and apart from any inherent impact that those photographs may have had, adversely affected defendant's chances for a more favorable outcome at trial.

As defendant correctly notes, the central issue before the jury at trial was whether defendant did or did not act in self-defense when he killed Ms. Chapman. In arguing that the trial court's erroneous decision to allow the jury to review the photographs that had been admitted into evidence in the jury room without his consent prejudiced him, defendant argues that the lengthy period of time that the jury was allowed to have photographs of the injuries that were inflicted upon Ms. Chapman's body and photographs of the relatively minor injuries that were inflicted upon him in its possession in the jury room could easily have led the jury to reject his self-defense claim when another jury that did not have access to these photographs in the jury room would have accepted it. We do not find this argument persuasive.

Aside from the fact that the jury had already seen the crime scene and autopsy photographs of Ms. Chapman and the photographs depicting defendant after he had been taken into custody during defendant's trial, the undisputed evidence tends to show that defendant inflicted severe injuries upon Ms. Chapman while sustaining only minor injuries himself. For example, Detective Daniel Iadonisi of the Cherokee Indian Police Department testified that Ms. Chapman had "wounds . . . on her face, her neck area, both sides of her neck . . . on the top of her head and . . . on her back," while Sam Davis, M.D., a pathologist who autopsied Ms. Chapman's body, told the jury that Ms. Chapman "appeared to have sustained fatal sharp instrument wounds of the neck and face," including "two separate . . . lacerations of the skin . . . from the neck across the shoulder blade" that were "likely to have been delivered from the back"; a hematoma on the top of her head caused by "a forceful injury delivered to the body"; "a 3.3 centimeter stab wound to the right lateral neck" and a "stab wound of [the] left anterior neck," either of which would, "if not treated within minutes," have caused her to bleed to death; and a "potentially fatal" "stab injury of the right eye with perforation of the globe." As a result, the record contained extensive evidence describing the nature and severity of Ms. Chapman's injuries separate and apart from the photographs that the jury was allowed to reexamine in the jury room.

On the other hand, Detective Sean Birchfield of the Cherokee Indian Police Department, who took the photographs of defendant that were admitted into evidence, testified that he saw some scratches on defendant's arms and legs and "a small cut" on the palm of defendant's hand close to his pinky finger on the day after Ms. Chapman was killed. Similarly, Mr. Bradley testified that, when he saw defendant on the morning following the killing, defendant had "a few cuts" and "a couple scratches" on his hands. Finally, defendant answered in the negative

when asked on cross-examination, "You didn't need any medical treatment?" and "You didn't need stitches?" Simply put, it is difficult for us to see how any comparison of the photographs depicting the injuries that Ms. Chapman and defendant sustained that the jury made in the jury room would have added much to the impact of the extensive evidence that the jury heard and saw concerning that subject in the courtroom.

In addition to the relative severity of the injuries that Ms. Chapman and defendant sustained, the record contains extensive additional evidence tending to undercut defendant's claim of self-defense. In addition to opining that the wounds to Ms. Chapman's back had been inflicted from the rear, Dr. Davis testified that the injuries to Ms. Chapman's hands were not "consistent with fighting" and were instead consistent "with being struck." According to Dr. Davis, the wounds to Ms. Chapman's hands were "defensive wounds" that had a "textbook appearance of being struck in a defensive posture," injuries that led Dr. Davis to "conclude that she was not striking, but rather being struck." In addition, Agent Van Williams of the State Bureau of Investigation testified that defendant sent a series of text messages to Mr. Bradley during the final hours before the killing in which defendant stated that "Im goin 2 kil her," that "Im goin 2 I cant take," that "Im over it I cant take no more," that obtaining lime would help him dispose of the body, that he wanted to obtain that substance from Mr. Bradley, and, when Mr. Bradley pleaded with him not to kill Ms. Chapman, defendant responded, "Im sorry I have 2." Finally, defendant testified that, "[f]rom initial contact with the knife," which he claimed to have grabbed to prevent Ms. Chapman from stabbing him in the face, "I never let go of it," and that, despite the fact that Ms. Chapman was still holding the handle of the knife when he grabbed it, "when we fell before we both hit the ground, I had possession of the whole thing." In view of the fact that the only evidence tending to show that defendant acted in self-defense was his own testimony, which the jury had an ample basis for disbelieving, and the "strong evidence against the defendant," we conclude that "letting the jury have [the photographs] in the jury room could not have affected the outcome of the trial." *Cunningham*, 344 N.C. at 364, 474 S.E.2d at 783 (citing *Huffstetler*, 312 N.C. 92, 322 S.E.2d 110).

Admittedly, the jury was allowed to view numerous photographs in the jury room. However, only forty-one of the one hundred and seventy-nine photographs that were admitted into evidence depicted Ms. Chapman's body in any way, and the jury had already had an opportunity to examine these photographs in the courtroom. In addition, while the jury did inform the trial court during its deliberations that it was unable

to reach a unanimous verdict, the trial court had already allowed the jury to review the photographs that had been admitted into evidence in the jury room when the jury conveyed this message to the trial court. Moreover, the fact that the record contains evidence tending to show that Ms. Chapman engaged in violent conduct on other occasions provides limited support for defendant's claim of self-defense in light of the extensive evidence, viewed in its entirety, outlined earlier in this opinion. Finally, defendant's contention to the contrary notwithstanding, his reliance upon self-defense in his effort to obtain an acquittal does not change the overall nature of the prejudice-related inquiry that we are required to make with respect to this issue, which, under our decisional law, necessarily focuses upon a determination of the reasonableness of the possibility that the jury would have found that defendant acted in self-defense in light of all of the relevant evidence rather than upon the nature of defendant's defense. As a result, given the strength of the evidence tending to show that defendant did not act in self-defense, the relative complexity of the trial court's instructions to the jury, the jury's decision to convict defendant of a lesser included offense, and the fact that the photographs about which defendant complains had already been delivered to the jury room when the jury claimed to be unable to reach a unanimous verdict, we hold that it is not reasonably possible that the jury would have returned a verdict more favorable to defendant had the trial court not allowed the jury to review the photographs that had been admitted into evidence and that its members had already seen during the course of defendant's trial in the jury room during the jury's deliberations and affirm the Court of Appeals' determination to the same effect.

B. "Aggressor" Instruction

[2] Secondly, defendant contends that the Court of Appeals erred by unanimously determining that the trial court did not err "by instructing the jury that self-defense was not available to [defendant] if he was the aggressor." According to defendant, "no evidence was introduced showing that he was the aggressor," with an aggressor for self-defense purposes being one who "aggressively and willingly enter[s] into the fight without legal excuse or provocation," quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572 (1981). We do not believe that defendant is entitled to relief from the trial court's judgment on the basis of this contention.

At trial, defendant testified that he was sitting on the bed when Ms. Chapman, who outweighed him by thirty to forty pounds, rushed at him with a knife, pulled him back down to the floor after they had fallen, and,

as defendant attempted to rise, bit and punched him in an effort to recover the knife that defendant had taken from her. Defendant claimed that he stabbed Ms. Chapman to death because he "had to end that fight [given that s]he was trying to get the knife back." Based upon this testimony, defendant claims that Ms, Chapman was the aggressor for purposes of the confrontation that led to her death and that the Court of Appeals erred by upholding the trial court's decision to include an "aggressor" instruction in describing the law of self-defense on the grounds that the evidence that defendant took the knife from Ms. Chapman and the text messages that defendant sent to Mr. Bradley "provid[ed] sufficient evidence from which a jury could find that defendant was the aggressor," quoting *Mumma*, ___ N.C. App. at ___, 811 S.E.2d at 220.

In defendant's view, the Court of Appeals "conducted the wrong analysis" in upholding the trial court's decision to give an "aggressor" instruction given that a person who is not the initial aggressor can only attain aggressor status if the initial aggressor has abandoned the fight and communicated that fact to his or her opponent, citing *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971), and *Cannon*, 341 N.C. at 82, 459 S.E.2d at 240-41. According to defendant, the Court of Appeals' error rested, at least in part, upon its failure to "interpret [the evidence] in the light most favorable to the defendant" in deciding whether the delivery of an "aggressor" instruction was appropriate, citing *State v. Holloman*, 369 N.C. 615, 625, 799 S.E.2d 824, 831 (2017). As result, defendant urges us to hold that the trial court erred by delivering an "aggressor" instruction and to remand this case to the Court of Appeals to conduct the required prejudice analysis or, in the alternative, to determine that the multiple references to the possibility that defendant was the "aggressor" in the trial court's self-defense instructions "had a probable impact on the jury's finding that the defendant was guilty," citing *State v. Lawrence*, 365 N.C. 506, 517, 723 S.E.2d 326, 334 (2012).

The State, on the other hand, contends that "[t]he Court of Appeals properly reviewed for plain error the trial court's jury instruction on the aggressor doctrine where defendant did not object to the instruction and the trial evidence more than supported it." In the State's view, "[a]bsent the aggressor instruction, there is not a reasonable probability that the jury would have found that defendant acted in self-defense" given additional factors that had to be considered in determining whether defendant acted in self-defense and the strength of the State's evidence that defendant did not kill Ms. Chapman to protect himself from death or great bodily injury. In light of defendant's testimony that he had control of the knife from virtually the instant that Ms. Chapman initially attempted

to stab him, Dr. Davis's testimony that certain of Ms. Chapman's wounds were defensive in nature and that certain other wounds that she had sustained had been inflicted upon her from the rear, the evidence concerning the disparity in the severity of the wounds that Ms. Chapman and defendant sustained, and the text messages that defendant sent to Mr. Bradley, the State contends that "[d]efendant has failed to establish error, much less plain error," in challenging the trial court's decision to deliver an "aggressor" instruction when describing the law applicable to defendant's claim to have acted in self-defense.

A trial court's jury instructions should be "a correct statement of the law and . . . supported by the evidence." *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629 (citation omitted), *cert. denied*, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997).[2] The trial court instructed the jury that:

> The defendant would be excused of first degree murder and second degree murder on the ground of self-defense if, first, the defendant believed that it was necessary to kill the victim in order to save the defendant from death or great bodily harm.
>
> And second, the circumstances, as they appeared to the defendant at the time, were sufficient to create such a belief in the mind of the person of ordinary firmness.
>
> In determining the reasonableness of the defendant's belief, you should consider the circumstances as you find them to have existed from the evidence, including the size, age, and strength of the defendant, as compared to the victim, the fierceness of the assault, if any, upon the defendant; whether the victim had a weapon in the

2. Although we have not addressed defendant's challenge to the sufficiency of the evidence to support the delivery of an "aggressor" instruction on the merits, we do observe that, while defendant is correct in noting that the trial court should view the evidence in the light most favorable to the defendant in determining whether a defendant is entitled to the delivery of an instruction concerning an affirmative defense, *Holloman*, 369 N.C. at 625, 799 S.E.2d at 831, this principle does not apply to the determination of whether the trial court erred by addressing the "aggressor" doctrine in the course of instructing the jury concerning the law of self-defense. In determining whether a self-defense instruction should discuss the "aggressor" doctrine, the relevant issue is simply whether the record contains evidence from which the jury could infer that the defendant was acting as an "aggressor" at the time that he or she allegedly acted in self-defense. *Cannon*, 341 N.C. at 82-83, 459 S.E.2d at 241 (stating that "the evidence in this case permits the inference that defendant was the aggressor at the time he shot the victim").

> victim's possession, and the reputation, if any, of the victim for danger and violence.
>
> The defendant would not be guilty of any murder or manslaughter if the defendant acted in self-defense, and if the defendant was not the aggressor in provoking the fight and did not use excessive force under the circumstances.
>
> One enters a fight voluntarily if one uses toward one's opponent abusive language, which, considering all of the circumstances, is calculated and intended to provoke a fight.
>
> If the defendant voluntarily and without provocation entered the fight, the defendant would be considered the aggressor, unless the defendant thereafter attempted to abandon the fight and gave notice to the deceased that the defendant was doing so. In other words, a person who uses a defensive force is justified if the person withdraws in good faith from physical contact with the person who was provoked and indicates clearly that he desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.
>
> A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he was in imminent danger of death or serious bodily harm.
>
> The person using defensive force had no reasonable means to retreat, and the use of force likely to cause death or serious bodily harm was the only way to escape the danger.
>
> The defendant is not entitled to the benefit of self-defense if the defendant was the aggressor with the intent to kill or inflict serious bodily harm upon the deceased.

Although defendant has contended on appeal that the record evidence did not support the trial court's decision to instruct the jury concerning the effect of a determination that defendant was the "aggressor" at the time that he killed Ms. Chapman, he did not object to the delivery of an "aggressor" instruction at trial, thereby waiving his right to challenge the delivery of the "aggressor" instruction on appeal. N.C. R. App. P. 10(a)(2) (providing that "[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"). On the other hand, Rule of Appellate Procedure 10(a)(4) provides that "[i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule of law . . . 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." *See Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330. As a result of defendant's failure to object to the delivery of an "aggressor" instruction to the jury before the trial court, defendant is only entitled to argue that the delivery of the "aggressor" instruction constituted plain error,[3] under which defendant is not entitled to an award of appellate relief on the basis of the alleged error unless he can "demonstrate that a fundamental error occurred at trial," *id.* at 518, 723 S.E.2d at 334, that "had a probable impact on the jury's finding that the defendant was guilty," *id.* at 518, 723 S.E.2d at 334 (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

As this Court recently stated in *State v. Juarez*, 369 N.C. 351, 794 S.E.2d 293 (2016), we need not "decide whether an instruction on the aggressor doctrine was improper" given defendant's failure "to sufficiently demonstrate that, absent instructions on the aggressor doctrine, the jury would not have rejected his claim of self-defense for other reasons."[4] *Id.* at 358-59, 794 S.E.2d at 300. Our analysis of the record shows

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3. Although defendant argued before the Court of Appeals that his challenge to the trial court's decision to deliver an "aggressor" instruction was properly preserved for purposes of appellate review on the basis of the principle enunciated in *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (observing that, "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial"), the Court of Appeals rejected this argument and defendant has not brought it forward for our consideration.

4. Arguing in reliance upon decisions such as *Virginia Electric & Power Co. v. Tillett*, 316 N.C. 73, 76, 340 S.E.2d 62, 64-65 (1986), defendant contends that, since the Court of Appeals declined to award relief from the trial court's judgment on the grounds that the record supported the delivery of an "aggressor" instruction in this case, we should refrain from deciding whether any error that the trial court might have committed in instructing the jury concerning the "aggressor" doctrine sufficiently prejudiced defendant to constitute plain error and remand this case to the Court of Appeals to enable it to make the necessary prejudice determination in the first instance. In view of the fact that the ultimate question for our consideration with respect to the trial court's "aggressor" instruction is whether the delivery of that instruction constituted plain error and the fact that plain error analysis requires a reviewing court to determine both whether error occurred, *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (stating that "[a] prerequisite to our

that defendant sent multiple text messages to Mr. Bradley in the hours before Ms. Chapman's death indicating that he wanted to kill her. In addition, the record contains no physical evidence tending to validate defendant's otherwise unsupported claim to have acted in self-defense and does contain substantial physical evidence tending to undercut his self-defense claim including, but not limited to, the evidence that Ms. Chapman sustained defensive wounds to her hand, that she had sustained stab wounds that had been inflicted from the rear, and that the wounds that defendant sustained were much less severe than the wounds that had been inflicted upon Ms. Chapman. As a result, given that defendant's claim to have acted in self-defense rested upon his otherwise unsupported testimony and that the record contained ample justification for questioning the credibility of defendant's account of the circumstances surrounding Ms. Chapman's death, we cannot conclude that any error that the trial court might have committed in delivering an "aggressor" instruction when discussing the law of self-defense rose to the level of plain error.

III. Conclusion

Thus, for the reasons stated above, we hold that the trial court's erroneous decision to allow the jury to review the photographs that had already been admitted into evidence in the jury room without defendant's consent did not constitute prejudicial error and that the trial court did not commit plain error by including a discussion of the "aggressor" doctrine in its instructions to the jury concerning defendant's claim to have killed his wife in the exercise of his right of self-defense. As a result, the Court of Appeals' decision finding no prejudicial error in the proceedings leading to the entry of the trial court's judgment is, as modified in this opinion, affirmed.

MODIFIED AND AFFIRMED.

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

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engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes 'error' at all"), *cert. denied*, 479 U.S. 836, 107 S. Ct. 133, 93 L. Ed. 2d 77 (1986), and, if so, whether any such error was sufficiently prejudicial to merit an award of appellate relief from the underlying trial court judgment, *Lawrence*, 365 N.C. at 516-18, 723 S.E.2d at 333-34, we see no need to remand this case to the Court of Appeals to undertake the necessary prejudice inquiry.

Justice EARLS concurring in part and dissenting in part.

I agree with the majority that Mr. Mumma cannot meet the high burden of showing that the jury in this case probably would have either remained deadlocked or acquitted him of murder if the aggressor instruction had not been given, a burden he must meet because he did not object to the instruction at trial. *State v. Lawrence*, 365 N.C. 506, 517, 723 S.E.2d 326, 334 (2012). It is particularly noteworthy that the Court's basis for this conclusion is not the theory advanced by the State in this case, namely that defendant became the aggressor when he grabbed the knife from Ms. Chapman, but rather that the evidence of their relative physical injuries, combined with the text messages that Mr. Mumma sent in the hours before the fight demonstrating his state of mind that evening, could have led the jury to disbelieve "defendant's account of the circumstances surrounding Ms. Chapman's death" and reject his claim of self-defense.

Nonetheless, I cannot agree that the trial court's error in sending 179 photographs, including forty-one pictures of Ms. Chapman's dead body, to the jury room over defendant's objection, and therefore in violation of N.C.G.S. § 15A-1233(b), was harmless under the lower standard applicable to this error, namely that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached." N.C.G.S. §15A-1443(a) (2017). Here, when the only question at issue was whether defendant acted in self-defense, it is entirely possible that the jury would have remained deadlocked or reached a different verdict if jurors had been required to view the photographs in the presence of all the parties in the courtroom, rather than in the privacy of the jury room.

The majority's approach to evaluating the reasonable possibility of a different result is to stand in the shoes of the jury and, "after carefully reviewing the record," come to a conclusion about what verdict the jury hypothetically would have reached if they had not been able to take the 179 photographs into the jury room for the duration of their deliberations. The majority, however, fails to take into account all the evidence in the record, which includes testimony that Ms. Chapman had a history of bipolar disorder and had previously stabbed Mr. Mumma in the arm. On another occasion Ms. Chapman threatened Mr. Mumma with a knife. Chapman was known to be quick to anger for no apparent reason. On the night in question, not only had she consumed a considerable amount of Klonopin and alcohol, but she also was "raising hell" because Mr. Mumma wanted to leave, accused him of pursuing another woman,

and pushed and slapped him. Ms. Chapman's son's first thought upon seeing some blood in the bedroom was that his mother had injured Mr. Mumma. Given that the only issue for the jury to decide was whether Mr. Mumma acted in self-defense, it is entirely possible that without prolonged exposure to forty-one pictures of Ms. Chapman's corpse, the jury would have remained deadlocked or reached a different verdict.

Also relevant to this question is the fact that the prosecutor in closing argument specifically directed the jury to take the photographs to the jury room with them and urged them to study the pictures showing Ms. Chapman's injuries:

> If he stabbed her from the back -- if he stabbed her from the back, what does that say? Is he really thinking he's going to die? Is he grabbing for the knife? He wanted her dead.
>
> Take that photo back. I hope you do. Take it with the other photos. You can request any exhibit you want. But ask for the photo with the two dots on it. And I would love to put it up here, but in respect to the family, I don't think they need to see their daughter, and sister, and mother like that. That's why I've got these boards up here.
>
> Take it back there. You're the jury. You get to decide. Not me, not Mr. Mumma, not Mr. Earwood. Look at it, and then look at those two wounds from the lacerations. And if you say yeah, it shouldn't take long.
>
> Grossly excessive force. Stab wound to the left throat, stab wound to the right neck, stab wound to the right neck, stab wound to the right eye. Defensive wounds, both right and left hands. Top of her head had a bruising on her brain. He had to pull back her scalp and find it. Up here. That's what the red dots are on top.

This excerpt strongly suggests the photographs were key to the jury's deliberations and that if the court had followed the law, the jury may have been less influenced by the graphic and disturbing photographs and instead would have, in giving due consideration to all of the evidence in the case, concluded that it had a reasonable doubt as to Mr. Mumma's culpability for murder.

In other cases in which it is uncertain what happened in the jury room or impossible to guess what "might have been," prejudice to the defendant is assumed. Here all we know is that the jury asked to be able

to take all the photographs into the jury room. Whether jurors spent most of the three hours examining the pictures in detail, or looked at one or two and then placed them away on a shelf, is unknown. Perhaps jurors were simply complying with the prosecutor's request, or perhaps they used the pictures of Ms. Chapman's injuries to convince the holdout juror to join the other eleven to convict. If jurors had been required to view the photographs in the courtroom, as defendant had the right to insist, the jury's use of the photographs might have been very different. But the point is, we simply cannot know.

This Court has found per se reversible error in situations in which it is not possible to assess from the record whether the error was prejudicial. *See, e.g.*, *State v. Hucks*, 323 N.C. 574, 580-81, 374 S.E.2d 240, 244-45 (1988) (finding prejudicial error per se when a capital defendant did not have second counsel appointed for him); *State v. Bindyke*, 288 N.C. 608, 627-30, 220 S.E.2d 521, 533-35 (1975) (holding that reversible error per se occurs when an alternate juror is present in the jury room during jury deliberations). It is a curious result that the law says if an alternate juror is in the jury room, there is per se reversible error, but if a defendant objects to the jury taking evidence to the jury room, it remains the defendant's burden to show what cannot be proved with certainty, namely what happened behind the closed doors of the jury room and was in the jurors' minds as they reviewed that evidence in private. The similar problems faced in attempting to analyze prejudice in *Bindyke* and *Hucks* should be instructive in our analysis here. In our "careful review of the record" we should be wary of speculating too much about what is impossible to know.

There is further support for the proposition that it is impossible for a defendant to meet this standard. Even though state law provides that evidence can only go to the jury room if the parties consent, this Court has never found a violation of that statute to constitute prejudicial error. *See State v. Locklear*, 349 N.C. 118, 150-51, 505 S.E.2d 277, 296 (1998) (in which the defendant failed to establish prejudicial error in his conviction for first-degree murder based on the trial court's allowing the jury to take the defendant's statement to police into the jury room without his consent), *cert. denied*, 526 U.S. 1075 (1999); *State v. Cunningham*, 344 N.C. 341, 364, 474 S.E.2d 772, 783 (1996) (The defendant failed to establish prejudicial error in his conviction for first-degree murder based on the trial court's allowing the jury to take evidence into the jury room without his consent, including "an unspent bullet, cartridge casing, and a bullet which had been pulled apart in the police laboratory."); *State v. Cannon*, 341 N.C. 79, 83-86, 459 S.E.2d 238, 241-43 (1995)

(concluding that the defendant failed to establish prejudicial error in his conviction for first-degree murder based on the trial court's allowing the jury to take evidence into the jury room over his objection, including "photographs from the scene of the crime and the autopsy, a copy of defendant's confession, [a witness's] first statement to the police, and a diagram of the crime scene"); *State v. Huffstetler*, 312 N.C. 92, 113-15, 322 S.E.2d 110, 123-24 (1984) (determining that the defendant failed to establish prejudicial error in his conviction for first-degree murder based on the trial court's allowing the jury to take evidence into the jury room over his objection, including photographs that showed "the overall view of the interior of the victim's trailer and the location of the body, a metal fragment found on the floor, and the false teeth found near the body"), *cert. denied*, 471 U.S. 1009 (1985). Under the circumstances of this case, forty-one pictures of the victim's injuries, including autopsy photographs, are likely to have had some effect on the jury. Indeed, the very fact that the prosecutor emphasized the photographs in his closing argument, and the jury asked to see them, demonstrates that they had some significance.

The majority's analysis begins with the assumption that all 179 photographs were properly admitted into evidence, and therefore, the extent to which any of them may have been erroneously admitted in violation of Rule 403 of the North Carolina Rules of Evidence, because they were more prejudicial than probative, is irrelevant to whether defendant was prejudiced by the jury taking them back to the jury room without his consent. This determination misses the point of defendant's argument concerning a Rule 403 analysis. That it may be error under Rule 403 to admit gruesome, distressing, and redundant photographs of a victim demonstrates that the law recognizes the sensational and emotional effect that such photographs can have. *State v. Hennis*, 323 N.C. 279, 283-87, 372 S.E.2d 523, 526-28 (1988), and *State v. Phipps*, 331 N.C. 427, 451-54, 418 S.E.2d 178, 191-92 (1992), are relevant here not because the pictures in this case should not have been admitted at all, but because the logic of those cases should apply to whether defendant was prejudiced when the trial court allowed those pictures to go to the jury room without defendant's consent. In short, a picture is worth a thousand words, whether under Rule 403 or N.C.G.S. § 15A-1233(b). And a picture in the jury room throughout jurors' deliberations has a greater impact than a picture viewed in the courtroom during trial. Hence, it does not resolve the prejudice inquiry to note that the jury had already seen the pictures and heard narrative testimony about the injuries.

If the General Assembly's decision to require the parties' consent before allowing evidence in a trial to go to the jury room, thus abrogating the common law rule that juries hear the evidence in the courtroom, is to have any legal effect, this Court must enforce it. *See Gooding v. Pope*, 194 N.C. 403, 404-05, 140 S.E. 21, 21 (1927) ("The practice at common law was against allowing the jury to examine the papers introduced in evidence, either during the trial or afterwards in the jury room." (citations omitted)); *Watson v. Davis*, 52 N.C. (7 Jones) 178, 181 (1859) (stating that "[t]he jury ought to make up their verdict upon evidence offered to their senses, *i. e.*, what they see and hear in the presence of the court," and should not be permitted to draw any inference "which their imaginations may suggest, because the opposite party ought to have an opportunity to reply to any suggestion of an inference contrary to what was made in open court"). In this particular case, where the issue is whether defendant acted in self-defense, and where the evidence of Mr. Mumma's slight injuries in comparison to Ms. Chapman's extensive ones is the main evidence supporting the conclusion that Mr. Mumma was the aggressor, I cannot conclude that gruesome pictures of Ms. Chapman's injuries had no effect on the jury's deliberations. Mr. Mumma was prejudiced by the trial court's error. I would reverse the ruling of the Court of the Appeals on this issue and remand for a new trial.

STATE v. WHITE

[372 N.C. 248 (2019)]

STATE OF NORTH CAROLINA
v.
MICHAEL LEE WHITE

No. 396PA17

Filed 10 May 2019

1. Indictment and Information—superseding indictment—identity of child victim

A superseding indictment charging defendant with a sexual offense against a seven-year-old child did not sufficiently name the victim under N.C.G.S § 15-144.2(b) where it referred to her as "Victim # 1." To "name" someone is to identify them in a unique way that enables others to distinguish between the named person and all other people.

2. Indictment and Information—superseding indictment—identity of victim—reference to outside material

A superseding indictment did not sufficiently identify the victim in a prosecution for a sexual act against a child by an adult where the child was named only as "Victim # 1" and could not be identified without looking outside the four corners of the indictment. A court may not look to extrinsic evidence to supplement a missing or deficient allegation in an indictment.

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

Justice NEWBY dissenting.

Justice MORGAN dissenting.

Justice NEWBY joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 563 (2017), finding no error in a judgment entered on 9 September 2015 by Judge J. Thomas Davis in Superior Court, Graham County. Heard in the Supreme Court on 8 January 2019.

Joshua H. Stein, Attorney General, by John F. Oates, Jr., Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Daniel Shatz, Assistant Appellate Defender, for defendant-appellant.

BEASLEY, Chief Justice.

The sole question presented by this appeal is whether the superseding indictment upon which defendant was tried and convicted was facially defective, and thus failed to establish jurisdiction in the trial court, because it identified the alleged victim only as "Victim #1." For the reasons stated below, we hold that an indictment identifying the alleged victim only as "Victim #1" fails to satisfy the statutory requirement that the indictment name the victim; and, therefore, the indictment is facially invalid. As a result, the trial court's judgment must be vacated.

Background

Beginning in December 2010, the victim, Hannah,[1] lived with her mother and defendant in defendant's trailer for a brief time when she was around seven years old. Hannah reported to her aunt in 2013 that defendant had molested her during her stay at the trailer. Defendant confessed in writing to sexually assaulting Hannah after Hannah's aunt reported the incident to the police. On 1 May 2013, an arrest warrant was issued, alleging probable cause to believe that defendant "unlawfully, willfully and feloniously did engage in a sex offense with [Hannah], a child under the age of 13 years." On the same day, defendant was arrested and charged with one count of first-degree sex offense with a child in violation of N.C.G.S. § 14-27.4A(1) (recodified as N.C.G.S. § 14-27.28(a) (2015)). A grand jury returned a true bill of indictment on this charge on 8 July 2013. On 18 May 2015, the grand jury returned a superseding indictment, which charged defendant with one count of sexual offense with a child by an adult, stating that he "engage[d] in a sexual act with Victim #1, a child who was under the age of 13 years, namely 7 years old," and added a new count of indecent liberties with a child, alleging that "[t]he name of the child is Victim #1." Both the arrest warrant and the original indictment identified Hannah by her full name.

1. The victim will be referred to as Hannah, a pseudonym to protect the child's privacy.

The case was tried at the 31 August 2015 session of Superior Court, Graham County, with the Honorable J. Thomas Davis presiding. On 9 September 2015, the jury returned a verdict finding defendant guilty of sexual offense with a child by an adult offender. The trial court imposed an active sentence of 300 to 369 months of imprisonment. On 17 October 2017, the Court of Appeals affirmed defendant's conviction in an unpublished opinion, *State v. White*, ___ N.C. App. ___, 805 S.E.2d 563, 2017 WL 4638188 (2017) (unpublished). Defendant petitioned this Court for review, arguing that the Court of Appeals erred by holding that an indictment that failed to identify the alleged victim was not facially invalid.

Before the Court of Appeals, defendant argued that the superseding indictment upon which he was convicted was invalid because it identified the victim as "Victim #1" rather than naming the victim as the short-form indictment statute for the offense directs. *White*, 2017 WL 4638188, at * 2. The Court of Appeals held that the indictment was valid because the identity of the victim could be ascertained by reference to other documents in the record. *Id.* at *3 (relying on *State v. McKoy*, 196 N.C. App. 650, 657-58, 675 S.E.2d 406, 412, *appeal dismissed and disc. rev. denied*, 363 N.C. 586, 683 S.E. 2d 215 (2009)).

Analysis

"A defendant can challenge the facial validity of an indictment at any time, and a conviction based on an invalid indictment must be vacated." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (citing *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966)). The sufficiency of an indictment is a question of law reviewed de novo. *See, e.g.*, *State v. Sturdivant*, 304 N.C. 293, 307-11, 283 S.E.2d 719, 729-31 (1981).

"[A] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Rankin*, 371 N.C. 885, 886, 821 S.E.2d 787, 790 (2018) (alteration in original) (quoting *Campbell*, 368 N.C. at 86, 772 S.E.2d at 443). Generally, an indictment "is fatally defective if it 'fails to state some essential and necessary element of the offense of which the defendant is found guilty.' " *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)). While "it is not the function of an indictment to bind the hands of the State with technical rules of pleading," *State v. Williams*, 368 N.C. 620, 623, 781 S.E.2d 268, 270-71 (2016) (quoting *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731), the indictment must fulfill its constitutional purposes—to "identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from

being jeopardized by the State more than once for the same crime," *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731 (citing *Gregory*, 223 N.C. 415, 27 S.E.2d 140).

The General Assembly has the power "to relieve the State of the common law requirement that every element of the offense be alleged" in an indictment, *State v. Lowe*, 295 N.C. 596, 603, 247 S.E.2d 878, 883 (1978), "provided the form established is sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged." *Id.* at 603, 247 S.E. 2d at 883 (quoting *State v. Harris*, 145 N.C. 456, 457-58, 59 S.E. 115, 116 (1907)). In particular, this Court has held that statutes authorizing short form indictments for rape and first-degree sexual offense "comport with the requirements of the North Carolina and United States Constitutions," even though they do not require each essential element of the offense to be alleged. *State v. Wallace*, 351 N.C. 481, 505, 528 S.E.2d 326, 342, *cert. denied*, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000). Furthermore, courts do not favor quashing an indictment. *See, e.g.*, *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953).

Use of the Phrase "Victim #1" Does Not Constitute "Naming the Victim."

[1] "The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *Rankin*, 371 N.C. at 889, 821 S.E.2d at 792 (citing *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 276-77 (2005)). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citing *State ex rel. Utils. Comm'n v. Edmisten*, 291 N.C. 451, 232 S.E.2d 184 (1977)).

Subsection 15-144.2(b) of the North Carolina General Statutes states:

> If the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, *naming the child*, and concluding as required by law. Any bill of indictment containing the averments and allegations named in this section is good and sufficient in law as an indictment for a sex offense against a child under the age of 13 years and all lesser included offenses.

N.C.G.S. § 15-144.2(b) (Supp. 2018) (emphasis added). The statutory language is clear and unambiguous: it requires that the child be named as part of the allegations in the indictment. In common understanding, to name someone is to identify that person in a way that is unique to that individual and enables others to distinguish between the named person and all other people. The phrase "Victim #1" does not distinguish this victim from other children or victims.

In holding that "naming the victim" could be satisfied by use of "Victim #1," the Court of Appeals relied on *State v. McKoy*. There the court evaluated the sufficiency of a short-form indictment for second-degree rape, which identified the victim by the initials "RTB." *McKoy*, 196 N.C. App. at 654, 675 S.E.2d at 410. The relevant statutes required that the short-form indictment "nam[e] the victim." *Id.* at 655, 675 S.E.2d at 410 (quoting N.C.G.S. §§ 15-144.1(a), -144.2(a) (2007)). The court acknowledged that no North Carolina court had interpreted "whether 'naming' the victim [could] only be satisfied by using the victim's full name, or whether a nickname, initials or other identification method would be sufficient." *Id.* at 657, 675 S.E.2d at 411. The court held that, when use of the victim's initials was adequate to provide notice of the victim's identity and protect the defendant from double jeopardy, the indictment was sufficient. *Id.* at 657-58, 675 S.E.2d at 411-12 (first citing *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984); and then citing *Lowe*, 295 N.C. at 603, 247 S.E.2d at 883). Even if this Court decides that initials are sufficient to satisfy the "naming the victim" requirement, the indictment in this case is still insufficient. The State concedes that its intent was to conceal the identity of the child—an intent at odds with the purpose of the naming requirement: to provide notice of the essential elements of the crime charged to the accused. Thus, use of the phrase "Victim #1" does not constitute "naming the child."

The State points to the North Carolina Rules of Appellate Procedure and various provisions in the North Carolina General Statutes regarding juvenile offenders as evidence of a preference for protecting the privacy of minors. These comparisons are inapt.

It is true that this Court has created rules for the protection of juvenile victims' identities in documents filed in the Appellate Division. *See, e.g.*, N.C. R. App. P. 42(b), https://www.nccourts.gov/assets/inline-files/North-Carolina-Rules-of-Appellate-Procedure-Codified-7-January-2019.pdf?U4QsCKDrkl0LSp9BdSHmngXdzgDylUGf (mandating that, in appeals from juvenile proceedings, counsel must use "initials or a pseudonym instead of the minor's name" in briefs, motions, and petitions filed in certain matters, including appeals "that involve a sexual offense committed

against a minor"). This Court has the authority to promulgate rules for the appellate courts. It does not, however, have the authority to rewrite statutes to implement its own policy preferences.

Additionally, the State cites statutes enacted to keep juveniles' records confidential. *See* N.C.G.S. § 7B-2901 (2017) (governing the maintenance under seal of records pertaining to reports of juvenile abuse, neglect, and dependency); *id.* § 7B-3000 (2017) (governing confidentiality of records of the juvenile courts); *id.* § 7B-3001 (2017) (requiring that all court records pertaining to juvenile offenders "be withheld from public inspection"); *id.* § 7B-3100 (2017) (prohibiting the disclosure of information "that would reveal the identity of [any juvenile under investigation]"). These statutes all govern the keeping of records of allegedly abused, neglected, dependent, or delinquent juveniles rather than records in adult criminal cases. The existence of these particular statutes does not negate the requirements of N.C.G.S § 15-144.2(b).

Adopting the State's interpretation that "Victim #1" is sufficient to name the victim would frustrate the purpose of the statute and render useless the phrase "naming the victim." *See Porsh Builders*, *Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) ("[A] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage."). If we were to adopt this proposed interpretation, the State would be permitted to prosecute defendants using indictments that ignore plainly stated statutory pleading requirements.

Facial Validity is Determined by Evaluating Only the Allegations in the Criminal Pleading.

[2] We turn now to the question of whether a court may supplement the allegations in an indictment by referring to extrinsic evidence. The Court of Appeals relied upon our opinion in *State v. Ellis* to conclude that reference to various record documents and trial evidence to supplement a missing material allegation in an indictment is permissible.

In *Ellis* the defendant was convicted upon an indictment charging injury to personal property after, in the course of committing larceny at an electrical substation on the campus of North Carolina State University (NCSU), he damaged copper wire located on the property. *Ellis*, 368 N.C. at 342-43, 776 S.E.2d at 676. The defendant appealed his conviction, arguing the indictment was fatally defective for failing to allege that NCSU and NCSU High Voltage Distribution were legal entities capable

of owning property. *Id.* at 343-44, 776 S.E.2d at 677. This Court observed that, because NCSU was authorized by N.C.G.S. § 116-3 to own property, the indictment need not repeat that the entity was so empowered. *Id.* at 345, 776 S.E.2d at 678 (citing *Campbell*, 368 N.C. at 87, 772 S.E.2d at 444 (holding that "alleging ownership of property in an entity identified as a church or other place of religious worship . . . signifies an entity capable of owning property")).

The Court of Appeals in the instant case relied on *Ellis* for the proposition that a court may look outside the four corners of the indictment for information that can be used to supplement the missing essential element in the indictment. *White*, 2017 WL 4638188, at *4-5 (citing *Ellis*, 368 N.C. at 345, 776 S.E.2d at 678). According to this Court, NCSU's ability to own property is an inherent power of the University, not a separate element that must be alleged. *See Ellis*, 368 N.C. at 345, 776 S.E.2d at 678. Therefore, the State adequately alleged that the damaged property in *Ellis* was owned "by another" when it alleged simply that the property was owned by NCSU. *See id.* at 345, 776 S.E.2d at 678.

This Court made clear in *Ellis* that facial validity "should be judged based solely upon the language of the criminal pleading in question without giving any consideration to the evidence that is ultimately offered in support of the accusation contained in that pleading." *Id.* at 347, 776 S.E.2d at 679. A court may not look to extrinsic evidence to supplement a missing or deficient allegation in an indictment. *See*, *e.g.*, *State v. Brice*, 370 N.C. 244, 250, 806 S.E.2d 32, 36-37 (2017) (opining that "under the traditional test utilized in evaluating the facial validity of a criminal pleading," a reading of the *indictment only* revealed that all essential elements of the crime of larceny were charged); *State v. Loesch*, 237 N.C. 611, 612, 75 S.E.2d 654, 655 (1953) (observing that an indictment for a statutory offense "must be framed upon the statute" and such compliance "must distinctly appear upon the face of the indictment itself"). Standing alone, the superseding indictment here fails to identify the victim because her identity cannot be ascertained without referring to defendant's confession, the arrest warrant, and the original indictment. Therefore, the indictment is facially invalid.

Here, the dissent agrees with the Court of Appeals' conclusion that the arrest warrant, original indictment, and proceedings at trial may be considered in evaluating whether a defendant had sufficient notice of the crime charged, with *Ellis* providing the legal authority for the consideration of these additional materials. The additional information upon which *Ellis* relies, which consists of the statutory provision setting out the inherent authority of NCSU to own property, is fundamentally

different than the additional case-specific factual material upon which the Court of Appeals and the dissent rely. Ultimately, *Ellis* stands for the proposition that one determines the facial validity of an indictment by examining the four corners of the charging instrument in light of the applicable law without making any reference to additional factual information contained elsewhere in the record like that upon which the Court of Appeals and our dissenting colleagues rely.

We recognize the compelling public policy concerns that motivate the State and our courts to protect victims' identities. Protecting a victim's identity from the public increases privacy and safety, and encourages overall reporting of sexual assaults. Public access to a victim's identity often leads to inquiries and commentary from the community or media, compromising victim privacy. *See* Daniel M. Murdock, Comment, *A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims*, 58 Ala. L. Rev. 1177, 1180 (2007). Furthermore, studies show that significantly more rape victims would come forward to report assaults if they could rely on the justice system to protect them from public scrutiny. *See id.* ("Throughout the nation, 'rape remains the most underreported crime within the criminal justice system.' " (quoting *People v. Ramirez*, 55 Cal. Ct. App. 47, 53, 64 Cal. Rptr. 2d 9, 13 (2000)); *see also* Moira E. McDonough, Note, *Internet Disclosures of a Rape Accuser's Identity (Focus on the Kobe Bryant Case)*, 3 Va. Sports & Ent. L.J. 284, 293 (2004) ("The growing recognition of privacy rights in this country necessitates protecting rape victims' identities. Not only is a person's status as a victim within a zone of privacy, this protection will also help ensure victims' safety and alleviate the problems of underreporting.").

It is within the purview of the General Assembly to mandate that the victim's identifying information be redacted from documents generated in sexual assault prosecutions, a measure that many other states have taken.[2] Additionally, the State may move to seal indictments in

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2. *See*, *e.g.*, Mo. Rev. Stat. § 595.226(1) (2017) (stating that any information that could be used to identify or locate a victim of a sexual offense shall be redacted before any such record is publicly disclosed); N.J. Rev. Stat. § 2A:82-46 (2017) (stating that the name, address, and identity of any victim under the age of 18 at the time of the alleged sexual offense shall not appear on indictment or any other public record, and requiring that initials or a fictitious name be used instead; any document identifying a minor victim of an alleged sexual assault "shall be confidential and unavailable to the public"); Wash. Rev. Code § 10.97.130 (2018) (prohibiting public release of information identifying sexual assault victims under age eighteen, including name, address, location, photographs, and information about victim's relationship to the alleged perpetrator).

individual cases to protect victim information from public inspection. It is not, however, within this Court's authority to read these protections into a statute that does not provide them on its face.

Because the Court of Appeals erred when it held that "Victim #1" constituted "naming the victim" as contemplated by the short-form indictment statute, and because the court referred to and relied on record documents and trial evidence to supplement the faulty indictment, we reverse the decision below and remand this case to the Court of Appeals for further remand to the trial court with instructions to vacate the trial court's judgment.

REVERSED AND REMANDED.

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

Justice NEWBY dissenting.

I fully join Justice Morgan's dissent in this case. I write separately to explain that I also dissent on the basis of the rationale stated in the dissenting opinion in *State v. Rankin*, ___ N.C. ___, ___, 821 S.E.2d 787, 801-11 (2018) (Martin, C.J., dissenting) (discussing the progression of indictment jurisprudence and concluding that the Criminal Procedure Act "reveals significant evidence" indicating that flaws in indictments should no longer be considered jurisdictional matters).

The purpose of an indictment is to notify the defendant of the charges against him and to protect him against being tried twice for the same offense (double jeopardy). Here the indictment fulfilled those purposes as defendant was fully aware of the charges against him. He confessed to his wrongful conduct. He was tried and convicted; jeopardy attached. Yet, based on archaic decisions predating notice pleading under the Criminal Procedure Act, the majority concludes defendant's indictment is technically inadequate. Once again, a child victim must endure the emotional distress and indignities of another trial because of a purely legal technicality. It is this type of legal gamesmanship which leads to cynicism about whether justice prevails in our criminal justice system.

Justice MORGAN dissenting.

While I agree with my learned colleagues in the majority that N.C.G.S. § 15-144.2(b) (2017) expressly requires that a short-form indictment must

name the alleged child victim in a sex offense that is charged pursuant to this statute in order for the indictment to be facially valid, I firmly disagree with them that the superseding indictment upon which defendant was found guilty in this case failed to comport with the statute's requirements. In light of the facts and circumstances of this particular case, the majority unfortunately places the fundamental right of a criminal defendant to have sufficient notice of the charges lodged against him and the State's laudable aim to protect the identity of a minor who is the alleged victim of a sex crime on an unnecessary collision course based upon a narrow and rigid interpretation of the applicable law. I embrace the fundamental reasoning of the Court of Appeals in this case and would arrive at its same outcome.

North Carolina General Statutes section 15-144.2(b), in delineating the essentials of a short-form indictment for a sex offense, states in pertinent part:

> (b) If the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, *naming the child*, and concluding as aforesaid [in subsection (a)].

N.C.G.S. § 15-144.2(b) (Supp. 2018) (emphasis added). N.C.G.S. § 14-27.4A(a) (now recodified as N.C.G.S. § 14-27.28 (2015) established:

> (a) A person is guilty of statutory sexual offense with a child by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years.

Id. § 14-27.28 (2017).

While an indictment is defined in N.C.G.S. § 15A-641(a), the operation of a superseding indictment in conjunction with the original indictment which it supplants is addressed in N.C.G.S. § 15A-646. Every criminal proceeding by indictment is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment." N.C.G.S. § 15-153 (2013), *quoted in State v. Williams*, 368 N.C. 620, 623, 781 S.E.2d 268, 271 (2016). "[W]e are no longer bound by the 'ancient strict pleading requirements of the common law.' " *Williams*, 368 N.C. at 623, 781 S.E.2d at 271 (quoting *State*

v. Freeman, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985). Instead, contemporary criminal pleadings requirements have been "designed to remove from our law unnecessary technicalities which tend to obstruct justice." *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746. "An indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1964).

In the present case, the original indictment charged defendant with a sex offense committed against a minor child in violation of N.C.G.S. § 14-27.4A(a). The minor child was accurately identified in the indictment as the alleged victim by her first and last names. This disclosure of the first and last name of the alleged victim also appeared in the arrest warrant that was issued for defendant and which served as a preface for defendant's subsequent indictment. At this stage in defendant's criminal proceedings, he had been clearly apprised of the identity of his alleged child victim through each of the two critical criminal procedural stages of arrest and indictment. Upon the State's determination to successfully seek a superseding indictment from a grand jury renewing the same charge that appeared in the original indictment with the alleged victim's first and last name, and altering the dates of the alleged offenses in order to be consistent with the time period shown in the arrest warrant that also bore the alleged victim's first and last name, the State deemed it prudent to refer to the alleged child victim in the superseding short-form indictment authorized by N.C.G.S. § 15-144.2(b) merely as "Victim #1." This approach was an obvious effort employed by the State to protect the alleged victim's identity in light of the apparent satisfaction of its constitutional duty, as enacted in the cited statutory law and consistently interpreted by this Court in such cases as *Williams*, *Freeman*, and *Coker*, to apprise defendant of the charged sex offenses against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offenses.

The effectiveness and sufficiency of the notice given to defendant as to the identity of "Victim #1" in the superseding indictment, based upon the alleged victim's name being divulged in the original indictment, is readily apparent from the procedural and substantive circumstances at the trial level. As the Court of Appeals astutely noted in its rendered opinion, the superseding indictment was filed in the same criminal case bearing the same file number as the warrant and original indictment; the dismissal filed by the State to dispose of the original indictment upon

the introduction of the superseding indictment expressly noted that the only substantive changes between the two charging instruments were a correction of the dates of offense and an increase in the level of the charged felony; defendant did not contend at any point during his trial that the identity of the alleged victim was in question or that he faced any difficulty in preparing his defense. With this confluence of constitutional law, statutory law, and appellate case law readily flowing with the particular facts and circumstances contained in the instant case, I agree with the conclusion of the lower appellate court that defendant was given sufficient notice as to the identity of the alleged child victim and that nothing in the record demonstrates that such notice was affected by the superseding indictment.

The majority's restricted view of the properness of the superseding indictment in the case at bar is further displayed by its application of the Court's decision in *State v. Ellis*, 368 N.C. 342, 776 S.E.2d 675 (2015). While my colleagues of the majority conveniently frame the issue of the State's employment of the superseding short-form indictment in a sweepingly broad manner so as to couch the matter in terms of the charging instrument's allegations being buttressed by "extrinsic evidence" in order to reiterate the principle that "[a] court may not look to extrinsic evidence to supplement a missing or deficient allegation in an indictment" in depicting the Court of Appeals' application of *Ellis* in its decision below, I do not consider the *Ellis* decision to be determinative of this current case. The Court of Appeals construed *Ellis* in a manner in which to authorize the lower appellate court to authenticate its favorable view of the sufficiency of the superseding indictment by considering matters which were extraneous to the charging instrument, stating that in *Ellis*, this Court has "looked beyond the four corners of the documents" "[i]n holding that the charging instruments were facially valid." *State v. White*, ___ N.C. App. ___ 805 S.E.2d 563 2017 WL 4638188 at *5 (2017) (unpublished). This conclusion by the Court of Appeals prompted the majority here to explain that this Court did not authorize "the proposition that [the Court of Appeals] may look outside the four corners of the indictment for information to supplement the missing essential element in the indictment." Because *Ellis* involves the element of the facial validity of an indictment regarding the capability of an alleged victim entity to own property that is the subject of a criminal charge, thus constituting a significant distinguishing factor which does not exist in the present case, I would find that the Court of Appeals' reliance on *Ellis* was needless and the resulting usage of it by the majority is neatly opportune. In my view, the majority does

not sufficiently justify its determination that the superseding indictment is facially invalid as to the identification of the alleged child victim as "Victim #1" in light of the obvious achievement of required notice to defendant which protected all of his constitutional rights, while simultaneously satisfying the legal requirements for a valid short-form indictment and salvaging some protection of privacy for the minor child.

For the reasons stated, I would modify and affirm the opinion of the Court of Appeals in this case.

Justice NEWBY joins in this dissenting opinion.

WELLS FARGO INSURANCE SERVICES USA, INC.
v.
KEVIN LINK, NELSON RAYNOR, ELIZABETH PACK, AND
BB&T INSURANCE SERVICES, INC.

No. 300A18

Filed 10 May 2019

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion on defendants' motion to dismiss entered on 8 May 2018 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice under N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 10 April 2019.

Fisher & Phillips LLP, by J. Michael Honeycutt, Meredith W. Norvell, and Holly N. Mancl, for plaintiff-appellant.

Parry Tyndall White, by K. Alan Parry, Michelle M. Walker, and Megan E.A. Bishop, for defendant-appellees.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT
OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS 12848

WELLS FARGO INSURANCE SERVICES USA, INC.

Plaintiffs,

v.

KEVIN LINK, NELSON RAYNOR, ELIZABETH PACK AND BB&T INSURANCE SERVICES, INC.

Defendants.

ORDER AND OPINION ON DEFENDANTS' MOTION TO DISMISS

THIS MATTER comes before the Court on Defendants Kevin Link, Nelson Raynor, Elizabeth Pack, and BB&T Insurance Services, Inc.'s Partial Motion to Dismiss Pursuant to Rule 12(b)(6). ("Motion to Dismiss", ECF No. 7.) Defendants seek to dismiss Counts One–Five, Seven, and Eight in the Complaint, but do not seek dismissal of Count Six.

THE COURT, having considered the Motion to Dismiss, the briefs filed in support of and in opposition to the Motion to Dismiss, the arguments of counsel at the hearing, and other appropriate matters of record, CONCLUDES, in its discretion, that the Motion to Dismiss should be GRANTED, in part, and DENIED, in part, for the reasons set forth below.

Fisher & Phillips, by J. Michael Honeycutt and Meredith W. Norvell, for Plaintiff Wells Fargo Insurance Services USA, Inc.

Parry Tyndall White, by K. Alan Parry and Michelle M. Walker, for Defendants Kevin Link, Nelson Raynor, Elizabeth Pack, and BB&T Insurance Services, Inc.

McGuire, Judge.

I. FACTS AND PROCEDURAL BACKGROUND

1. The Court does not make findings of fact on motions to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (hereinafter, "Rule(s)"), but only recites those facts included in the complaint that are relevant to the Court's determination of the Motion. *See, e.g., Concrete Serv. Corp. v. Inv'rs Grp., Inc.*, 79 N.C. App. 678, 681, 340 S.E.2d 755, 758 (1986).

A. The parties

2. Plaintiff Wells Fargo Insurance Services USA, Inc. ("Plaintiff" or "Wells Fargo") is a North Carolina-licensed insurance broker that sells insurance products and services to its customers. (Compl., ECF No. 3, at ¶ 9.) Wells Fargo alleges that it provides "insurance products and services that are unique to the particular needs of its customers." (*Id.* at ¶ 16.)

3. Defendant BB&T Insurance Services, Inc. ("BB&T") is also an insurance broker providing insurance products and services to its customers in the same segment of the insurance market. (*Id.* at ¶ 10.)

4. Wells Fargo employed Defendant Kevin Link ("Link") as a Senior Sales Executive. Link was responsible for "soliciting insurance customers and providing risk management services." (*Id.* at ¶ 11.) Link resigned from Wells Fargo effective October 31, 2016, and began working for BB&T. (*Id.*)

5. Wells Fargo employed Defendant Nelson Raynor ("Raynor") as a Commercial Insurance Producer. Raynor was responsible for "procuring insurance customers and providing risk management services." (*Id.* at ¶ 12.) On April 12, 2017, Raynor resigned from Wells Fargo and began working for BB&T. (*Id.*)

6. Wells Fargo employed Elizabeth Pack ("Pack") as a Marketing Placement Specialist. Pack was responsible for marketing to Wells Fargo's insurance customers. (*Id.* at ¶ 13.) On April 3, 2017, Pack resigned from Wells Fargo and began working for BB&T. (*Id.* at ¶ 13.) (Collectively, Link, Raynor, and Pack are referred to as the "Individual Defendants.")

7. While employed with Wells Fargo, the Individual Defendants "brokered and serviced the insurance needs of Wells Fargo customers assigned to them" and had knowledge about the insurance needs and policies of their customers. (*Id.* at ¶ 14.)

8. Wells Fargo has developed and maintains certain "confidential and trade secret information" concerning its customers. (*Id.* at ¶¶ 17–21.) The confidential and trade secret information "provides Wells Fargo with a competitive advantage over its competitors who do not know the information." (*Id.* at ¶ 20.) Wells Fargo makes efforts to protect the secrecy of its confidential and trade secret information through the use of written confidentiality agreements, and the implementation of a Code of Ethics and Information Security Policy and policies in its Team Member Handbook. (*Id.* at ¶¶ 22–25.)

B. Link's and Raynor's Restrictive Agreements

9. During their employment with Wells Fargo, Link and Raynor each executed an agreement with Wells Fargo entitled "Agreement Regarding Trade Secrets, Confidential Information, Nonsolicitation and Assignment of Inventions" (the "Restrictive Agreements"). (ECF No. 3, at ¶ 27; Link Restrictive Agreement, ECF No. 3, Ex. 1; Raynor Restrictive Agreement, ECF No. 3, Ex. 2.) The Restrictive Agreements provide that for a period of two (2) years immediately following termination of their employment for any reason, Link and Raynor will not:

a. [S]olicit, recruit or promote the solicitation or recruitment of any employee or consultant of the Company for the purpose of encouraging that employee or consultant to leave the Company's employ or sever an agreement for services;

b. [S]olicit, participate in or promote the solicitation of any of the Company's clients, customers, or prospective customers with whom [they] had Material Contact and/or regarding whom [they] received Confidential Information, for the purpose of providing products or services that are in competition with the Company's products or services ("Competitive Products/Services"). "Material Contact" means interaction between [them] and the customer, client or prospective customer within one (1) year prior to [their] last day as a team member which takes place to manage, service, or further the business relationship; or

c. Accept insurance business from or provide Competitive Products/Services to customers or clients of the Company:

    i. with whom [they] had Material Contact, and/or

    ii. were [their] clients or customers of the Company within six (6) months prior to [their] termination of employment.

(ECF No. 3, at ¶¶ 30, 34.)

10. The Restrictive Agreements also prohibit Link and Raynor from using or disclosing Wells Fargo's "Trade Secrets" and "Confidential Information". (*Id.* at ¶¶ 30 and 35.) The Restrictive Agreements define "Trade Secrets" as including, but not limited to:

> [T]he names, addresses, and contact information of the Company's customers and prospective customers, as well

> as any other personal or financial information relating to any customer or prospect, including, without limitation, account numbers, balances, portfolios, maturity and/or expiration or renewal dates, loans, policies, investment activities, purchasing practices, insurance, annuity policies and objectives;
>
> [A]ny information concerning the Company's operations, including without limitation, information related to its methods, services, pricing, costs, margins and mark ups, finances, practices, strategies, business plans, agreements, decision-making, systems, technology, policies, procedures, marketing, sales, techniques, agent information, and processes;
>
> [A]ny other proprietary and confidential information relating to the Company's customers, employees, products, services, sales, technologies, or business affairs.

(ECF No. 3, at Exs. 1 and 2.) The Restrictive Agreements do not contain a separate definition of "Confidential Information."

11. The Restrictive Agreements define "the Company" as: "a Wells Fargo company and/or any of its past, present, and future parent companies, subsidiaries, predecessors, successors, affiliates, and acquisitions." (*Id.*)

12. Under the Restrictive Agreements, Link and Raynor also were required to return to Wells Fargo upon termination of employment all "Confidential Information of the Company" and all "Records of the Company" in their respective possessions. (*Id.* at ¶¶ 31, 36; Exs. 1 and 2.)

C. The resignations from Wells Fargo and breaches of the Restrictive Agreements

13. Link resigned from Wells Fargo on October 31, 2016, Pack resigned on April 3, 2017, and Raynor resigned on April 12, 2017. Link and Raynor "solicit[ed] and encourage[ed]" each other, and Pack, to terminate employment with Wells Fargo. (ECF No. 3, at ¶¶ 40–41.)

14. On or about April 12, 2017, immediately prior to submitting his resignation, Raynor entered Wells Fargo's offices at around 8:00 p.m. and printed and copied documents for approximately one hour. (*Id.* at ¶¶ 42, 101.) Wells Fargo alleges that it "is informed and believes . . . that the documents printed and copied by Defendant Raynor contained highly confidential and trade secret information belonging to Wells Fargo." (*Id.* at ¶ 46.)

15. Since becoming employed with BB&T, Link, Raynor, and Pack have contacted and solicited Wells Fargo's customers "in an attempt to divert their insurance business away from Wells Fargo" and to BB&T. (*Id.* at ¶¶ 47–48.) Wells Fargo alleges upon information and belief that Link, Raynor, and Pack used Wells Fargo's trade secrets and confidential information "to identify, contact, solicit and induce Wells Fargo clients to transfer their accounts and otherwise divert business from Wells Fargo to BB&T." (*Id.* at ¶ 56.) In the Complaint, Wells Fargo lists approximately 18 Wells Fargo customers assigned to Link or Raynor who have transferred their insurance business to BB&T since Link and Raynor left Wells Fargo. (*Id.* at ¶¶ 53–71.)

16. On November 27, 2017, Wells Fargo filed the Complaint. In the Complaint, Wells Fargo alleges four separate claims against Link and Raynor for breaches of Restrictive Agreements: breach of the non-solicitation of customers provision (Count One); breach of the non-solicitation of employees provisions (Count Two); breach of the confidential information provisions (Count Three); and breach of the return of property provision (Count Four). Wells Fargo also alleges the following claims against all of the Defendants: misappropriation of trade secrets in violation of the North Carolina Trade Secrets Protection Act ("NCTSPA"), N.C. General Statute § 66-152 et seq., (hereinafter "G.S.") (Count Five); tortious interference with contractual relations (Count Seven); and unfair and deceptive trade practices (Count Eight). Finally, Wells Fargo alleges a claim for computer trespass under G.S. § 14-458 against Raynor only (Count Six).

17. On November 28, 2017, the case was designated to the North Carolina Business Court and assigned to the undersigned. (Designation Order, ECF No. 1; Assignment Order, ECF No. 2.)

18. On December 28, 2017, Defendants filed the Motion to Dismiss and a supporting memorandum of law. (Def. Memo. Supp. Mot. Dismiss, ECF No. 8.) On January 22, 2018, Plaintiff filed its brief in opposition to the Motion to Dismiss. (Pl. Br. Opp. Mot. Dismiss, ECF No. 10.) Defendants filed a reply on February 8, 2018. (Def. Reply Supp. Mot. Dismiss, ECF No. 15.) On February 20, 2018, the Court heard oral argument on the Motion to Dismiss. The Motion to Dismiss is now ripe for disposition.

II. ANALYSIS

19. The Court, in deciding a Rule 12(b)(6) motion, treats the well-pleaded allegations of the complaint as true and admitted. *Sutton v. Duke*, 277 N.C. 94, 98 (1970). However, conclusions of law or unwarranted

deductions of fact are not deemed admitted. *Id.* The facts and permissible inferences set forth in the complaint are to be treated in a light most favorable to the nonmoving party. *Ford v. Peaches Entm't Corp.*, 83 N.C. App. 155, 156 (1986). As our Court of Appeals has noted, the "essential question" raised by a Rule 12(b)(6) motion is "whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory." *Barnaby v. Boardman*, 70 N.C. App. 299, 302, 318 S.E.2d 907, 909 (1984), *rev'd on other grounds*, 313 N.C. 565 (1985) (citations and emphasis omitted).

20. Our appellate courts frequently reaffirm that North Carolina is a notice pleading state. *See, e.g.*, *Feltman v. City of Wilson*, 238 N.C. App. 246, 252, 767 S.E.2d 615, 620 (2014) (quoting *Wake Cty. v. Hotels.com, L.P.*, 235 N.C. App. 633, 646–47, 762 S.E.2d 477, 486 (2014)). "Under notice pleading, a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the res judicata, and to show the type of case brought." *Id.* Accordingly, "a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton*, 277 N.C. at 103, 176 S.E.2d at 166 (1970) (emphasis omitted).

21. A Rule 12(b)(6) motion should be granted when the complaint, on its face, reveals (a) that no law supports the plaintiff's claim, (b) the absence of facts sufficient to form a viable claim, or (c) some fact which necessarily defeats the plaintiff's claim. *Jackson v. Bumgardner*, 318 N.C. 172, 175 (1986). In addition, the Court may consider documents which are the subject of plaintiff's complaint and to which the complaint specifically refers, including the contract that forms the subject matter of the action. *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001).

22. The Court first will address Wells Fargo's claims for breach of the Restrictive Agreements by Link and Raynor, and then the claims alleged against all of the Defendants.

A. Breach of the non-solicitation of customers restriction (Count One)

23. In its first claim, Wells Fargo alleges Link and Raynor breached the prohibitions against soliciting or accepting insurance business from Wells Fargo's customers contained in sections III.b. and III.c. of the Restrictive Agreements. (ECF No. 3, at ¶¶ 80–84.) Section III.b. prohibits Link and Raynor from soliciting "the Company's" customers or

prospective customers with whom they had "Material Contact and/or" customers about whom they received "Confidential Information." (*Id.* at ¶¶ 30 and 34.) "Material Contact" is defined as interaction with the customer during the year prior to their respective terminations of employment from Wells Fargo. Section III.c. of the Restrictive Agreements prohibits Link and Raynor from accepting "insurance business" from or providing competitive products and services to customers of "the Company" with whom they had "Material Contact and/or" who were "customers of the Company within six (6) months prior to [their] termination of employment." (*Id.*)

24. North Carolina courts will enforce a covenant not to compete if it is: "(1) in writing; (2) reasonable as to [the] terms, time, and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) not against public policy." *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 228, 393 S.E.2d 854, 857 (1990); *United Lab., Inc. v. Kuykendall*, 322 N.C. 643, 649–50, 370 S.E.2d 375, 380 (1988). The party seeking enforcement of a restrictive covenant has the burden of proving its reasonableness. *Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 655, 670 S.E.2d 321, 327 (2009). The reasonableness of a non-competition covenant is a matter of law for the court to decide. *Id.*

25. In the absence of an express geographic territory restriction, a court can enforce a restriction prohibiting a former employee from soliciting customers or clients. *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 526, 379 S.E.2d 824, 826f (1989) (relying on *Kuykendall* and enforcing a noncompetition agreement that included client-based restrictions for 24 months without any expressly defined geographical territory other than the employee's sales territory at the time of termination and holding that "customers developed by a salesperson are the property of the employer and may be protected by a contract under which the salesperson is forbidden from soliciting those customers for a reasonable time after leaving his or her employment"); *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 469, 556 S.E.2d 331, 336 (2001) (enforcing covenant prohibiting solicitation of any former employer's customers).

26. A customer-based restriction on solicitation is analyzed in much the same manner as a geographic restriction, taking into consideration many of the same factors and, particularly, the time period of the restriction. *See, e.g.*, *Wade S. Dunbar Ins. Agency*, 147 N.C. App. at 469, 556 S.E.2d 335; *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 281–82, 530 S.E.2d 878, 883 (2000) ("The geographic limitation of that case is analogous to the client-based limitation in the case at bar."); *Sandhills Home*

Care, L.L.C. v. Companion Home Care – Unimed, Inc., 2016 NCBC LEXIS 61, at *25 (N.C. Super. Ct. Aug. 1, 2016).

27. In this case, Defendants challenge the prohibitions on soliciting or accepting insurance business from Wells Fargo customers on the grounds that the definitions of the terms "the Company" and "Confidential Information" make the restrictions unreasonably broad and vague, and unenforceable as a matter of law. (ECF No. 8, at pp. 8–10.) Accordingly, the Court must determine whether sections III.b. and III.c. are unreasonable as a matter of law.

i. Section III.b.

28. Section III.b. does not have a geographic restriction, but instead prohibits Link and Raynor, for a period of two years, from soliciting "the Company's" customers and prospective customers with whom Link and Raynor had "Material Contact and/or" about whom they received "Confidential Information." (ECF No. 3, at Exs. 1 and 2, sec. III.) Defendants do not challenge the reasonableness of the prohibition on Link and Raynor soliciting Wells Fargo customers or prospective customers with whom they had Material Contact. Instead, Defendants argue that the terms "the Company" and "Confidential Information" are defined so broadly in the Employment Agreement that it makes the prohibition against Link and Raynor soliciting customers and prospective customers about whom they received "Confidential Information" unreasonably vague and overly broad. (ECF No. 8, at pp. 8–10.)

29. The Employment Agreements define "the Company" to include not only Wells Fargo Insurance Services, but also its "past, present, and future parent companies, subsidiaries, predecessors, successors, affiliates, and acquisitions." (ECF No. 3, Exs. 1 and 2.) The Employment Agreement does not identify the subsidiary and affiliate companies, but according to publicly available data from Wells Fargo, it is a vast organization with many affiliate companies.

30. Wells Fargo noted to its shareholders in its 2016 Annual Report that Wells Fargo "provide[s] banking, insurance, investments, mortgage, and consumer and commercial finance through more than 8,600 locations, 13,000 ATMs, digital (online, mobile and social), and contact centers (phone, email and correspondence), and [Wells Fargo] ha[s] offices in 42 countries and territories." WELLS FARGO, 2016 ANNUAL REPORT 36 (2016)[1]. Wells Fargo listed 44 significant subsidiaries in an attached

1. Available online at: https://www.wellsfargo.com/assets/pdf/about/investor-relations/annual-reports/2016-annual-report.pdf

exhibit to its Form 10-K annual report to the United States Securities Exchange Commission ("SEC") for 2017. Wells Fargo, Form 10-K Annual Report to SEC (Exhibit 21) (Jan. 3, 2018)[2]. The listed subsidiaries include, *inter alia*, companies that provide personal, commercial, and real estate financing, insurance companies, venture capital firms, securities companies, and holding companies. *Id.* In 2016, Wells Fargo employed over 269,000 full-time employees. WELLS FARGO, 2016 ANNUAL REPORT 36 (2016).

31. Defendants contend that North Carolina courts have found similarly broad prohibitions on soliciting customers of parent, subsidiary, and affiliate companies for whom the former employees performed no services unreasonable as matter of law. *Medical Staffing Network*, 194 N.C. App. at 657, 670 S.E.2d at 328 (finding restrictive covenants unenforceable because the plaintiff had no legitimate business interest in foreclosing solicitation of clients of "an unrestricted and undefined set of [the plaintiff's] affiliated companies that engage in business distinct from the . . . business in which [the defendant] had been employed").

32. To the extent that Link and Raynor are prohibited from soliciting Wells Fargo customers or prospective customers with whom they had "Material Contact" during the last year of their employment, the potential inclusion of customers of affiliate companies does not necessarily render the restriction overbroad and unreasonable. *See*, *e.g.*, *Laboratory Corp. of America Holdings v. Kearns*, 84 F. Supp. 3d 447, 459 (M.D.N.C. Jan. 30, 2015) ("In North Carolina, covenants prohibiting competition for a former employer's customers are only enforceable when they prohibit the employee from contacting customers with whom the employee actually had contact during his former employment."). If Link and Raynor had significant interactions with customers or prospective customers of affiliate companies of Wells Fargo, Wells Fargo may have a legitimate interest in restricting them from soliciting those customers.

33. Link and Raynor, however, are not only prohibited from soliciting Wells Fargo customers with whom they had "Material Contact", but also from soliciting customers and prospective customers about whom they received "Confidential Information." The Restrictive Agreements define "Confidential Information" as including "the Company's Trade Secrets and other proprietary information relating to its business methods, personnel, and customers." (ECF No. 3, at Exs. 1 and 2, sec. II.) Wells Fargo's "Trade Secrets" are defined as including, but not limited to:

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2. Available online at: https://www.sec.gov/Archives/edgar/data/72971/000007297118000272/wfc-12312017xex21.htm

> [T]he names, address, and contact information of the Company's customers and prospective customers, as well as any other personal or financial information relating to any customer or prospect, including, without limitation, account numbers, balances, portfolios, maturity and/or expiration or renewal dates, loans, policies, investment activities, purchasing practices, insurance, annuity policies and objectives;
>
> [A]ny information concerning the Company's operations, including without limitation, information related to its methods, services, pricing, costs, margins and mark ups, finances, practices, strategies, business plans, agreements, decision-making, systems, technology, policies, procedures, marketing, sales, techniques, agent information, and processes; [and]
>
> [A]ny other proprietary and/or confidential information relating to the Company's customers, employees, products, services, sales, technologies, or business affairs.

(*Id.*)

34. The Restrictive Agreements further expand the definition of "Confidential Information" to include the "Records of the Company," and provide that:

> 'Records' include, but are not limited to original, duplicated, computerized, memorized, handwritten or any other form of information, whether contained in materials provided to me by the Company, or by any institution acquired by the Company, or compiled by me in any form or manner including information in documents or electronic devices, such as software, flowcharts, graphs, spreadsheets, resource manuals, videotapes, calendars, day timers, planners, rolodexes, or telephone directories maintained in personal computers, laptop computers, personal digital assistants or any other device.

(*Id.*)

35. Defendants argue that the restriction on soliciting customers or prospective customers of "the Company" about whom they received "Confidential Information" is far too broad based on the definitions used in the Restrictive Agreements. For example, the Restrictive Agreements define "Confidential Information" as including the names and addresses

of customers and prospective customers of Wells Fargo and any of its affiliate companies, and Wells Fargo's "Records" as including "memorized, handwritten or any other form of information, . . . such as software, flowcharts, graphs, spreadsheets, resource manuals, videotapes, calendars, day timers, planners, rolodexes, or telephone directories." Arguably, the clause prohibits solicitation of any customers or prospective customers of Wells Fargo-affiliate companies whose name, address, or other contact information was shown (purposefully or inadvertently) to Link or Raynor during their employment, whether or not that customer or prospective customer had any dealings with Wells Fargo's insurance division or with Link or Raynor. Defendants aptly point out that, read literally, the non-solicitation provision in section III.b. would prohibit Link and Raynor from soliciting a prospective customer of a Wells Fargo affiliate company based simply on them having seen an "actual or prospective customer's name in a calendar, day timer, planner, rolodex, or telephone directory maintained anywhere at any Wells Fargo company." (ECF No. 8, at pp. 9–10.)

36. In its brief, Plaintiff does not address the breadth of the definitions of "the Company" and "Confidential Information" in the Restrictive Agreements, or attempt to explain why it has a business interest in prohibiting solicitation of such a vast array of customers. Instead, it argues that the provision restricting solicitation of customers or prospective customers about whom Link and Raynor received "Confidential Information" can be disregarded because "Link and Raynor would not have had access to confidential information concerning a client or customer they did not service, and there is no allegation in the Complaint alleging that they did." (ECF No. 10, at p. 9.) Plaintiff misapprehends their burden in responding to the Motion to Dismiss. Plaintiff has not alleged that Link and Raynor received "Confidential Information" only regarding Wells Fargo customers and prospective customers whom they serviced, and the Court cannot accept the representations in its brief in lieu of allegations in the Complaint.

37. At the hearing on the Motion to Dismiss, Plaintiff's counsel also suggested that Wells Fargo would only seek to restrain Link and Raynor from soliciting customers with whom they had "Material Contact," as Plaintiff has done in this lawsuit, and not customers about whom Link and Raynor received Confidential Information. This argument, however, is unavailing. It is the Court's duty at this stage to analyze the restrictive covenant, as alleged, and determine whether it is reasonable and enforceable. The Court cannot read provisions out of the Restrictive Agreements based on Plaintiff's representations in order to make the

covenant enforceable. A court may not construe an agreement in a way that ignores or deletes its plain terms. *See*, *e.g.*, *State v. Philip Morris USA*, *Inc.*, 193 N.C. App. 1, 12–13, 666 S.E.2d 783, 791 (2008) (stating that where the language of a contract is unambiguous, a court cannot ignore, insert, or improperly construe the meaning of any contract terms, but instead a court must infer the intent of the parties from the terms in the contract); *Happ v. Creek Pointe Homeowner's Ass'n*, 215 N.C. App. 96, 103–04, 717 S.E.2d 401, 406 (2011) (holding that even where the language of a contract is ambiguous, it is a "fundamental rule of contract construction" that the court "gives effect to all of its provisions, if the court is reasonably able to do so").

38. Finally, Plaintiff argues that, to the extent the prohibition in section III.b. on soliciting customers about whom Link and Raynor received "Confidential Information" makes the covenant over-broad, the Court can "blue pencil," or remove, that provision and enforce only the restriction on soliciting customers with whom they had "Material Contact." (ECF No. 10, at pp. 12–13.) Under the "blue pencil doctrine," North Carolina courts may specifically enforce divisible or separable sections of restrictive covenants while striking portions that are unenforceable. *Whittaker General Medical Corp.*, 324 N.C. at 528, 379 S.E.2d at 828 ("If the contract is separable, however, and one part is reasonable, the courts will enforce the reasonable provision" (citing *Welcome Wagon*, *Inc. v. Pender*, 255 N.C. 244, 120 S.E. 2d 739 (1961).); *see also*, *Hartman v. W.H. Odell & Assocs.*, 117 N.C. App. 307, 317, 450 S.E.2d 912, 920 (1994) ("When the language of a covenant not to compete is overly broad, North Carolina's "blue pencil" rule severely limits what the court may do to alter the covenant. A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or rewrite the covenant.").

39. The Court cannot "blue pencil" the provisions in section III.b. because the provision addressing customers about whom Link and Raynor received "Confidential Information" is not "distinctly separable" from the "Material Contact" provision. The two provisions are not contained in separately numbered paragraphs, separate sentences, or even separated by the word "or." Rather, the provisions are separated by the term "and/or." The use of "and/or" suggests that the prohibitions could be read in both the conjunctive and disjunctive senses, and creates an ambiguity. "When the language in a contract is ambiguous, we view the practical result of the restriction by 'construing the restriction strictly against its draftsman[.]' " *Electrical South*, *Inc. v. Lewis*, 96 N.C. App. 160, 167, 385 S.E.2d 352, 356 (1989) (citing *Manpower of Guilford County*, *Inc.*

v. Hedgecock, 42 N.C. App. 515, 522, 257 S.E.2d 109, 115 (1979)). In this case, the Court concludes that the term "and/or" must be construed against Wells Fargo and read in the conjunctive sense for the purpose of applying the "blue pencil" doctrine. Under this interpretation, the provision restricting Link and Raynor from soliciting customers about whom they received "Confidential Information" is not clearly separable from the other restrictions in section III.b. and cannot be stricken.

ii. Section III.c.

40. Section III.c. of the Restrictive Agreement prohibits Link and Raynor, for two years from their dates of termination, from accepting "insurance business from or provid[ing] Competitive Products/Services to" customers of "the Company" with whom they had "Material Contact, and/or" who were customers of "the Company" within the six months prior to their respective terminations from Wells Fargo. (ECF No. 3, at ¶¶ 30 and 34; Exs. 1 and 2.)

41. Defendants first challenge the scope of section III.c. on the grounds that it prohibits Link and Raynor from "accepting insurance business from" former Wells Fargo customers. (ECF No. 8, at pp. 10–11.) Defendants contend that the term "insurance business" is undefined in the Restrictive Agreements and could encompass insurance products and services beyond the commercial insurance policies and services with which Link and Raynor were involved. (*Id.*) Defendants argue that the prohibition on accepting "insurance business" of any type from former customers is broader than necessary to protects Wells Fargo's business interests. (*Id.*) While the Court concludes that there may be merit to Defendants' argument, the Court arguably could "blue pencil" the phrase "accepting insurance business from" out of the description of the conduct restricted by section III.c. because the term is separated from the prohibition on "provid[ing] Competitive Products/Services to" by the word "or", and could be viewed as a "distinctly severable" part of the covenant. *Hartman*, 117 N.C. App. at 317, 450 S.E.2d at 920; *see also*, *Superior Performers*, *Inc. v. Meaike*, 2014 U.S. Dist. LEXIS 50302, at *39–40 (M.D.N.C. Apr. 11, 2014) ("Although it is not separated off by number or in a different clause, the language can readily be struck through and the rest of the restrictive covenant still makes sense and stands on its own. Therefore, to the extent that the "or its Affiliates" language renders the restrictive covenant unreasonable, it is likely separable from the remainder of the covenant, which is reasonable.").

42. However, even if the phrase "accepting insurance business from" could be severed from the prohibition, it would not salvage the covenant

in section III.c. because the covenant prohibits Link and Raynor from providing competitive insurance products to customers with whom they had "Material Contact, and/or . . . customers of the Company within six (6) months prior to" their respective terminations from employment with Wells Fargo. (ECF No. 3, at ¶¶ 30 and 34.) Again, "the Company" is defined so broadly in the Restrictive Agreements that it sweeps within its ambit customers of far-flung Wells Fargo subsidiaries and affiliates unrelated to Wells Fargo's commercial insurance business, and customers w ith whom Link and Raynor would have had no contact. *See*, *Medical Staffing Network*, 194 N.C. App. at 657, 670 S.E.2d at 328. In addition, for the same reasons discussed above, the use of "and/or" must be construed against Wells Fargo, and III.c.ii. cannot be "blue penciled" out of the covenant contained in section III.c. Accordingly, the Court concludes that the restrictive covenant in section III.c. is too broad and is unreasonable as a matter of law.

43. Sections III.b. and III.c. of the Restrictive Agreements are too broadly written to be enforceable under North Carolina law. Accordingly, Defendants' motion to dismiss Plaintiff's First Count for breach of the non-solicitation of customers provisions in sections III.b. and III.c. of the Restrictive Agreements should be GRANTED.

B. Breach of the non-solicitation of employees covenants (Count Two)

44. In its second claim, Wells Fargo alleges that Link and Raynor breached the provisions of the Restrictive Agreements prohibiting them from soliciting Wells Fargo's employees to terminate employment with Wells Fargo. (ECF No. 3, at ¶¶ 80–84.) Section III.a. of the Restrictive Agreements provide that for two years following termination, Link and Raynor "will not . . . solicit, recruit, or promote the solicitation or recruitment of any employee or consultant of the Company for the purpose of encouraging that employee or consultant to leave the Company's employ or sever an agreement for services." (*Id.* at ¶¶ 30 and 34.)

45. Courts in North Carolina have recognized that reasonable restrictions on a former employee's right to solicit an employer's current employees are enforceable. *Kennedy v. Kennedy*, 160 N.C. App. 1, 11–12, 584 S.E.2d 328, 335 (2003) ("[T]he covenant prohibiting Carroll from soliciting and hiring plaintiff's former employees for the three-year period does not violate public policy."); *Superior Performers, Inc.*, 2014 U.S. Dist. LEXIS 50302, at *30 (finding a two year restriction on soliciting former employer's current employees reasonable). A restriction on solicitation of employees generally is subject to the same requirements

as other restrictive covenants. *Sandhills Home Care, L.L.C.*, 2016 NCBC LEXIS 61, at *36.

46. Here, the non-solicitation of employees covenant is in writing and supported by consideration. Defendants do not argue that the covenant would violate public policy. *See*, *Sandhills Home Care*, 2016 NCBC LEXIS 61, at *36 (citing *Phelps Staffing, LLC v. C.T. Phelps, Inc.*, 226 N.C. App. 506, 510, 740 S.E.2d 923, 927 (2013)). Defendants contend, however, that the non-solicitation of employees restriction is overbroad and unreasonable because it prohibits Link and Raynor from soliciting employees of "the Company." (ECF No. 8, at pp. 11–12.) As noted herein, in 2016, Wells Fargo claimed to have 44 subsidiary companies employing a total of over 269,000 employees in personal and commercial banking, investment, insurance, and other businesses. As written, the Restrictive Agreement would prohibit Link and Raynor from soliciting or attempting to solicit hundreds of thousands of employees in a variety of businesses other than commercial insurance and across a vast geographic area.

47. Covenants restricting former employees from soliciting a former employer's employees are another means of protecting the former employer's interest in the good-will it has with its customers. *Kennedy*, 160 N.C. App. at 11–12, 584 S.E.2d at 335 (enforcing prohibition against dentist soliciting his former practice's employees, holding "[t]he evidence demonstrates that plaintiff's employees, many of whom had been employed in plaintiff's practice for several years, were a valuable part of the asset owned by plaintiff, that the employees had developed personal relationships with plaintiff's patients, that the employees were an integral part of a patient's experience with plaintiff"). To establish that a non-solicitation of employees covenant is reasonable, an employer must establish that it has a protectable business interest in prohibiting solicitation of former employees, and such prohibition must be no broader than necessary to protect that interest. In *Medical Staffing Network, Inc.*, the Court held that a prohibition on the defendant soliciting employees of the plaintiff's affiliate businesses for which the defendant did not work was overbroad.

> [The plaintiff] presented no evidence, and the trial court made no findings that [the plaintiff] had any legitimate business interest in . . . foreclosing the solicitation of employees of . . . an unrestricted and undefined set of [the plaintiff's] affiliated companies that engage in business distinct from the medical staffing business in which [the defendant] had been employed. We conclude that on its

> face, this bar extends beyond any legitimate interest [the plaintiff] might have in this case.

194 N.C. App. at 657, 670 S.E.2d at 328.

48. Plaintiff has not alleged any facts that would support a legitimate business interest in restricting Link or Raynor from soliciting employees working for Wells Fargo's affiliate companies in any segment of the banking, investment, or insurance industries. It is highly unlikely that the vast majority of these employees would have had any involvement or contact with Wells Fargo's commercial insurance customers. The non-solicitation of employees covenant, as written, is unreasonable and unenforceable as a matter of law. *Id.*

49. Accordingly, the Defendants' motion to dismiss Count Two for breach of the non-solicitation of employees provisions in section III.a. of the Restrictive Agreements should be GRANTED.

C. Breach of the confidentiality covenant against Link and return of property provision against Link (Counts Three and Four)

50. Plaintiff also makes claims that Link and Raynor violated the covenants prohibiting use or disclosure of "Confidential Information," and the provisions requiring return of "Records" and "Confidential Information," in the Restrictive Agreements. (ECF No. 3, at ¶¶ 85–94.) Defendants argue the Complaint does not state claims against Link and seek dismissal of Counts Three and Four against Link only. (ECF No. 8, at pp. 12–14.) They do not seek dismissal of these claims against Raynor. (*Id.*) Defendants argue that Plaintiff makes nothing more than conclusory allegations against Link, and does not plead facts supporting the claims for breach of the confidentiality and return of property provisions. (*Id.*)

51. "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of [the] contract." *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 588, 619 S.E.2d 577, 580 (2005); *Regency Ctrs. Acquisition, LLC v. Crescent Acquisitions, LLC*, 2018 NCBC LEXIS 7, at *18 (N.C. Super. Ct. Jan. 24, 2018). The North Carolina Court of Appeals has held that "an agreement is not in restraint of trade . . . if it does not seek to prevent a party from engaging in a similar business in competition with the promisee, but instead seeks to prevent the disclosure or use of confidential information." *Chemimetals Processing, Inc. v. McEneny*, 124 N.C. App. 194, 197, 476 S.E.2d 374, 376 (1996). Such an agreement is enforceable "even though the agreement

is unlimited as to time and area, upon a showing that it protects a legitimate business interest of the promisee." *Id.* at 197, 476 S.E.2d at 376-77 (citation omitted).

52. The Court has thoroughly reviewed the allegations in the Complaint and concludes that Plaintiff has sufficiently alleged a claim against Link for breach of the "Confidential Information" restrictions, but has not alleged any facts that would support the claim that Link failed to return "Records and Confidential Information" after his resignation from Wells Fargo.

53. With regard to the claim for breach of the "Confidential Information" covenant, Plaintiff alleges that Link executed the Restrictive Agreement prohibiting the use or disclosure of "Confidential Information." (ECF No. 3, at ¶ 30.) Plaintiff further alleges that Link solicited and obtained for BB&T the insurance business of customers that he serviced for Wells Fargo. (*Id.* at ¶¶ 39, 47, and 53.) Finally, Plaintiff alleges, albeit "upon information and belief", that Link "used "Wells Fargo's Confidential Information . . . to identify, contact, solicit, and induce" his former customers and to divert their business to BB&T. (*Id.* at ¶¶ 56, 88.) These allegations sufficiently state a claim for breach of contract regarding the "Confidential Information" provisions of the Restrictive Agreement at this stage of the case. *Myrtle Apartments, Inc. v. Lumbermen's Mut. Casualty Co.*, 258 N.C. 49, 51, 127 S.E.2d 759, 761 (1962) (finding that in stating claims in a complaint, a plaintiff "may allege facts based on actual knowledge, or upon information and belief"). Defendants' motion to dismiss Plaintiff's Count Three against Link should be DENIED.

54. With regard to Count Four, the Complaint contains only the conclusory allegation that Link "fail[ed] to return to Wells Fargo its property upon resigning" from employment with Plaintiff. (*Id.* at ¶ 92.) Plaintiff does not, however, allege what property Link possessed or failed to return at the time of his resignation, nor any other facts underlying its claim for breach of the return of property provisions in the Restrictive Agreement. This is insufficient to support a claim for breach of the return of property provision. *Myrtle Apartments, Inc.*, 258 N.C. at 51, 127 S.E.2d at 761 ("In testing the sufficiency of a complaint, the court ignores the conclusions and looks to the facts.") Defendants' motion to dismiss Count Four against Link should be GRANTED.

D. Misappropriation of trade secrets (Count Five)

55. Plaintiff makes claims for misappropriation of trade secrets against all of the Defendants. (ECF No. 3, at ¶¶ 95–104.) Defendants

first argue that Plaintiff has not identified its trade secrets with sufficient specificity to support a claim for misappropriation under the NCTSPA. (ECF No. 8, at pp. 14–16.) Defendants also contend that Plaintiff does not allege the act or acts by which Defendants misappropriated any trade secrets. (*Id.* at pp. 15–16.)

56. Under the NCTSPA, "misappropriation" is defined as the "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." G.S. § 66-152(1). A "Trade Secret" is:

> [B]usiness or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

G.S. § 66-152(3).

57. The courts consider the following factors in determining whether information constitutes a trade secret:

> (1) The extent to which [the] information is known outside the business; (2) the extent to which it is known to employees and others involved in the business; (3) the extent of measures taken to guard secrecy of the information; ([4]) the value of information to [the] business and its competitors; ([5]) the amount of effort or money expended in developing the information; and ([6]) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Wilmington Star-News, Inc. v. New Hanover Reg'l Med. Ctr., Inc., 125 N.C. App. 174, 180–81, 480 S.E.2d 53, 56 (1997).

58. To survive a motion to dismiss, a plaintiff's complaint "must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and

a court to determine whether [misappropriation] has or is threatened to occur." *VisionAir, Inc. v. James*, 167 N.C. App. 504, 510–11, 606 S.E.2d 359, 364 (2004); *AYM Techs., LLC. v. Rodgers*, 2018 NCBC LEXIS 14, at *36–37 (N.C Super. Ct. Feb. 9, 2018) (quoting *VisionAir*). The complaint also must set forth with sufficient specificity the acts by which the alleged misappropriation occurred. *Washburn v. Yadkin Valley Bank & Tr. Co.*, 190 N.C. App. 315, 327, 660 S.E.2d 577, 586 (2008) ("These allegations do not identify with sufficient specificity either the trade secrets [p]laintiffs allegedly misappropriated *or the acts by which the alleged misappropriations were accomplished*" (emphasis added).); *see also*, *Bldg. Ctr., Inc. v. Carter Lumber, Inc.*, 2016 NCBC LEXIS 79, at *9 (N.C. Super. Ct. Oct. 21, 2016) (citing *Washburn*).

59. Defendants focus on Plaintiff's inclusion of "customers' names and addresses" as part of its alleged trade secrets, and argue that such information by itself generally does not constitute a trade secret. (ECF No. 8, at pp. 14–15.) Plaintiff, however, has not alleged that its trade secrets consist only of its customer names and contact information. Although the Complaint is vague in this regard, read liberally in favor of Plaintiff, the Complaint and the attached Restrictive Agreements appear to allege that Plaintiffs trade secrets include, *inter alia*:

> Information concerning Wells Fargo's customers and the details of their insurance needs and policies, including but not limited to information concerning Wells Fargo's customers and the details of their insurance needs and policies, including but not limited to, customer policies, insurance application information, policy cost information, payment information, profit loss statements, insurance schedules, certificate of holder lists, underwriting information, detailed customer information, detailed employee information, detailed property information, customer financial information, expiration dates of insurance policies and insurance daily reports.

(ECF No. 3, at ¶ 17);

> The books, files, electronic data, and all other records of Wells Fargo, the confidential information contained in [the records], and especially the data pertaining to Wells Fargo customers, such as customers' names and addresses, as well as additional information such as customers' social security numbers, account numbers, financial status, and other highly confidential personal and financial information[.]

(*Id.* at ¶ 97); and,

> [T]he names, addresses, and contact information of the Company's customers and prospective customers, as well as any other personal or financial information relating to any customer or prospect, including, without limitation, account numbers, balances, portfolios, maturity and/or expiration or renewal dates, loans, policies, investment activities, purchasing practices, insurance, annuity policies and objectives[.]

(*Id.*, Exs. 1 and 2, at sec. II.)

60. Within these sprawling lists, there are particular pieces of information that might constitute trade secrets, including: "insurance application information, policy cost information, payment information, profit loss statements, insurance schedules, certificate of holder lists, [and] underwriting information"; "expiration dates of insurance policies and insurance daily reports"; "customers' social security numbers, account numbers, [and] financial status"; and "maturity and/or expiration or renewal dates, loans, . . . investment activities, purchasing practices, [and], annuity policies and objectives." (*Id.*) In addition, while not expressly pleaded, this information, if compiled in a database or other form for each of Plaintiff's customers, might also constitute a trade secret. This Court has held that "where an individual maintains a compilation of detailed records over a significant period of time," such that they have particular value as a compilation or manipulation of information, "those records could constitute a trade secret even if 'similar information may have been ascertainable by anyone in the . . . business.' " *Koch Measurement Devices*, *Inc. v. Armke*, 2015 NCBC LEXIS 45, at *13 (N.C. Super. Ct. May 1, 2015) (quoting *Byrd's Lawn & Landscaping*, *Inc. v. Smith*, 142 N.C. App. 371, 376, 542 S.E.2d 689, 692 (2001)). *See also*, *State ex rel. Utils. Comm'n v. MCI Telecomms.*, *Corp.*, 132 N.C. App. 625, 634, 514 S.E.2d 276, 282 (1999) (concluding that a "compilation of information" involving customer data and business operations which has "actual or potential commercial value from not being generally known" is sufficient to constitute a trade secret under the NCTSPA); *RoundPoint Mortg. Co. v. Florez*, 2016 NCBC LEXIS 18, at *31–32 (N.C. Super. Ct. Feb. 18, 2016); *Red Valve v. Titan Valve*, 2018 NCBC LEXIS 41, at *27 (N.C. Super. Ct. Apr. 17, 2018) (citing *Koch*, *Byrd's*, and *RoundPoint*).

61. The Court concludes that the allegations in this case, read generously, are minimally sufficient to put Defendants on notice of the trade secrets that they have allegedly misappropriated.

62. Defendants next argue that the claims for misappropriation must be dismissed because Plaintiff fails to allege facts regarding the means by which Defendants misappropriated Plaintiff's trade secrets. (ECF No. 8, at pp. 15–16.) With regard to Pack and BB&T, the Court agrees. Misappropriation requires the "acquisition, disclosure, or use of a trade secret without express or implied authority or consent." G.S. § 66-152(1). Plaintiff does not allege any acts by which Pack and BB&T allegedly misappropriated trade secrets. While Plaintiff alleges that Pack "had access to" Wells Fargo's trade secret information while she was employed, there is no allegation that Pack accessed or acquired trade secrets at any time when she was not authorized to do so. Plaintiff also fails to allege facts that would show Pack disclosed or used Wells Fargo's trade secrets, or that any particular customers for whom Pack was responsible have diverted their business from Wells Fargo to BB&T.

63. In sum, the Complaint does not allege facts to support an allegation of misappropriation against Pack, and the claim against her must be dismissed. Defendants' motion to dismiss the misappropriation of trade secrets claims against Pack in Count Five of the Complaint therefore should be GRANTED.

64. Plaintiff also fails to allege facts that support its claim that BB&T misappropriated Wells Fargo's trade secrets. Plaintiff does not allege that Link, Raynor, or Pack disclosed Wells Fargo's trade secrets to BB&T or that BB&T acquired Wells Fargo's trade secrets by some other means. Nor does Wells Fargo claim that BB&T has used Wells Fargo's trade secrets, alleging only that "[u]pon information and belief, *Individual Defendants* have used Wells Fargo's . . . Trade Secrets to identify, contact, solicit, and induce Wells Fargo's clients." (ECF No. 3, at ¶ 56; emphasis added.) Instead, Plaintiff alleges only that "[u]pon information and belief, the Defendants have misappropriated Wells Fargo's trade secret information in order to unfairly compete against Wells Fargo and solicit its customers." (*Id.* at ¶ 102.) The Court is not required to accept Wells Fargo's conclusory speculation regarding BB&T's alleged misappropriation of trade secrets. *Washburn*, 190 N.C. App. at 327, 660 S.E.2d at 586 (affirming dismissal of misappropriation claim and holding "Defendant's allegation that it 'believes [Plaintiffs] used its trade secrets' is general and conclusory"). Defendants' motion to dismiss the misappropriation of trade secrets claims against BB&T in Count Five of the Complaint therefore should be GRANTED.

65. Plaintiff's allegations in support of its claim that Link misappropriated trade secrets are weak, at best. Plaintiff does not expressly allege that Link ever accessed Wells Fargo's trade secrets without

authorization or consent. To the contrary, Plaintiff alleges that Link had access to trade secret information only "by way of his employment with Wells Fargo." (ECF No. 3, at ¶ 96.) The Complaint does not allege that Link downloaded, copied, or otherwise removed from Wells Fargo any trade secret information, nor that Link has disclosed trade secrets to BB&T or anyone else. Instead, Plaintiff alleges only that Link had access to Wells Fargo's trade secret information during his employment with Wells Fargo, that Link became employed by BB&T, that some Wells Fargo customers for whom Link was responsible have transferred their business to BB&T, and "upon information and belief" Link has used Wells Fargo's trade secret information to solicit these customers. A significant inferential leap is required from those alleged facts to conclude that Link misappropriated trade secrets.

66. Nevertheless, the Court is mindful that Plaintiff is entitled to have inferences drawn in its favor at this stage of the proceedings. Accordingly, the Court concludes that the claim for misappropriation of trade secrets against Link should survive dismissal. Therefore, Defendants' motion to dismiss the misappropriation of trade secrets claims against Link in Count Five of the Complaint should be DENIED.

67. Plaintiff's allegations that Raynor, immediately prior to submitting his resignation, entered Plaintiff's offices after hours, and downloaded and copied documents that, on information and belief, contained Plaintiff's trade secrets, sufficiently alleges the acts by which Raynor misappropriated trade secrets. Therefore, Defendants' motion to dismiss the misappropriation of trade secrets claims against Raynor in Count Five of the Complaint should be DENIED.

E. Tortious interference with contractual relations (Count Seven)

68. As its seventh claim, Plaintiff makes claims for tortious interference with contract against all Defendants, alleging that they each interfered with the Restrictive Agreements between Wells Fargo and Link and Raynor, respectively. (ECF No. 3, at ¶¶ 110–15.)

69. To state a claim for tortious interference with contract, a plaintiff must allege: "(1) a valid contract between plaintiff and a third party which confers upon the plaintiff a contractual right against a third party; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so he acts without justification; (5) resulting in actual damage to the plaintiff." *Kuykendall*, 322 N.C. at 661, 370 S.E.2d at 387 (citing *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181–82 (1954)).

70. As a preliminary matter, the Court has already concluded that Plaintiff's claims for breach of the non-solicitation of customers and non-solicitation of employees covenants in sections III.a., III.b. and III.c. of the Restrictive Agreements should be dismissed because those covenants are invalid and unenforceable. Since no valid contract existed based on these covenants, Plaintiff's claims that the Defendants interfered with those covenants in the Restrictive Agreements must also fail. *Medical Staffing Network, Inc.*, 194 N.C. App. at 658, 670 S.E.2d at 328 (affirming dismissal of tortious interference claim where trial court had found restrictive covenants overbroad and unenforceable). Accordingly, Defendants' motion to dismiss the claims for tortious interference in Count Seven of the Complaint claiming interference with the covenants not to solicit customers and employees should be GRANTED.

71. Similarly, to the extent that Plaintiff attempts to make a claim for tortious interference with contract based on Defendants' alleged interference with the return of property provisions in Restrictive Agreement, the Court has dismissed the claim for breach of this provision as against Link. In addition, the Complaint does not plead any facts to support an allegation that Link, Pack, or BB&T engaged in any conduct intended to induce Raynor's alleged breach of the return of property provisions. Defendants' motion to dismiss the claims for tortious interference in Count Seven of the Complaint claiming interference with the return of property provisions should be GRANTED.

72. This leaves only the claim that Defendants intentionally interfered with the confidential information covenants in the Restrictive Agreements. With regard to this claim, the Complaint fails to plead any facts to support an allegation that Pack interfered with the Restrictive Agreements between Wells Fargo and Link and Raynor. The claim against Pack for tortious interference fails and should be dismissed.

73. Defendants contend that the claim for tortious interference against BB&T should be dismissed because Plaintiff does not plead facts in support of the allegation that BB&T intentionally induced Link or Raynor to breach the Restrictive Agreements. (ECF No. 8, at p. 17.) Defendants also argue that the claim for tortious interference against BB&T fails because the allegations in the Complaint establish that Wells Fargo and BB&T are competitors, but Plaintiff does not allege facts supporting the conclusory claim that BB&T acted without justification in interfering with the Restrictive Agreements. (*Id.* at pp. 17–18.) The Court agrees with Defendants on both contentions.

74. First, as with Pack, the Complaint does not contain a single allegation of fact that BB&T engaged in any conduct designed to interfere

with the Restrictive Covenants. Unlike the vast majority of cases that arise in this context, Plaintiff does not allege that BB&T recruited Link and Raynor as part of a campaign to raid Wells Fargo's sales force, that BB&T encouraged Link and Raynor to secretly acquire Wells Fargo's confidential information, nor that BB&T directed Link and Raynor to target their former Wells Fargo customers and solicit their commercial insurance business. Rather, Plaintiff alleges only that Link and Raynor resigned from Wells Fargo, became employed with BB&T, and subsequently diverted several customers from Wells Fargo to BB&T. These allegations do not sufficiently state that BB&T intentionally interfered with the Restrictive Covenants.

75. In addition, Wells Fargo and BB&T were competitors in the commercial insurance industry. The North Carolina Supreme Court has held that if the defendant's interference is "for a legitimate business purpose, his actions are privileged. . . . [C]ompetition in business constitutes justifiable interference in another's business relations and is not actionable so long as it is carried on in furtherance of one's own interest and by means that are lawful." *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 221, 367 S.E.2d 647, 650 (1988). This "privilege [to interfere] is conditional or qualified; that is, it is lost if exercised for a wrong purpose. In general, a wrong purpose exists where the act is done other than as a reasonable and *bona fide* attempt to protect the interest of the defendant which is involved." *Id.* at 220, 367 S.E.2d at 650.

76. "If the defendant's only motive is a malicious wish to injure the plaintiff, [defendant's] actions are not justified." *Hooks*, 322 N.C. at 221, 367 S.E.2d at 650. The malice required to overcome a justification of business competition is legal malice, and not actual malice. *Childress*, 240 N.C. at 675, 84 S.E.2d at 182 ("It is not necessary, however, to allege and prove actual malice in the sense of personal hatred, ill will, or spite in order to make out a case for the recovery of compensatory damages against the outsider for tortiously inducing the breach of the third person's contract with the plaintiff. The term 'malice' is used in this connection in its legal sense, and denotes the intentional doing of the harmful act without legal justification."); *Murphy v. McIntyre*, 69 N.C. App. 323, 328–29, 317 S.E.2d 397, 401 (1984) (noting that legal malice "means intentionally doing a wrongful act or exceeding one's legal right or authority in order to prevent the making of a contract between two parties" and the act "must be taken with the design of injuring one of the parties to the contract or of gaining some advantage at the expense of a party"); *Robinson, Bradshaw, & Hinson, P.A. v. Smith*, 129 N.C. App. 305, 318, 498 S.E.2d 841, 851 (1998) ("A person acts with legal malice if he does a

wrongful act or exceeds his legal right or authority in order to prevent the continuation of the contract between the parties.").

77. In order to survive dismissal, a complaint alleging tortious interference "must admit of no motive for interference other than malice." *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 605, 646 S.E.2d 826, 832–33 (2007); *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 674, 541 S.E.2d 733, 738 (2001) ("[W]e have held that the complaint must admit of no motive for interference other than malice."); *Kerry Bodenhamer Farms, LLC v. Nature's Pearl Corp.*, 2017 NCBC LEXIS 27, at *16 (N.C. Super. Ct. Mar. 27, 2017) (holding "[t]he pleading standards for a tortious interference with contract claim are strict. The complaint must admit of no motive for interference other than malice. When the complaint reveals that the interference was justified or privileged, this Court must grant a motion" to dismiss (citations and quotations omitted)).

78. Here, Plaintiff has alleged that the Defendants, including BB&T, acted "without justification", but does not plead facts supporting a claim that BB&T acted with malice or for any improper purpose, nor that BB&T was motivated by anything other than an interest in successfully competing against Wells Fargo. (ECF No. 3, at ¶ 113.) The recruitment of employees from a business competitor is presumptively privileged competitive activity, absent an allegation of legal malice. *Hooks*, 322 N.C. at 221, 367 S.E.2d at 650. The claim for tortious interference as against BB&T fails and should be dismissed.

79. With regard to the claims against Link and Raynor for tortious interference with the confidentiality covenants in the Restrictive Agreements, Plaintiff has not alleged facts to support an allegation that Raynor induced Link to violate his confidentiality covenant. To the contrary, Raynor resigned his employment with Wells Fargo over five months *after* Link left Wells Fargo and became employed with BB&T, and Plaintiff offers no explanation as to why Raynor would encourage Link to violate confidentiality restrictions while both were still employed with Wells Fargo. The allegations do not support a claim for tortious interference with the confidentiality covenants against Raynor. Therefore, the tortious interference with contract claim based on these allegations fails and should be dismissed.

80. With regard to Link, Plaintiff alleges that "Raynor told his manager at Wells Fargo that [ ] Link encouraged him to leave Wells Fargo for BB&T." (ECF No. 3, at ¶ 41.) While this is not an express allegation that Link encouraged Raynor to also violate his confidentiality covenant, the Court concludes that the allegation arguably would support

the claim for tortious interference against Link, and Plaintiff's claim that Link tortiously interfered with the confidentiality covenant in Raynor's Restrictive Agreement.

81. Therefore, Defendants' motion to dismiss Count Seven for tortious interference with contractual relations is DENIED as to Plaintiff's claim that Link interfered with the confidentiality covenant in Raynor's Restrictive Agreement. Defendants' motion to dismiss Count Seven for tortious interference with contractual relations as to all other Defendants and claims is GRANTED, and such claims are DISMISSED.

F. Unfair and deceptive trade practices (Count Eight)

82. As its Eighth claim, Plaintiff alleges that all Defendants have engaged in unfair and deceptive acts or practices in violation of G.S. § 75-1.1. (ECF No. 3, at ¶¶ 116–120.) Plaintiff specifically alleges that

> Defendants' wrongful acts, include[e] but [are] not limited to, Defendants' misappropriation of trade secrets, conspiracy and fraudulent scheme to divert business opportunities away from Wells Fargo, theft of company property to gain an unfair advantage, interference with Defendant Link and Defendant Raynor's contractual obligations owed to Wells Fargo, and other deceptive, unethical and unscrupulous conduct[.]

(ECF No. 3, at ¶ 117.)

83. "To establish a prima facie case of unfair and deceptive trade practices, a plaintiff must show that (1) the defendant committed an unfair or deceptive act or practice, (2) the act was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 303, 603 S.E.2d 147, 161 (2004).

84. Defendants correctly point out that the facts pleaded in the Complaint do not support allegations of a "conspiracy and fraudulent scheme to divert business opportunities away from Wells Fargo." Plaintiff does not make claims for fraud or conspiracy, and there are no facts alleged that would support such claims. Plaintiff makes no argument in support of these allegations, and the claim for unfair and deceptive trade practices cannot be based on such conduct.

85. In addition, the underlying claims against Pack and BB&T for misappropriation of trade secrets and intentional interference with contract have been dismissed. Plaintiff does not allege, nor argue, that Pack or BB&T engaged in any other conduct that would support a claim for

unfair trade practices. Therefore, Defendants' motion to dismiss the claims against Pack and BB&T for unfair and deceptive trade practices in Count Eight of the Complaint should be GRANTED.

86. With regard to the claims against Link and Raynor, "[a] violation of the [NCTSPA] constitutes an unfair act or practice under N.C. Gen. Stat. § 75-1.1." *Medical Staffing Network, Inc.*, 194 N.C. App. at 659, 670 S.E.2d at 329 (citing N.C. Gen. Stat. § 66-146(2007)). Since Plaintiff's claims against Link and Raynor for misappropriation of trade secrets survive dismissal, so must the claims for violation of G.S. § 75-1.1. Defendants' motion to dismiss the claims against Link and Raynor for unfair and deceptive trade practices in Count Eight of the Complaint should be DENIED.

III. CONCLUSION

THEREFORE, IT IS ORDERED that Defendants' motion to dismiss is GRANTED, in part, and DENIED, in part, as follows:

1. Defendants' motion to dismiss Plaintiff's First and Second Counts for breach of contract are GRANTED, and the claims are DISMISSED.

2. Defendants' motion to dismiss Plaintiff's Count Three for breach of contract against Link is DENIED.

3. Defendants' motion to dismiss Count Four for breach of contract against Link is GRANTED, and the claim is DISMISSED.

4. Defendants' motion to dismiss Count Five for misappropriation of trade secrets against Pack and BB&T is GRANTED, and those claims are DISMISSED.

5. Defendants' motion to dismiss Count Five for misappropriation of trade secrets against Link and Raynor is DENIED.

6. Defendants' motion to dismiss Count Seven for tortious interference with contractual relations is DENIED as to Plaintiff's claim that Link interfered with the confidentiality covenant in Raynor's Restrictive Agreement.

7. Defendants' motion to dismiss Count Seven for tortious interference with contractual relations as to all other Defendants and claims is GRANTED, and those claims are DISMISSED.

8. Defendants' motion to dismiss the claims against Pack and BB&T in Count Eight for unfair and deceptive trade practices is GRANTED, and those claims are DISMISSED.

9. Defendants' motion to dismiss the claims against Link and Raynor in Count Eight for unfair and deceptive trade practices is DENIED.

This, the 8th day of May, 2018.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge
for Complex Business Cases

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

9 MAY 2019

001P19	Teressa B. Rouse v. Forsyth County Department of Social Services	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA17-884) 2. Respondent's Conditional PDR Under N.C.G.S. § 7A-31 3. Respondent's Motion to Stay Reinstatement of Employee	1. Allowed 2. Denied 3. Allowed **01/14/2019** Dissolved **05/09/2019**
002A19	State v. John Thomas Coley	1. State's Motion for Temporary (COA18-234) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/04/2019** 2. Allowed **03/28/2019** 3.
009P19	State v. Allen Jamison	Def's PDR Under N.C.G.S. § 7A-31 (COA18-292)	Denied
012P19	State v. Timothy A. Noble	Def's PDR Under N.C.G.S. § 7A-31 (COA18-299)	Denied
014P09-2	State v. Keith Lavoris Hall	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-1250) 2. Def's Petition for *Writ of Certiorari* to Review Order of the COA 3. State's Motion to Dismiss PDR	1. --- 2. Denied 3. Allowed
015P19	State v. Anthony Vinh Nguyen	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1163) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
018P19	The Estate of Anthony Lawrence Savino v. The Charlotte-Mecklenburg Hospital Authority, a North Carolina Hospital Authority, D/B/A Carolinas Healthcare System and CMC-Northeast	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1335) 2. Def's (The Charlotte-Mecklenburg Hospital Authority, D/B/A Atrium Health and Carolinas Healthcare System Northeast) PDR Under N.C.G.S. § 7A-31 3. Plt's Conditional PDR Under N.C.G.S. § 7A-31 4. North Carolina Advocates for Justice's Conditional Motion for Leave to File *Amicus* Brief	1. Allowed 2. Allowed 3. Allowed 4. Dismissed without prejudice **Davis, J., recused**

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

9 MAY 2019

031A18	Crowell v. Crowell	Def's Motion to Deem Brief Timely Filed	Allowed
033P19	State v. Cameron Romero Graves	Def's PDR Under N.C.G.S. § 7A-31(COA17-1380)	Denied
037P19	Natasha Spencer v. Portfolio Recovery Associates, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-629)	Denied
038P19	State v. Markline Oguchukwu Ajoku	1. Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP18-522) 2. Def's Motion to Proceed *In Forma Pauperis* 3. Def's Motion to Appoint Counsel 4. Motion to Consolidate Matters	1. Dismissed 2. Allowed 3. Dismissed as moot 4. Dismissed as moot
039A99-2	State v. Timmy Euvonne Grooms	Def's Motion to Establish Deadline to File Petition for *Writ of Certiorari*	Allowed **04/02/2019**
041P19	Jonathan Brunson v. North Carolina Innocence Inquiry Commission and the State of North Carolina	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-659)	Denied
044P19	Jonathan E. Brunson v. North Carolina Department of Public Safety, North Carolina Prisoner Legal Services, Inc., and the State of North Carolina	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-657)	Denied
045P07-4	State v. Terry Gilmore	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA (COAP19-110) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Gaston County 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed as moot **Ervin, J. recused**

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

9 MAY 2019

053P19	Terry L. Brown v. Wendover Plaza LLC Delhaize America LLC	1. Plt's *Pro Se* Motion for Notice of Appeal 2. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA 3. Def's Motion to Dismiss Appeal 4. Plt's *Pro Se* Motion to Amend Petition for *Writ of Certiorari* 5. Plt's *Pro Se* Motion to Deny Motion to Dismiss 6. Plt's *Pro Se* Motion to Compel	1. --- 2. Denied 3. Allowed 4. Allowed 5. Denied 6. Denied
058P19	Tracie Lee Gilmartin v. Michael Thomas Gilmartin	Def's PDR Under N.C.G.S. § 7A-31 (COA18-466)	Denied
062P19	State v. Carlos Sinclair	Def's PDR Under N.C.G.S. § 7A-31 (COA18-293)	Denied
065A19	In the matter of A.R.A., P.Z.A., Z.K.A.	Respondent-Father's Motion to Stay Briefing Schedule	Dismissed as moot **05/01/2019**
068P19	State v. Eric Christopher Orr	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of the COA (COA18-424)	Denied
072P19	International Property Developments, LLC D/B/A Signature Group v. K. Construction & Roofing, LLC, Evangel Worship Center, Inc., and Bank of the Ozarks as Successor-in-Interest to Bank of the Carolinas	Def's (Evangel Worship Center, Inc.) PDR Under N.C.G.S. § 7A-31 (COA17-509, COA17-509-2)	Denied
073P19	State v. Corey F. Maldonado	Def's *Pro Se* Motion for PDR (COAP19-44)	Dismissed
076P19	State v. Hadari Aponte	Def's *Pro Se* Motion for PDR Review (COAP18-221)	Dismissed
079P18	State v. Kenneth Vernon Golder	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-987) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed

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081P19	State v. James Michael Latham, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1075)	Denied **Davis, J., recused**
082P19	State v. Joseph Brian Shelton	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1426)	Denied **Davis, J., recused**
083P19	The Estate of William Belk, by and through Taquitta Belk, Administratrix v. Boise Cascade Wood Products, L.L.C., a member of Boise Cascade Company, John Doe 1 and John Doe 2	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-542)	Denied
084P19	State v. Christopher Neal Swafford	Def's PDR Under N.C.G.S. § 7A-31 (COA18-324)	Denied
089P19	State v. Brian Keith Robinson	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA18-661) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
092A19	In the Matter of T.N.H.	Respondent-Mother's Motion to Amend the Record on Appeal	Allowed **04/26/2019**
093P19	Wendell M. Turner v. Delmonte Food Co., Inc.	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Forsyth County 2. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Forsyth County 3. Plt's *Pro Se* Motion to Amend Petition for *Writ of Certiorari*	1. Dismissed 2. Dismissed 3. Allowed
095P19	In the Matter of The Estate of Clarence Maynard Johnson	Respondent's PDR Under N.C.G.S. § 7A-31 (COA18-778)	Denied

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096P19	State v. Markline Oguchukwu Ajoku	1. Def's Petition for *Writ of Certiorari* to Review Order of the COA (COAP19-163)	1. Dismissed
		2. Def's Petition for *Writ of Certiorari* to Review Orders of District and Superior Court, Wake County	2. Dismissed
		3. Def's Petition for *Writ of Mandamus*	3. Denied
		4. Def's Motion to Amend Petition for *Writ of Certiorari*	4. Dismissed as moot
		5. Def's Motion for Leave of Court to Consider Def's Reply	5. Dismissed
		6. Def's Petition for *Writ of Certiorari* to Review Order of the COA	6. Dismissed
		7. Def's Motion for Temporary Stay	7. Denied **04/23/2019**
		8. Def's Petition for *Writ of Supersedeas*	8. Denied
		9. Def's Motion to Remove Duplicate State Response	9. Dismissed as moot
104P19	State v. Joey Parice Graham	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
109A19	In the Matter of C.M.C.	Respondent-Mother's Petition for *Writ of Certiorari* to Review Order of District Court, Haywood County	Allowed **04/24/2019**
111P19	State v. Brittany Sue Opal Bryant	1. Def's Petition for *Writ of Certiorari* to Review Order of the COA (COA18-649)	1. ---
		2. Def's Motion to Proceed *In Forma Pauperis*	2. Allowed
		3. Def's Motion to Withdraw Petition for *Writ of Certiorari*	3. Allowed

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112P19	State v. Jwana Cherise Lake	1. Def's Petition for *Writ of Mandamus*	1. Dismissed as moot **04/16/2019**
		2. Def's Petition for *Writ of Certiorari* to Review Order of the COA	2. Denied **04/16/2019**
		3. Def's Petition for *Writ of Certiorari* to Review Orders of District and Superior Courts, Wake County	3. Denied **04/18/2019**
		4. Def's Motion to Arrest the District Court Criminal Judgment	4. Denied **04/18/2019**
		5. Def's Motion for Temporary Stay	5. Denied **04/01/2019**
		6. Def's Petition for *Writ of Supersedeas*	6. Denied **04/18/2019**
		7. Def's Motion for Leave of Court to Consider Def's Reply	7. Dismissed as moot **04/18/2019**
		8. Def's Motion for Leave of Court to Consider Def's Reply	8. Dismissed as moot **04/18/2019**
		9. Def's Motion to Withdraw *Mandamus* Petition	9. Dismissed as moot **04/18/2019**
114P19	State v. Juston Leon Williams	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed **03/29/2019**
117P19	State v. Brittany Sue Opal Bryant	1. Def's Motion for Temporary Stay (COAP19-194)	1. Denied **04/10/2019**
		2. Def's Petition for *Writ of Supersedeas*	2. Denied
		3. Def's Petition for *Writ of Certiorari* to Review Order of the COA	3. Dismissed
		4. Def's Petition for *Writ of Certiorari* to Review Orders of District and Superior Court, Wake County	4. Dismissed
		5. Def's Petition in the Alternative for *Writ of Prohibition*	5. Dismissed
		6. Def's Motion for Leave of Court to Consider Def's Reply	6. Dismissed
		7. Def's Motion to Consolidate Matters	7. Dismissed as moot

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118P19	State v. Brittany Sue Opal Bryant	1. Def's Petition for *Writ of Certiorari* to Review Order of the COA (COAP19-201)	1. Dismissed
		2. Def's Petition for *Writ of Certiorari* to Review Orders of District and Superior Courts, Wake County	2. Dismissed
		3. Def's Motion for Leave of Court to Consider Def's Reply	3. Dismissed
		4. Def's Motion to Redact Petition for *Writ of Certiorari*	4. Allowed
119P18	State v. Christopher B. Smith	1. Def's Motion for Temporary Stay (COA17-680)	1. Allowed **04/19/2018**
		2. Def's Petition for *Writ of Supersedeas*	2. Allowed
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Allowed
		4. State's Conditional PDR Under N.C.G.S. § 7A-31	4. Allowed
122P19	In the matter of A.R.A., P.Z.A., Z.K.A.	Respondent-Mother's PDR Prior to a Determination of the COA (COAP19-101)	Allowed **05/01/2019**
124PA14-2	State v. Jason Lynn Young	Def's PDR Under N.C.G.S. § 7A-31 (COA13-586-2)	Denied
130PA17-2	Joan A. Meinck v. City of Gastonia, a North Carolina Municipal Corporation	Def's PDR Under N.C.G.S. § 7A-31 (COA16-892-2)	Denied
131P18	State v. Zachary Allen Blankenship	1. State's Motion for Temporary Stay (COA17-713)	1. Allowed **05/03/2018** Dissolved **05/09/2019**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Def's PDR Under N.C.G.S. § 7A-31	4. Denied
131P19	State v. Roderick Demetrius Blount	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA	1. Denied **04/15/2019**
		2. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	2. Denied **04/15/2019**
		3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	3. Allowed **04/15/2019**
134P19	State v. John Christian Duff	1. Def's Motion for Temporary Stay	1. Allowed **03/29/2019**
		2. Def's Petition for *Writ of Supersedeas*	2.

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135P19	State v. Paulino R. Serrano	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **04/16/2019**
136P19	State v. Kim Ragland	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA18-799) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA	1. Dismissed *ex mero motu* 2. Denied
145PA17-2	In the Matter of A.P.	1. Guardian ad Litem's Motion for Temporary Stay (COA16-1010-2) 2. Guardian ad Litem's Petition for *Writ of Supersedeas* 3. Guardian ad Litem's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/12/2018** Dissolved **05/09/2019** 2. Denied 3. Denied **Davis, J., recused**
161P19	Elizabeth Ball, Employee v. Bayada Home Health Care, Employer, Arch Insurance Group, Inc., Carrier (Gallagher Bassett Services, Inc., Third-Party Administrator)	1. Defs' Motion for Temporary Stay (COA18-918) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **05/01/2019** 2. 3. **Davis, J., recused**
162P19	State v. DaQuan Antonio Green	Def's *Pro Se* Motion for Petition Regarding Violation of Constitutional Rights	Dismissed **05/03/2019**
165P19	In re Bart F. McClain	Petitioner's *Pro Se* Motion for Review of Emergency Appeal	Dismissed **05/08/2019**
167P19	Cornelius Alvin Nobles v. Stephen C. Jacobs, Superintendent III, Columbus Correctional Institution	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Motion in the Alternative to Appoint Counsel	1. Denied **05/03/2019** 2. Denied **05/03/2019** **Davis, J., recused**
169P19	State v. Brian Keith Hughes	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/03/2019** 2.
170A19	State v. Melvin Lamar Fields	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/06/2019** 2.

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176P18	Kent Jeffries, Petitioner and Lynwood Hare, Frances L. Hare, Bobbie Lewis Jeffries, and Thomas Glenn Finch, Intervening Petitioners v. County of Harnett, Respondent and Drake Landing LLC, William Dan Andrews, and Linda Andrews, Intervening Respondents	Intervening Respondents' PDR Under N.C.G.S. § 7A-31 (COA17-729)	Denied
181A16	Lawrence Piazza and Salvatore Lampuri v. Gregory Brannon, David Kirkbride and Robert Rice	Plts' Petition for *Writ of Certiorari* to Review Decision of the COA	Dismissed as moot **Earls, J., recused** **Davis, J., recused**
199P18	State v. Shenandoah Freeman	Def's *Pro Se* Motion for PDR (COA17-347)	Denied
246A09-2	State v. Michael Wayne Sherrill	1. Def's Motion for Appropriate Relief 2. State's Motion for Extension of Time to File Response to Motion for Appropriate Relief	1. 2. Allowed **04/26/2019**
247P16-5	State v. Jonathan Eugene Brunson	Def's *Pro Se* Motion for Petition for Rehearing of PDR	Dismissed
247P16-6	State v. Jonathan Eugene Brunson	Def's *Pro Se* Motion for PDR (COAP18-881)	Dismissed
252A95-3	State v. Carl Lorice Brewton	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Buncombe County	Dismissed
271A18	State *ex rel.* Utilities Commission v. Attorney General	1. Intervenor's (Sierra Club) Motion to Admit Bridget M. Lee *Pro Hac Vice* 2. Intervenor's (Sierra Club) Motion to Admit Dorothy E. Jaffe *Pro Hac Vice*	1. Allowed **04/15/2019** 2. Allowed **04/15/2019**
271A18	State *ex rel.* Utilities Commission v. Attorney General	Attorney General's Motion to Amend Appendix to Brief	Allowed **05/07/2019**

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292P03-5	State v. Wali Farad Muhammad Bilal	Def's *Pro Se* Motion for PDR (COAP17-579)	Denied **04/15/2019**
300A93-3	State v. Norfolk Junior Best	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Bladen County	Allowed **Ervin, J., recused**
309P15-6	State v. Reginald Underwood Fullard	Def's *Pro Se* Motion for Appropriate Relief	Dismissed
323A92-11	State v. Charles Alonzo Tunstall	1. Def's *Pro Se* Motion for Notice of Appeal (COAP18-823) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Petition in the Alternative for *Writ of Mandamus*	1. Dismissed 2. Dismissed 3. Dismissed
330P18	State v. William Burnett Lindsey	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-676) 2. Def's Petition for *Writ of Certiorari* to Review Order of the COA	1. Denied 2. Dismissed as moot
332P17-2	Joris Haarhuis, Administrator of the Estate of Julie Haarhuis (Deceased) v. Emily Cheek	1. Def's Motion for Temporary Stay (COA17-1179) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Reconsider and Vacate Order Allowing Temporary Stay 5. Universal Insurance Company's PDR Under N.C.G.S. § 7A-31 6. North Carolina Association of Defense Attorneys' Conditional Motion for Leave to File *Amicus* Brief 7. Walter K. Burton, Stephanie W. Anderson, and the Law Firm of Burton, Sue & Anderson, LLP's Motion to Withdraw 8. National Consumer Bankruptcy Rights Center and National Association of Consumer Bankruptcy Attorneys' Conditional Motion for Leave to File *Amicus* Brief	1. Allowed **10/19/2018** Dissolved **05/09/2019** 2. Denied 3. Denied 4. Denied **10/22/2018** 5. Denied 6. Dismissed as moot 7. Allowed 8. Dismissed as moot **Davis, J., recused**

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333P18-2	State v. Douglas Wayne Stanaland	1. Def's *Pro Se* Motion for Petition for Redress of Grievances 2. Def's *Pro Se* Motion for Claim of Void Judgments 3. Def's *Pro Se* Motion for Injunctive Relief	1. Denied **05/03/2019** 2. Denied **05/03/2019** 3. Denied **05/03/2019**
341P12-8	State v. Donald Durrant Farrow	1. Def's *Pro Se* Motion for PDR(COAP16-888) 2. Def's *Pro Se* Motion for Appropriate Relief	1. Dismissed 2. Dismissed **Ervin, J., recused**
356P18	Briana Washington Glover, and Husband, Randie Janson Glover, Individually v. The Charlotte-Mecklenburg Hospital Authority, a North Carolina Hospital Authority, D/B/A Carolinas Healthcare System, Carolinas Medical Center, Carolinas Healthcare System University, Carolinas Medical Center-University, CMC-University, Carolinas Healthcare System Mercy, Carolinas Medical Center Mercy, CMC-Mercy, Greater Carolinas Women's Center, and Carolinas Laboratory Network; and Glen Ellis Powell, II, MD, Individually	1. Defs' PDR Under N.C.G.S. § 7A-31(COA17-1398) 2. North Carolina Association of Defense Attorneys' Conditional Motion for Leave to File *Amicus* Brief 3. Plts' Conditional PDR Under N.C.G.S. § 7A-31 4. Def's Motion for Temporary Stay of the Decision of the COA 5. Def's Petition for *Writ of Supersedeas*	1. Denied 2. Dismissed as moot 3. Dismissed as moot 4. Allowed **11/01/2018** Dissolved **05/09/2019** 5. Denied **Ervin, J., recused** **Davis, J., recused**
362P17-2	James Cornell Howard v. Wayne County Clerk of Court	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **Davis, J., recused**

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388P09-4	State v. Shayno Marcus Thomas	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **05/01/2019** 2. Dismissed as moot **05/01/2019**
390P12-3	State v. Todd Joseph Martin	1. Def's *Pro Se* Motion for PDR (COA 18-404) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
401A18	State *ex rel.* Utilities Commission v. Attorney General	1. Intervenor's (Sierra Club) Motion to Admit Bridget M. Lee *Pro Hac Vice* 2. Intervenor's (Sierra Club) Motion to Admit Dorothy E. Jaffe *Pro Hac Vice*	1. Allowed **04/15/2019** 2. Allowed **04/15/2019**
401A18	State *ex rel.* Utilities Commission v. Attorney General	Attorney General's Motion to Amend Appendix to Brief	Allowed **05/08/2019**
403P18	Jonathan E. Brunson v. N.C. Dept. of Human Resources, Office of the Clerk of the N.C. Court of Appeals, Office of the N.C. Court of Appeals, Office of the Clerk of the N.C. Supreme Court, Office of the N.C. Supreme Court, and the State of North Carolina	1. Plt's *Pro Se* Motion for PDR (COAP18-726) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Plt's *Pro Se* Motion to Withdraw PDR	1. --- 2. Allowed 3. Allowed
412P18	Annette Baker, Ph.D. v. The North Carolina Psychology Board	1. Plt's PDR Under N.C.G.S. § 7A-31(COA18-264) 2. Plt's Motion for Temporary Stay 3. Plt's Petition for *Writ of Supersedeas*	1. Denied 2. Allowed **01/23/2019** Dissolved **05/09/2019** 3. Denied **Davis, J. recused**
413P18	State v. Daniel Barker	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-178) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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417P18	State v. Rudolph Coles, Jr.	1. State's Motion for Temporary Stay (COA18-357) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/26/2018** 2. Allowed 3. Allowed
423P18	State v. Timothy Lamont Hazel	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA18-266) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
424P18	In re Tony Oxendine	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
427P18	State v. Walter Britt Garrison	Def's PDR Under N.C.G.S. § 7A-31 (COA18-156)	Denied
430P18	Debra Jones, Employee v. Wells Fargo Bank, NA, Employer, and Old Republic Insurance Company, Carrier	1. Plt's Petition for *Writ of Certiorari* to Review Decision of the COA (COA18-245) 2. Def's Motion for Sanctions 3. Plt's Motion to Consider Petition for *Writ of Certiorari* a PDR	1. Denied 2. Denied 3. Allowed
434P18	PHG Asheville, LLC v. City of Asheville	Respondent's PDR Under N.C.G.S. § 7A-31 (COA18-251)	Allowed
436PA13-3	I. Beverly Lake, et al. v. State Health Plan for Teachers and State Employees, et al.	Joint PDR Prior to a Determination of the COA	Dismissed as moot **04/11/2019** **Newby, J., recused** **Ervin, J., recused**
444P09-6	State v. Charles Gene Rogers	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **04/16/2019**
444P18	Joseph Padron v. Bentley Marine Group, LLC, Larry D. Behm, Keenan W. Green, and Noel Winter	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-537)	Denied

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453P18	State v. Barbara Jean Myers-McNeil	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1404) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Deem Response Timely Filed 4. Def's Motion for Temporary Stay 5. Def's Petition for *Writ of Supersedeas* 6. Def's Motion to File an Amended PDR 7. Def's Amended PDR under N.C.G.S. § 7A-31 8. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of the COA	1. 2 3. 4. Allowed **04/17/2019** 5. 6. 7. 8.
505P96-4	State v. Melvin Lee White, Jr. (DEATH)	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
536P00-10	Terrance L. James v. State	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Motion to Proceed Without Fees	1. Denied **05/09/2019** 2. Allowed **05/09/2019** **Ervin, J., recused**

STATE v. ALVAREZ

[372 N.C. 303 (2019)]

STATE OF NORTH CAROLINA
v.
SAMUEL CALLEROS ALVAREZ

No. 299A18

Filed 14 June 2019

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. ___, 818 S.E.2d 178 (2018), finding no error in a judgment entered on 13 January 2017 by Judge Richard Kent Harrell in Superior Court, Lenoir County. Heard in the Supreme Court on 29 May 2019 in session in the State Capitol Building in the City of Raleigh.

Joshua H. Stein, Attorney General, by M. Denise Stanford, Special Deputy Attorney General, for the State.

Anne Bleyman for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
ALPHONZO HARVEY

No. 290A18

Filed 14 June 2019

Homicide—self-defense instructions—not supported by evidence

The trial court did not err by declining defendant's request to instruct the jury on perfect self-defense or imperfect self-defense in his trial for murder. The evidence failed to establish that defendant was being attacked by the victim such that he feared great bodily harm or death, or that he stabbed the victim to protect himself from such harm.

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

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 500 (2018), finding no error after appeal from a judgment entered on 24 May 2017 by Judge Milton F. Fitch, Jr. in Superior Court, Edgecombe County. Heard in the Supreme Court on 4 March 2019.

Joshua H. Stein, Attorney General, by Thomas O. Lawton III, Assistant Attorney General, for the State.

Jeffrey William Gillette for defendant-appellant.

MORGAN, Justice.

Defendant Alphonzo[1] Harvey was charged upon a proper indictment and convicted by a jury of second-degree murder, a criminal offense in violation of N.C.G.S. § 14-17. Defendant contended on appeal that the trial court committed error by failing to instruct the jury on the

1. Defendant's first name is spelled "Alphonso" in the trial transcript. For purposes of continuity and to avoid confusion, this opinion retains the spelling of defendant's name as shown in the Court of Appeals opinion and the record on appeal.

affirmative defense of self-defense pursuant to his request. The Court of Appeals disagreed and upheld defendant's conviction, finding that in light of the evidence, defendant was not entitled to a jury instruction on any theory of self-defense. We affirm the determination of the Court of Appeals.

Factual and Procedural Background

On 11 April 2016, defendant was indicted by a grand jury for the criminal offense of first-degree murder in connection with the stabbing death of Tobias Toler. Defendant pleaded not guilty and the State elected to refrain from proceeding capitally. A jury trial was held beginning on 22 May 2017 before the Honorable Milton F. Fitch, Jr. in Superior Court, Edgecombe County, during which the State presented evidence from ten witnesses and defendant testified on his own behalf.

The evidence presented at trial tended to show the following: On 11 August 2015, Toler and four of defendant's friends attended a party at defendant's mobile home. At the party, the attendees were drinking alcohol, listening to music, and dancing. At some point, Toler was dancing with a woman with whom defendant had previously engaged in a romantic or sexual relationship. Toler had been drinking a beer with a high alcohol content from a plastic bottle, and he began staggering "all over [the] house" and acting in a rowdy manner by "getting real loud and . . . cussing and fussing." Defendant, who had consumed at least one beer by this time, realized Toler was intoxicated and testified that he "asked him to leave about seven, eight times." Toler, however, refused to depart until defendant left the dwelling as well. Defendant testified that, as he exited the trailer, Toler followed and stated that "he ought to whip [defendant's] damn ass." Toler threw the plastic beer bottle from which he had been drinking in defendant's direction, but the bottle did not make contact with defendant.

Defendant started to go back inside his mobile home but, upon realizing that Toler had not yet left the premises, turned back to confront Toler, asking, "[D]idn't I tell you [to] leave my damn house[?]" Defendant testified that, in response, Toler found "a piece of broke [sic] off little brick" and threw it at defendant, cutting defendant's finger. Toler then reached into his pocket and produced a small, black pocketknife, telling defendant that "he ought to kill [defendant's] damn ass with it."[2]

2. Defendant referred to the pocketknife in his testimony as a "little bitty, black pocketknife about two fingers long."

Defendant once again ordered Toler to leave his property, at which point defendant testified that after Toler hit him, he "hit [Toler] in the face."

Defendant then went back inside his mobile home and grabbed a knife from the top of a cabinet.[3] Defendant testified that his purpose for returning to the trailer to obtain the knife was "[b]ecause I was scared [Toler] was going to try and hurt me," and that it was defendant's belief that once he got the knife, Toler would "leave, go ahead on and leave." When defendant returned outside, he approached Toler while displaying the knife and swinging it in Toler's direction. When questioned at trial regarding his use of the knife, defendant testified that he "tried to make [Toler] leave." During the confrontation, Toler attempted to move defendant's motorized scooter which was resting against the side of the mobile home. In the process, the scooter fell to the ground, breaking its headlights.[4] Toler also slipped to the ground, but immediately returned to his feet. Defendant then approached Toler and "ma[d]e a stabbing motion about three times," piercing Toler once in the chest and puncturing his heart.

Following the stabbing, Toler attempted to run away but collapsed in a nearby resident's yard. When asked on direct examination about Toler's departure from defendant's mobile home property, defendant stated that "[a]fter the accident happened to him, he left, he ran out of the yard then." Defendant further testified that he believed that Toler "just got scared and ran," and he thought that Toler had collapsed because he was drunk. Defendant did not approach Toler after he left defendant's property; instead, defendant walked back inside the mobile home, pulled out a tissue, and cleaned Toler's blood from the blade of the knife. Defendant then placed the knife back on top of the cabinet from where defendant had initially obtained it, walked outside, and proceeded to burn the bloody tissue that he had used to clean the knife.

Defendant had given notice of his intent to assert defenses that included self-defense, and during the charge conference he requested a self-defense instruction along with an instruction on voluntary manslaughter. The trial court declined to deliver both of these requested instructions and instructed the jury to consider only whether defendant

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3. Witnesses testified that the knife resembled "an iron pipe with a blade on the end of it."

4. Defendant did not request an instruction based on the "castle doctrine" as set forth in N.C.G.S. §§ 14-51.2(b) or 14-51.3(a)(1). Defendant's counsel, to the contrary, expressly stated to the trial court that such an instruction was not warranted under the circumstances of this case. Therefore, the applicability of the castle doctrine is not before us.

was guilty of first-degree murder, the lesser-included offense of second-degree murder, or not guilty. Accordingly, no form of a self-defense instruction was given to the jury by the trial court. On 24 May 2017, the jury convicted defendant of second-degree murder for the stabbing of Toler. The trial court thereupon sentenced defendant to a term of 483 to 592 months of imprisonment.

Upon defendant's appeal, the Court of Appeals concluded that defendant was not entitled to a self-defense instruction because the evidence at trial did not establish that defendant believed that it was necessary to kill Toler in order to protect himself from death or great bodily harm. As a result, the Court of Appeals majority found no error in defendant's trial. The dissenting judge on the Court of Appeals panel expressed the opinion that the trial court should have delivered a self-defense instruction and that its failure to do so prejudiced defendant. We agree with the lower appellate court, as this Court finds the Court of Appeals' application of the pertinent law to be sound and correct. Consequently, we shall weave some of its analysis into our own.

Analysis

"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." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (quoting *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927)). The principles of the two types of self-defense—perfect and imperfect—"are well established." *State v. Reid*, 335 N.C. 647, 670, 440 S.E.2d 776, 789 (1994). A defendant is entitled to an instruction on perfect self-defense as an excuse for a killing when the evidence presented at trial tends to show that, at the time of the killing:

> (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. Bush, 307 N.C. 152, 158-59, 297 S.E.2d 563, 568 (1982) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981) (italics omitted)), *habeas corpus granted sub nom. Bush v. Stephenson*, 669 F. Supp. 1322 (E.D.N.C. 1986), *aff'd per curiam*, 826 F.2d 1059 (4th Cir. 1987) (unpublished); *see also State v. Watson*, 338 N.C. 168, 179-80, 449 S.E.2d 694, 701 (1994) (quoting *State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489 (1992)), *cert. denied*, 514 U.S. 1071 (1995), *disavowed in part in State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995). The doctrine of imperfect self-defense applies when the evidence supports a determination that only the first two elements in the preceding quotation existed at the time of the killing, in which case the defendant would be guilty of the lesser included offense of voluntary manslaughter. *State v. Locklear*, 349 N.C. 118, 154-55, 505 S.E.2d 277, 298 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). Therefore, for a defendant to establish entitlement to an instruction on perfect or imperfect 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.

Moore, 363 N.C. at 796, 688 S.E.2d at 449 (quoting *Bush*, 307 N.C. at 160-61, 297 S.E.2d at 569). That is, when "there is no evidence from which a jury could reasonably find that defendant, in fact, believed it to be necessary to kill his adversary to protect himself from death or great bodily harm, defendant is not entitled to have the jury instructed on self-defense." *Reid*, 335 N.C. at 671, 440 S.E.2d at 789 (citing *Bush*, 307 N.C. at 161, 297 S.E.2d at 569).

Defendant contends in the case sub judice that the trial court erred by refusing to instruct the jury on self-defense. Defendant argues that the evidence presented at trial—namely, Toler's (1) aggressiveness, (2) verbal and physical threats against defendant, and (3) attack on defendant with a brick fragment, a beer bottle, and a pocketknife—entitled defendant to instructions on perfect and imperfect self-defense because he possessed reasonable fear of death or great bodily harm such that

a jury "could have found . . . that, at the time he administered the fatal wound with his knife, he believed it was necessary to kill or seriously injure Toler in order to save himself." This argument is unpersuasive.

The evidence, taken in the light most favorable to defendant, fails to manifest any circumstances existing at the time defendant stabbed Toler which would have justified an instruction on either perfect or imperfect self-defense. Despite his extensive testimony recounting the entire transaction of events from his own perspective, defendant never represented that Toler's actions in the moments preceding the killing had placed defendant in fear of death or great bodily harm such that defendant reasonably believed that it was necessary to fatally stab Toler in order to protect himself. On the other hand, defendant's own testimony undermines his argument that any self-defense instruction was warranted because, as the Court of Appeals majority correctly noted in its opinion, this Court's previous determinations have clear and direct applicability to defendant's contentions so as to eliminate his eligibility for his requested jury charge language.

The lower appellate court cited: (1) our decision in *State v. Blankenship*, 320 N.C. 152, 155, 357 S.E.2d 357, 359 (1987), for the principle that "a defendant cannot benefit from a self-defense instruction where he claims that the killing was accidental", *Harvey*, ___ N.C. App. ___, 817 S.E.2d 500, 2018 WL 3734234, at *3 (2018) (unpublished); (2) our determination in *State v. Lyons*, 340 N.C. 646, 459 S.E.2d 770 (1995), for the premise that "defendant's self-serving statement that he was 'scared' is not evidence that defendant formed a belief that it was necessary to kill in order to save himself", *id.* at *4 (quoting *Lyons*, 340 N.C. at 662, 459 S.E.2d at 779); and (3) our declaration in *State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996), for the point that a self-defense instruction is not required where defendant fired his pistol in order to get the murder victim and others to retreat, *id.* at *3. After viewing this Court's rulings in these cases as controlling, the Court of Appeals majority vividly demonstrated defendant's lack of entitlement to a self-defense instruction by quoting from an extensive passage of defendant's testimony elicited on his direct examination during which defendant twice expressly referred to his act of stabbing Toler as "the accident," explicitly stated that his purpose in going back in the trailer and picking up that knife was "[b]ecause I was scared he [Toler] was going to try and hurt me," and definitively represented that what he sought to do with the knife was "to make him [Toler] leave." *Id.* at *4.

We agree with the Court of Appeals' view of defendant's testimony at trial regarding this issue:

> [Defendant's] testimony fails to satisfy the requirements for an instruction on self-defense because it does not establish that (1) Defendant was actually being attacked by Toler such that he actually feared great bodily harm or death as a result of Toler's actions; and (2) he inflicted the fatal blow to Toler in attempt to protect himself from such harm . . . Defendant never clearly testified that he feared he was in such danger as a result of Toler's actions with the pocketknife in the moments preceding the stabbing. Nor did he ever testify as to facts demonstrating that such a fear would have been reasonable—i.e., that Toler lunged at him with the pocketknife, that Toler made any stabbing motions with the pocketknife, or that the pocketknife was even pointed in Defendant's direction. . . .
>
> Defendant's testimony also fails to demonstrate that his fear of such harm caused him to inflict that fatal blow to Toler's chest. Indeed, Defendant's failure to expressly admit to stabbing Toler with his knife further undercuts his ability to argue that the stabbing was committed as an act of self-defense.

Id. at *6. Defendant's own depictions of his act of killing Toler as an accident, his decision to obtain the knife due to being motivated by fear, and his intention to use the knife in order to persuade Toler to leave defendant's residential premises all operate to clearly invoke the application of our holdings in *Blankenship*, *Lyons*, and *Williams* so as to establish that it was not appropriate for defendant in the present case to receive the benefit of an instruction on self-defense.

In assessing defendant's contention that the trial court erred in failing to grant his request to instruct the jury on the affirmative defense of self-defense, and in evaluating the applicability of the principles of perfect and imperfect self-defense to the facts of the instant case in light of the relevant case law, we agree with the Court of Appeals' determination that the requirements for a jury instruction on self-defense do not exist in this case. Under *Bush*, defendant is not entitled to an instruction on perfect self-defense, and in light of *Locklear*, defendant is not eligible for an instruction on imperfect self-defense. Defendant has failed to satisfy the threshold requirements of *Moore* and *Reid*, both of which required defendant to present evidence that he formed a reasonable belief that it was necessary for him to fatally stab Toler in order for defendant to protect himself from death or great bodily harm, because there is no evidence from which a jury could reasonably make such a finding so as to entitle defendant to have the jury to be instructed on self-defense.

Conclusion

We conclude that the trial court did not err in declining defendant's request to instruct the jury on either the affirmative defense of perfect self-defense or imperfect self-defense. Defendant received a fair trial, free from error. Accordingly, this Court affirms the decision of the Court of Appeals.

AFFIRMED.

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

Justice EARLS dissenting.

Tobias Toler was thirty-six years old when he was stabbed in the heart on 11 August 2015 and died moments later in Sharpsburg, North Carolina. His blood alcohol content at the time of his death was 0.34 and a pocketknife was found on his person. Defendant Alphonzo Harvey admitted stabbing Mr. Toler, and the only question for the jury in this case was whether the killing was justified. I dissent because I believe the trial court and this Court are making the judgment call that should be made by the jury, the twelve men and women of Edgecombe County who heard the evidence and saw the witnesses testify at trial. In so doing, the Court ignores controlling precedent and applies inconsistent standards to weigh the evidence.

This Court recently reaffirmed long-standing doctrine that:

> "The jury charge is one of the most critical parts of a criminal trial." *State v. Walston*, 367 N.C. 721, 730, 766 S.E.2d 312, 318 (2014). "[W]here competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case . . . ." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (citations and emphasis omitted); *see State v. Guss*, 254 N.C. 349, 351, 118 S.E.2d 906, 907 (1961) (per curiam) ("The jury must not only consider the case in accordance with the State's theory but also in accordance with defendant's explanation.").

State v. Lee, 370 N.C. 671, 674, 811 S.E.2d 563, 565-66 (2018) (alterations in original).

To determine whether Mr. Harvey was entitled to an instruction on self-defense, the evidence must be viewed in the light most favorable to him. *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010). "An affirmative defense is one in which the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged because * * * .' " *State v. Caddell*, 287 N.C. 266, 289, 215 S.E.2d 348, 363 (1975) (citations omitted). Defendant here admitted to killing the victim; the trial judge was required to consider the evidence in the light most favorable to defendant and to ignore any inconsistent evidence in deciding whether to submit the requested self-defense or imperfect self-defense instructions. It was then the jury's job to determine defendant's guilt or innocence. By refusing to instruct the jury on self-defense when evidence supporting the instruction was present, the judge usurped the role of the jury and all but guaranteed a guilty verdict.

Rather than consider the evidence in the light most favorable to defendant, the Court here imposes a "magic words" requirement in favor of the State. In essence, the majority holds that by failing to testify using the magic words, "I was in fear of my life and believed I needed to kill Toby to save myself from death or great bodily harm," the defendant has failed to allege self-defense and, equally damning, by using the magic word "accident" in passing during his testimony to refer to the incident, defendant has foreclosed any consideration by the jury of whether he acted in self-defense. Our case law imposes no such magic word requirement or trap for defendants. Instead, the trial court must consider the defendant's evidence as true, including other testimony and evidence received at trial which tends to support it, and disregard any contradictory evidence when determining whether the jury should be instructed on self-defense. *Moore*, 363 N.C. at 796-98, 688 S.E.2d at 449-50.

The majority recounts some of defendant's evidence concerning self-defense and then finds it "unpersuasive." The question for the Court is not whether the evidence is persuasive, but whether it establishes the elements of self-defense or imperfect self-defense. With regard to the first two elements of self-defense, whether it appeared to defendant that it was necessary to kill Toler in order to protect himself from death or great bodily harm and whether that belief was reasonable, the evidence is as follows: Alphonzo Harvey repeatedly asked Toby Toler to leave his house after Toler had been drinking, was argumentative, and used foul language in front of Harvey and his female guests. Toler was "staggering all over my [Harvey's] house" and Harvey asked him seven or eight times to leave. Toler refused to do so.

Finally, Harvey walked out and Toler followed him. Toler then "said he ought to whip my [Harvey's] damn ass." Other witnesses described how Toler said to Harvey, "I will fuck you up." Toler threw a bottle of beer at Harvey.[1] Toler also threw a brick at Harvey, which Harvey testified hit his finger when he raised his hand. Witnesses said the brick hit the wall of Harvey's house with a loud thud. Toler hit Harvey; Harvey hit him back, and Toler knocked over Harvey's scooter, breaking the headlights.

Toler then pulled out a pocketknife and threatened Harvey with it: according to Harvey, "He told me he ought to kill my damn ass with it." Harvey testified that at this point, "I thought he was going to try and hurt me so." When asked why, Harvey responded, "Because he had a pocketknife." Harvey testified that he then went back into his trailer and got a knife that was mounted on the end of a wooden rod "because I was scared he [Toler] was going to try and hurt me." Harvey explained that he was just holding his knife in his hand:

> Q. Were you just holding it or were you –
>
> A. I didn't do nothing. Just holding it in my hand. I didn't do nothing.
>
> Q. At any point did you go and use your knife to physically remove him?
>
> A. No, he came up on me, coming up on me. He was walking up on me with his knife. That's when I had my knife.
>
> . . . .
>
> Q. And at what point did you hit him with your knife?
>
> A. I didn't, I just hit – he –
>
> THE COURT: Did what?
>
> . . . .
>
> A. I said hit him right there.
>
> Q. After you hit him right there with it, what did he do?
>
> A. He ran to the road.

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1. The majority describes this as a plastic beer bottle, but only one witness of several who testified to this actually said that it was plastic; other testimony indicated the bottle was glass.

Later Harvey explained that, after returning the knife to his trailer, he left the scene because "I was scared somebody might come up and try to hurt me." Taken in the light most favorable to the State, Harvey left the scene and went to a neighbor's house because he knew he had done something wrong. Taken in the light most favorable to defendant, Harvey left because he truly was afraid of Toler, and his contemporaneous action confirms that his testimony that he was scared is not simply a self-serving fabrication after the fact.

Harvey further testified that he was scared and uncertain as to what Toler would do to him, partly because he knew Toler to carry a knife at all times. "[E]vidence of prior violent acts by the victim or of the victim's reputation for violence may, under certain circumstances, be admissible to prove that a defendant had a reasonable apprehension of fear of the victim." *State v. Strickland*, 346 N.C. 443, 459, 488 S.E.2d 194, 203 (1997) (citation omitted), *cert denied*, 522 U.S. 1078 (1998); *see also State v. Irabor*, ___ N.C. App. ___, ___, 822 S.E.2d 421, 424 (2018) ("Defendant's knowledge of [the victim]'s violent propensities, *being armed*, and prior acts supports the trial court's finding that defendant reasonably believed it was necessary to use deadly force to save himself from death or great bodily harm." (emphasis added)). Based on defendant's testimony and all the circumstances, the evidence was "sufficient that defendant ha[d] a reasonable apprehension that an assault on him with deadly force [wa]s imminent." *State v. Spaulding*, 298 N.C. 149, 157, 257 S.E.2d 391, 396 (1979) (citations omitted).

On some key points, the majority ignores Harvey's testimony and credits contradictory testimony. For example, on the question of whether Toler was approaching Harvey with his knife in his hand when Harvey stabbed him, or whether Harvey approached Toler, the majority assumes the facts most favorable to the State. Despite Harvey's repeated testimony that he was scared of Toler, was afraid he would be hurt, and was being threatened with a knife by Toler, who was drunk and had just said he ought to kill him, the majority finds that the evidence "fails to manifest any circumstances existing at the time defendant stabbed Toler which would have justified an instruction on either perfect or imperfect self-defense." This is contrary to our precedents presenting very similar facts in which this Court has held that a self-defense or imperfect self-defense instruction is required.

For example, in *Spaulding* the defendant stabbed and killed another inmate who was advancing on him with his hand in his pocket, and this Court found it was error to refuse to instruct the jury on self-defense. 298 N.C. at 156-57, 257 S.E.2d at 396. In that case the reasonableness of

the defendant's belief that he was in imminent danger of great bodily harm or death "was a question for the jury." *Id.* at 157, 257 S.E.2d at 396. Similarly, in *State v. Webster* the defendant shot and killed an unarmed man who previously had been in the defendant's trailer, was asked to leave, and had left. 324 N.C. 385, 389, 378 S.E.2d 748, 751 (1989). Sometime later, the victim returned and was standing on the steps of the trailer when the defendant shot him. *Id.* at 389, 378 S.E.2d at 751. The defendant testified: "I was afraid in my condition. I could not fight him and that was the only thing I could do." *Id.* at 389, 378 S.E.2d at 751. That was sufficient evidence to submit a self-defense instruction to the jury, and the trial court's refusal to allow the defendant in that case to state whether he believed his life was threatened was reversible error. *Id.* at 393, 378 S.E.2d at 753. In relevant portions, the facts in *Spaulding* and *Webster* are similar to the facts in this case, and defendant here is entitled to a self-defense instruction, as were those defendants.

Even more relevant is *State v. Buck*, in which the Court instructed that "we reiterate that it is important for the trial court to include the possible verdict of not guilty by reason of self-defense in its final mandate to the jury." 310 N.C. 602, 607, 313 S.E.2d 550, 553 (1984). There the defendant's account of the incident was that the victim had an open pocketknife in his hand and came into the kitchen where the defendant was standing. *Id.* at 603, 313 S.E.2d at 551. The victim acted abusively and threatened to kill a third person. *Id.* at 603, 313 S.E.2d at 551. When the victim went towards the defendant while brandishing the open pocketknife, the defendant, hoping to scare the victim, grabbed a butcher knife and the two men struggled and fell to the floor, causing the butcher knife to lodge in the victim's chest. *Id.* at 603, 313 S.E.2d at 551. The defendant pulled the butcher knife out and tossed it aside, and the two kept fighting for a period of time until the victim dropped the pocketknife, got up, and walked out of the apartment. *Id.* at 603-04, 313 S.E.2d at 551-52. The victim died later that day. *Id.* at 604, 313 S.E.2d at 552. In that case the Court had no difficulty observing that, based on the defendant's evidence, "[i]f, however, the jury should conclude that he intentionally wielded the knife, then it should acquit him on the grounds of self-defense." *Id.* at 606, 313 S.E.2d at 553. There is nothing about the material facts of *Buck* to distinguish it from this case.

Part of the majority's concern here appears to be that Harvey did not say, "*I was afraid for my life and believed I had to kill my attacker.*" But, as the transcript reveals, defendant was inarticulate. Defendant testified he only completed the ninth or tenth grade. In addition to his limited education, defendant had sustained a severe head injury in a

car accident in 2008, which required insertion of a metal plate in his head. As a result of the head injury, defendant was permanently disabled and suffered memory loss. The injury also affected defendant's ability to talk and function. Inarticulate and less well coached defendants should be treated equally with those who can easily learn the "magic words" the majority would require for a self-defense instruction. The question is whether there is evidence of self-defense or imperfect self-defense, when taken in the light most favorable to defendant. *See State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) ("Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." (citations omitted))

The cases cited by the majority for the proposition that when the defendant claims the killing is accidental, or that a weapon was used solely to get the victim and others to retreat, do not apply here because Harvey clearly stated that he feared Toler was trying to hurt him and that he used his knife when Toler "came up on" him with a pocketknife. Specifically, *State v. Williams*, 342 N.C. 869, 467 S.E.2d 392 (1996), involved a defendant who testified that he fired his weapon in the air to scare those who made him feel threatened and did not shoot at anyone; *State v. Lyons*, 340 N.C. 646, 459 S.E.2d 770 (1995), involved a defendant who testified that he fired a warning shot at the top of his door because he believed he was being robbed and that he was not trying to hit anyone; and *State v. Blankenship*, 320 N.C. 152, 357 S.E.2d 357 (1987), involved a defendant who testified that during a physical fight, he pulled out his gun to hit the victim on the head with it, after which the victim grabbed the gun by the barrel and it fired accidently. Each of these circumstances is very different from Mr. Harvey's situation, in which he testified that while he was standing on the steps of his trailer, Toler came at him with a knife and he stabbed Toler in the chest. Harvey acknowledged in his testimony that he struck the blow intentionally. The context of his later statement regarding Toler's "accident" shows that he was using the same word to refer to the incident that a previous witness had used. Annie May Alston, testifying before Harvey, stated: "Not on that particular day that the accident happened, no." Harvey then testified: "After the accident happened to him, he left." His use of the word "accident" does not directly refer to his own actions and does not negate all his other testimony regarding his fears about how Toler intended to harm him. To imply otherwise is to elevate form over substance in a manner that is unjustified by the evidence in this case.

Second-degree murder does not require that the accused acted with the intent to kill, and therefore, Harvey did not need to testify that he intended to kill Toler, only that he intended to strike the blow, as this Court explained in *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995). *See State v. Carter*, 357 N.C. 345, 361, 584 S.E.2d 792, 803-04 (2003) (reaffirming *Richardson*), *cert denied*, 541 U.S. 943 (2004); *see also Lee*, 370 N.C. at 673, 811 S.E.2d at 565 (self-defense available as a defense to second-degree murder). Moreover, Toler already had threatened to kill Harvey, had hit him, and he had thrown both a bottle and a brick at him. Harvey did not need to wait for Toler to actually stab him with the pocketknife before defending himself.

Harvey may have used excessive force to repel Toler's attack, in which case the jury should have had the option of finding that Harvey acted in imperfect self-defense. *See State v. Bush*, 307 N.C. 152, 159, 297 S.E.2d 563, 568 (1982) (imperfect self-defense exists when the defendant believed it necessary to kill his adversary in order to save himself and when that belief was reasonable, but the defendant was either the aggressor or used excessive force), *habeas corpus granted sub nom. Bush v. Stephenson*, 669 F. Supp. 1322 (E.D.N.C. 1986), *aff'd per curiam*, 826 F.2d 1059 (4th Cir. 1987) (unpublished). But the jury did not have that opportunity here because the trial court erroneously failed to give a self-defense instruction. The jury, not the trial judge or this Court, has the responsibility to weigh the evidence and determine whether Alphonzo Harvey acted in self-defense, either perfectly or imperfectly, when he stabbed Tobias Toler. Accordingly, I would remand for a new trial.

SUSAN SYKES D/B/A ADVANCED CHIROPRACTIC AND HEALTH CENTER, DAWN PATRICK, TROY LYNN, LIFEWORKS ON LAKE NORMAN, PLLC, BRENT BOST, AND BOST CHIROPRACTIC CLINIC, P.A.

v.

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, CIGNA HEALTHCARE OF NORTH CAROLINA, INC., MEDCOST, LLC, AND HEALTHGRAM, INC.

No. 248A18

Filed 14 June 2019

Collateral Estoppel and Res Judicata—two class actions on appeal—same claims and theories—relitigation of issues barred by outcome of the other appeal

Where plaintiff chiropractors filed two separate putative class actions against two different sets of defendants for claims arising from insurer conduct affecting chiropractic services, plaintiffs were barred by collateral estoppel from relitigating the issues in one of the two cases because the N.C. Supreme Court affirmed the decision of the trial court in the other case, *Sykes v. Health Network Solutions, Inc.*, 372 N.C. 326 (2019), and both cases presented essentially the same claims and relied on the same theories.

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

Appeal pursuant to N.C.G.S. § 7A-27(a) from an order and opinion entered on 5 April 2018 by Judge James L. Gale, Chief Business Court Judge, in Superior Court, Forsyth County, after the case was designated a mandatory complex business case by the Chief Justice under N.C.G.S. § 7A-45.4. Heard in the Supreme Court on 5 March 2019.

Oak City Law LLP, by Samuel Pinero II and Robert E. Fields III; and Doughton Blancato PLLC, by William A. Blancato, for plaintiff-appellants.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes, Elizabeth L. Winters, Peter M. Boyle, pro hac vice, and Christina E. Fahmy, pro hac vice, for Blue Cross and Blue Shield of North Carolina; Fox Rothschild LLP, by D. Erik Albright, and Kirkland & Ellis LLP, by Joshua B. Simon, pro hac vice, Warren Haskel, pro hac vice, and Dmitriy Tishyevish, pro hac vice, for Cigna Healthcare of North Carolina, Inc.; and Ellis & Winters LLP, by Stephen D. Feldman, for Medcost, LLC, defendant-appellees.

NEWBY, Justice.

This is a companion case to *Sykes v. Health Network Solutions, Inc.*, 372 N.C. 326, ___ S.E.2d ___ (2019) (hereinafter *Sykes I*). Like its companion, this case raises questions of civil liability based on insurer conduct affecting chiropractic services. Relying on and incorporating its reasoning in *Sykes I*, the trial court dismissed all claims in this case. Our Court has now issued its opinion affirming the trial court's decision in *Sykes I*. Because the decision in *Sykes I* meets the criteria for collateral estoppel, we affirm the trial court's order and opinion in this case.

This case is one of two putative class actions alleging, *inter alia*, that defendant insurers contract with Health Network Solutions, Inc. (HNS) to provide or restrict insured chiropractic services in violation of North Carolina's insurance and antitrust laws. Instead of amending the complaint in the companion case, plaintiffs chose to bring this action against defendant insurers separately from their action against HNS and its individual owners. Nevertheless, both actions present essentially the same claims and rely upon the same theories.

The facts relevant to this case are fully recited in this Court's opinion in *Sykes I*. HNS is an integrated independent practice association consisting of approximately one thousand, or approximately one-half, of North Carolina's active chiropractors. To enroll in HNS, chiropractors must agree to provide in-network care to patients who are covered by various insurers, namely, defendants in the present action, and with whom HNS has entered into exclusive agreements to provide in-network care. Chiropractors who contract to participate in the HNS network pay fees to HNS based on a percentage of the fees that insurers pay for in-network services.

In governing its chiropractors and the services they provide, HNS uses a utilization management (UM) program. Through UM, HNS and defendants review and manage enrolled chiropractors based on the cost per patient. The HNS-enrolled chiropractors may be put on probation and subject to potential termination if their average cost per patient exceeds by more than 50% a mean cost that HNS calculates.

In both of their lawsuits, plaintiffs allege that chiropractors must go through HNS to be deemed "in-network" providers for patients covered by defendant insurers. Plaintiffs contend that HNS's exclusive contracts with defendants enable a "scheme that reduces the number of medically necessary and appropriate treatments" that HNS chiropractors may

provide, which has the effect of restricting their output. Plaintiffs contend that these practices allow defendants to avoid paying for medically necessary treatments and appropriate care.

On 30 April 2013, plaintiffs initiated *Sykes I*. In that action plaintiffs asserted five claims for relief: (1) requests for a declaratory judgment on certain facts and law referenced in the complaint, including that the agreements described in the complaint "between HNS and Providers" and "between HNS and the Insurers" are "an illegal restraint of trade and anti-competitive"; (2) antitrust claims based on price fixing, monopsony, and monopoly, alleging that HNS, its owners, and insurers have illegally conspired by "[u]sing the Insurers' market power to fix the price of chiropractic services in North Carolina" and "[u]sing its utilization review procedures to continuously lower the availability of chiropractic services in North Carolina"; (3) claims under North Carolina General Statutes section 75-1.1 asserting unfair and deceptive trade practices and acts; (4) breach of fiduciary duties that HNS owners and HNS allegedly owe to the providers by, *inter alia*, "promoting a scheme to impede competition and restrict prices"; and (5) a request for punitive damages. Plaintiffs later amended their complaint to add a sixth claim for civil conspiracy.

Plaintiffs outlined four separate product markets in support of their antitrust claims: (1) "the market in which in-network managed care chiropractic services . . . are provided to the Insurers and their North Carolina patients through HNS" (HNS Market); (2) "the market for in-network chiropractic services provided to individual and group comprehensive healthcare insurers and their patients in North Carolina" (Comprehensive Health Market); (3) "the market for insurance reimbursed chiropractic services in North Carolina" (Insurance Health Market); and (4) "the market for chiropractic services provided in North Carolina" (North Carolina Market).

The trial court denied the defendants' initial motion to dismiss the claims in *Sykes I* and stayed additional proceedings pending full discovery on market definition. After discovery, plaintiffs decided to pursue the present case separately in addition to their suit against HNS. Thus on 26 May 2015, plaintiffs filed this action against certain North Carolina insurers, specifically, Blue Cross and Blue Shield of North Carolina, Cigna Healthcare of North Carolina, Inc., and Medcost, LLC (Insurers).[1]

1. Plaintiffs also initially named Healthgram, Inc. as a defendant in this action. On 11 September 2017, however, plaintiffs dismissed their claims against Healthgram.

The case was designated as a mandatory complex business case on 2 June 2015.

In their *Sykes II* complaint plaintiffs asserted essentially the same six claims from *Sykes I* but this time against Insurers: (1) requests for a declaratory judgment on certain facts and law referenced in the complaint, including that the agreements described in the complaint "between HNS and Providers" and "between HNS and the Insurers" are "an illegal restraint of trade and anti-competitive"; (2) antitrust claims, namely, claims for price fixing, monopsony, and monopoly; (3) claims under North Carolina General Statutes section 75-1.1 asserting unfair and deceptive trade practices and acts based on the antitrust allegations; (4) civil conspiracy; (5) aiding and abetting a breach of fiduciary duty; and (6) a request for punitive damages.

The defendants in *Sykes I* timely filed their motions for partial summary judgment and to dismiss. Similarly, on 25 September 2015, defendants in the present action moved to dismiss this case. On 18 August 2017, the trial court issued an order and opinion in *Sykes I* determining that "the proper market to assess the antitrust claims in [the *Sykes I*] litigation must be the North Carolina Market, which includes all insured and uninsured chiropractic services." Nonetheless, the trial court expressed concern about whether plaintiffs' filings "adequately pleaded market power in the North Carolina Market." Thus, the court requested supplemental briefing on that issue and denied the defendants' motion to dismiss the antitrust claims to the extent they were premised on the North Carolina Market.

As for the other claims in *Sykes I*, the trial court granted the defendants' motion to dismiss plaintiffs' declaratory judgment claim to the extent it was based on alleged Chapter 58 violations and plaintiffs' claim based on the defendants' purported breach of fiduciary duty. The trial court otherwise denied the motion as to the remaining claims while the antitrust issues remained pending.

After receipt of the supplemental briefing, on 5 April 2018, the trial court issued an order and opinion dismissing plaintiffs' antitrust claims in *Sykes I*, concluding that plaintiffs had not sufficiently pled that the defendants had market power within the North Carolina Market. As for the other claims, the trial court (1) dismissed plaintiffs' declaratory judgment claim premised on the antitrust claims, (2) dismissed plaintiffs' civil conspiracy claim, (3) dismissed all claims against the individual owners of HNS, and (4) dismissed plaintiffs' request for punitive damages, thereby leaving no remaining claims.

On the same day, the trial court issued the order and opinion in the present case dismissing plaintiffs' claims based on their failure to allege defendants' requisite market power in the North Carolina Market. The court noted that "[b]ecause the essential factual allegations in the two actions are the same, the Court appropriately incorporates and applies its rulings and reasoning in *Sykes I* when resolving the Motions in this case."

The trial court stated that "[t]he sufficiency of market power allegations is a 'threshold inquiry' for [plaintiffs'] Antitrust Claims." *See Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 822 F.2d 656, 666 (7th Cir.), *cert. denied*, 484 U.S. 977, 108 S. Ct. 488, 98 L. Ed. 2d 486 (1987); *see also Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir.), *cert. denied*, 516 U.S. 987, 116 S. Ct. 515, 133 L. Ed. 2d 424 (1995) (noting that market power may be demonstrated based on facts providing either direct or circumstantial evidence of that power and stating that "circumstantial evidence of market power requires that the plaintiff, at the threshold, define the relevant market"). The trial court agreed with plaintiffs that proof of actual detrimental effects "can obviate the need for an inquiry into market power." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 2019, 90 L. Ed. 2d 445, 458 (1986). Nonetheless, the trial court noted that "Plaintiffs conflate their allegation of a reduction of output *in markets the Court has rejected* with an allegation of reduction of output *in the North Carolina Market*." The trial court opined that an allegation that defendants caused a reduction of chiropractic services among in-network chiropractors cannot be deemed sufficient to allege "a reduction in output among *all chiropractors* in the North Carolina Market." Instead, the trial court reasoned that "the Complaint asserts no facts that suggest more than a shift in output from the in-network insured market to other segments of the larger North Carolina Market."

The trial court then recognized that plaintiffs' factual assertions of market power involved two related contentions: (1) "Defendants conspired together to reduce output, so the Court should aggregate the Defendant[s'] individual market shares"; and (2) "the market power of all Defendants, especially Blue Cross's alleged market power, is adequate to support a finding of combined market power by all co-conspirators in the North Carolina Market." Thus, the trial court recognized that plaintiffs attempted to assert a combination of vertical and horizontal agreements or conspiracies. The trial court set forth the definitions of each type of conspiracy and opined that plaintiffs' complaint attempted to allege a "hub-and-spokes" or "rimmed wheel" conspiracy, which involves both horizontal and vertical agreements. To adequately allege such a conspiracy, however, a plaintiff must plead facts showing an

agreement between the defendants and that "the competitors would benefit only if all the competitors participated in the scheme." The trial court recognized that "mere awareness of a competitor combined with parallel conduct is insufficient to show a horizontal conspiracy." *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 330 (3d Cir. 2010).

Here the trial court recognized that plaintiffs had "not alleged an express agreement between Insurers to reduce output of medically necessary chiropractic care," nor was there any factual allegation that "one Insurer's contract with HNS was conditioned on HNS contracting with any other Insurer." Instead, plaintiffs' allegation that "[t]he Insurers [were] aware of each other and the market power achieved by combining their patient populations under HNS's umbrella" only showed "mere awareness of a competitor combined with parallel conduct," which is ultimately "insufficient to show a horizontal conspiracy."

Alternatively, the trial court opined that even if it were "mistaken in concluding that Plaintiffs may not aggregate market power because they have not alleged a rimmed wheel conspiracy," it reiterated that plaintiffs "failed to allege that Defendants and HNS in combination possess market power in the North Carolina Market." Though plaintiffs alleged that defendants control "a materially significant percentage" of the North Carolina Market, the court found that plaintiffs "make no effort to further define what a 'materially significant' percentage might be." The trial court also rejected plaintiffs' pleadings involving specific defendants' control of the private health insurance market, opining that "any alleged market power in a narrow, rejected market does not alone support a conclusion" of market power in the North Carolina Market, which notably "is not restricted to insured chiropractic services." Thus, regardless of whether the market itself is sufficiently defined, the trial court noted that a plaintiff must assert more than "[v]ague or conclusory allegations of market power."

Though the trial court recognized North Carolina's more lenient standard for evaluating claims under Rule 12(b)(6), the trial court reasoned that a pleading based on conclusory allegations unsupported by underlying factual allegations cannot withstand an opposing party's motion to dismiss. Given that the parties conducted full market definition discovery and provided additional briefing, and because plaintiffs' pleading was based on conclusory allegations, the trial court concluded that plaintiffs failed to adequately plead market power in North Carolina. The trial court similarly concluded that plaintiffs failed to plead sufficient market power on the part of each individual defendant, thus warranting dismissal of the antitrust claims under Rule 12(b)(6).

As for the other claims, the trial court relied on its reasoning and conclusions in *Sykes I*: It dismissed plaintiffs' section 75-1.1 claim since it was premised on the alleged antitrust violations and dismissed plaintiffs' Chapter 58 claims because plaintiffs lacked standing to bring those claims. Similarly, the trial court dismissed plaintiffs' claim for aiding and abetting a breach of fiduciary duty, concluding that, as in *Sykes I*, there is "no factual basis to find that HNS owed a fiduciary duty to its network members," meaning defendants here could not have aided and abetted a breach of fiduciary duty where no fiduciary duty existed. But regardless of the merits of that claim, the trial court stated that it would not consider the claim, opining that this Court will not recognize a claim for aiding and abetting breach of fiduciary duty. Even if it did so, however, the trial court concluded that plaintiffs failed to allege each of the elements that would be required to state such a claim.

The trial court similarly determined that all of plaintiffs' declaratory judgment requests must be dismissed in that "each recasts substantive claims that the Court has rejected." Finally, because all other claims had been dismissed and North Carolina does not allow freestanding claims for either civil conspiracy or punitive damages, the trial court dismissed both of plaintiffs' remaining claims.

Plaintiffs appealed to this Court. In their arguments, however, both plaintiffs and defendants conceded that this Court's resolution of *Sykes I* at least in part determines the present case.

This Court reviews de novo a trial court's order on a motion to dismiss. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). In doing so, the Court must consider "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Coley v. State*, 360 N.C. 493, 494-95, 631 S.E.2d 121, 123 (2006) (quoting *Thompson v. Waters*, 351 N.C. 462, 463, 526 S.E.2d 650, 650 (2000)).

Collateral estoppel precludes "parties and parties in privity with them . . . 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); *see also Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) ("[C]ollateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." (citing *Hales v. N.C. Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594

(1994))). The doctrine of collateral estoppel "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *King*, 284 N.C. at 356, 200 S.E.2d at 805 (quoting *Comm'r v. Sunnen*, 333 U.S. 591, 599, 68 S. Ct. 715, 720, 92 L. Ed. 898, 907 (1948)). Collateral estoppel bars litigation of claims in which

> (1) the issues [are] the same as those involved in the prior action, (2) the issues . . . have been raised and actually litigated in the prior action, (3) the issues [were] material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action [was] necessary and essential to the resulting judgment.

State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (citing *King*, 284 N.C. at 358, 200 S.E.2d at 806).

Here the parties agree that resolving this case at least in part depends on our resolution of *Sykes I*. Because we affirm the trial court's orders in *Sykes I*,[2] we now conclude that plaintiffs' claims in the present case are barred by collateral estoppel. All elements for collateral estoppel are met here. First, both *Sykes I* and this action involve claims requesting a declaratory judgment, alleging antitrust violations, asserting unfair and deceptive trade practices and acts, alleging civil conspiracy, alleging a breach of fiduciary duty (and here, aiding and abetting such a breach), and requesting punitive damages. Second, plaintiffs actually litigated all six claims in *Sykes I*, as evinced by the *Sykes I* orders dismissing all claims after market definition discovery and additional briefing. Third, all six of these claims were material and relevant to the disposition of *Sykes I* because the trial court based its resolution of the action as a whole on the determination of each of the individual claims. Finally, the trial court's orders in *Sykes I* show that these six claims were necessary and essential to the trial court's eventual decision to dismiss all claims in the action. Thus, plaintiffs' claims here are barred by collateral estoppel.

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2. We note that this Court is equally divided in its decision on the antitrust claims and the dependent civil conspiracy claims in *Sykes I*, which means that the trial court's decision on those claims is affirmed without precedential value. This Court's decision in *Sykes I* affirms the trial court's decision on all remaining claims, i.e., the declaratory judgment claim, unfair and deceptive trade practice claims, breach of fiduciary duty claims, and request for punitive damages.

Because collateral estoppel bars plaintiffs from litigating these matters given our resolution of the issues in *Sykes I*, we affirm the trial court's order dismissing plaintiffs' claims in this action.

AFFIRMED.

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

SUSAN SYKES D/B/A ADVANCED CHIROPRACTIC AND HEALTH CENTER, DAWN PATRICK, TROY LYNN, LIFEWORKS ON LAKE NORMAN, PLLC, BRENT BOST, AND BOST CHIROPRACTIC CLINIC, P.A.

v.

HEALTH NETWORK SOLUTIONS, INC. F/K/A CHIROPRACTIC NETWORK OF THE CAROLINAS, INC., MICHAEL BINDER, STEVEN BINDER, ROBERT STROUD, JR., LARRY GROSMAN, MATTHEW SCHMID, RALPH RANSONE, JEFFREY K. BALDWIN, IRA RUBIN, RICHARD ARMSTRONG, BRAD BATCHELOR, JOHN SMITH, RICK JACKSON, AND MARK HOOPER

No. 251PA18

Filed 14 June 2019

1. Appeal and Error—equally divided vote of Supreme Court—no precedential value

The N.C. Supreme Court, by an equally divided vote, affirmed the Business Court's dismissal of plaintiff's antitrust claims in a case arising from insurer conduct affecting chiropractic services. The Business Court's opinion as to those claims accordingly stood without precedential value.

2. Appeal and Error—claims dismissed—claims based on same conduct dismissed

Where the N.C. Supreme Court affirmed the trial court's dismissal of plaintiffs' antitrust claims, the Court also affirmed the dismissal of plaintiffs' unfair trade practices claims that were based on the same conduct.

3. Unfair Trade Practices—learned profession exemption—chiropractors

In a case arising from insurer conduct affecting chiropractic services, plaintiff chiropractors' unfair trade practices claim was barred by the learned profession exemption in N.C.G.S. § 75-1.1(b).

All individual defendants and all members of defendant Health Network Solutions, Inc., which served as an intermediary between chiropractors and insurance companies, were licensed chiropractors, and the alleged conduct at the heart of the action was directly related to providing patient care.

4. Appeal and Error—claims dismissed—related Chapter 75 claims also dismissed

Where the N.C. Supreme Court affirmed the trial court's dismissal of plaintiffs' antitrust and unfair trade practices claims, the Court also affirmed the denial of declaratory relief to the extent that claim related to those Chapter 75 claims.

5. Insurance—alleged failure to comply with provisions of Chapter 58—no private cause of action

In a case arising from insurer conduct affecting chiropractic services, the N.C. Supreme Court affirmed the trial court's dismissal of plaintiff chiropractors' claims for declaratory relief relating to defendants' alleged failure to comply with the state's insurance laws. Chapter 58 of the N.C. General Statutes did not provide a private cause of action for plaintiffs' claims.

6. Fiduciary Relationship—contractual relationship—alleged joint venture

The N.C. Supreme Court affirmed the trial court's dismissal of plaintiff chiropractors' claims for breach of fiduciary duty. Plaintiffs' contractual relationship with defendant Health Network Solutions, Inc. (HNS), which served as an intermediary between chiropractors and insurance companies, was insufficient to establish a fiduciary duty, and plaintiffs failed to demonstrate that they were in a joint venture with HNS.

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

Justice EARLS concurring in part and dissenting in part.

Chief Justice BEASLEY joins in this opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of orders and opinions dated 18 August 2017 and 5 April 2018 entered by Judge James L. Gale, Chief

Business Court Judge, in Superior Court, Forsyth County, after the case was designated a mandatory complex business case by the Chief Justice under N.C.G.S. § 7A-45.4. Heard in the Supreme Court on 5 March 2019.

Oak City Law LLP, by Samuel Pinero II and Robert E. Fields III; and Doughton Blancato PLLC, by William A. Blancato, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jennifer K. Van Zant, Benjamin R. Norman, and W. Michael Dowling, for defendant-appellees.

HUDSON, Justice.

Plaintiffs appeal the North Carolina Business Court's 18 August 2017 order and opinion granting in part and denying in part defendants' motions to dismiss and for partial summary judgment and its 5 April 2018 order and opinion dismissing plaintiffs' remaining claims under Rule of Civil Procedure 12(b)(6). Plaintiffs are licensed chiropractic providers in North Carolina who allege that defendants Health Network Solutions, Inc. (HNS) and HNS's individual owners have engaged in unlawful price fixing ultimately resulting in a reduction of output of chiropractic services in North Carolina. Specifically, plaintiffs allege that defendant HNS has committed antitrust and other violations in its role as intermediary between individual chiropractors and several insurance companies and third-party administrators,[1] who are the defendants in a separate action also before this Court.

In their Second Amended Class Action Complaint (the second amended complaint), plaintiffs raise the following claims for relief: (1) declaratory judgment, (2) price fixing, monopsony, and monopoly (the antitrust claims), (3) unfair and deceptive trade practices and acts, (4) civil conspiracy, and (5) breach of fiduciary duty. In addition, plaintiffs seek punitive damages, a remedy styled in the complaint as a separate claim for relief.

1. Plaintiffs refer to these entities as the Insurers, while defendants refer to them as the Payors. Several of these entities are defendants in a separate action filed by the same plaintiffs on 26 May 2015. An appeal from the Business Court in that companion case, *Sykes v. Blue Cross & Blue Shield of North Carolina* (No. 248A18) (*Sykes II*), is also before this Court.

Today, we affirm the Business Court's dismissal of plaintiffs' antitrust claims, including the derivative claim of civil conspiracy, by an equally divided vote, meaning that the Business Court's opinion as to those claims will stand without precedential value. We also hold that the Business Court did not err in dismissing each of plaintiffs' other claims. As for plaintiffs' unfair trade practices claim, we hold that this claim is barred by the learned profession exemption set out in N.C.G.S. § 75-1.1(b). Regarding plaintiffs' declaratory judgment claim, we hold that the relevant statutes do not provide plaintiffs a private right of action to obtain the declaratory relief that they seek. As for plaintiffs' breach of fiduciary duty claim, we hold that no fiduciary relationship existed between the parties, meaning no fiduciary duty was ever created. The Business Court correctly noted that no freestanding claim exists for punitive damages, *see Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 425, 775 S.E.2d 1, 8 (2015), and plaintiffs have no remaining legal claim to which punitive damages might attach. As so described, we affirm the decision of the Business Court dismissing plaintiffs' entire action.

Factual and Procedural Background

Plaintiffs brought this action as a putative class action lawsuit, defining the class as "all licensed chiropractors practicing in North Carolina from 2005 to the present who provided services in the North Carolina Market" and identifying as three subsets of that class all licensed chiropractors participating in the HNS Market, the Comprehensive Health Market, and the Insurance Market. Plaintiffs made the following allegations in their second amended complaint, and for the purposes of our review they are taken as true.

Defendant HNS serves as an intermediary between individual chiropractors in North Carolina and various insurance companies and third-party administrators for insurance companies. Essentially, HNS contracts with various chiropractors, who, as part of the HNS network, are able to provide chiropractic services "in-network" for the various insurance payors with whom HNS has separately contracted. In exchange for in-network access, members of the HNS network agree to permit HNS to negotiate with the payors the prices to be charged for in-network chiropractic services. A chiropractor must maintain an average per-patient cost at a certain level or risk termination from the network. Individual defendants are themselves licensed chiropractors who are current or former owners of HNS.

Plaintiffs are licensed North Carolina chiropractors (and their businesses) who previously participated in the HNS network or have never

participated in the network. Plaintiffs fall within one of these three categories: they were removed from the HNS network because their per-patient cost was too high, left the network based on HNS's policies, or declined to join the network because of HNS's practices and restraints. Plaintiffs argue that because HNS is the sole path to becoming an in-network provider for the various participating insurance companies and other payors, they are being deprived of access to the large number of patients that receive health care coverage via the networks of the various payors.

Plaintiffs' claims are largely based on the following allegations. Plaintiffs contend that HNS, despite representing that it is an integrated independent practice association (IPA), in fact "operat[es] an involuntary cartel to control competition, supply, and pricing of chiropractic services in North Carolina made possible by the exclusive contracts with the Insurers and the market power provided by those contracts." Plaintiffs contend that HNS is operating as a medical service corporation, as described in N.C.G.S. § 58-65-1, that has not become licensed as required by N.C.G.S. § 58-65-50. In addition, they contend that HNS is conducting utilization review based only on providers' average per-patient cost, which does not take into account medical necessity or appropriateness of treatment, in violation of N.C.G.S. § 58-50-61 (2017). Thus, they contend, in addition to its failure to obtain proper licensure, HNS is violating North Carolina's antitrust statutes by fixing the prices charged by more than one-half of the licensed chiropractors in the state and by monopsony, a buyer-side form of monopoly,[2] in which, rather than using its market power as a sole seller to increase the price of services, HNS is using its market power as a buyer of those services to restrict output of services. Plaintiffs allege four relevant markets that have been adversely affected by the conduct of defendant HNS: the North Carolina market, defined as the market for chiropractic services provided in North Carolina, and three submarkets within the North Carolina Market. Those submarkets are (1) the HNS Market, "the market in which in-network managed care chiropractic services . . . are

2. Monopsony is "a market situation in which one buyer controls the market." *In re Duke Energy Corp.*, 232 N.C. App. 573, 583, 755 S.E.2d 382, 389 (2014) (quoting Black's Law Dictionary 1023 (7th ed. 1999)). "[A] monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.' " *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320, 127 S. Ct. 1069, 1075, 166 L. Ed. 2d 911, 919 (2007) (citing Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 Cornell L. Rev. 297, 301, 320 (1991) and Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Buyers' Competitive Conduct*, 56 Hastings L.J. 1121, 1125 (2005)).

provided to the Insurers and their North Carolina patients through HNS"; (2) the Comprehensive Health Market, "the market for in-network chiropractic services provided to individual and group comprehensive healthcare insurers and their patients in North Carolina"; and (3) the Insurance Health Market, "the market for insurance reimbursed chiropractic services in North Carolina."

The original complaint in this action was filed on 30 April 2013, and the case was designated a mandatory complex business case on 31 May 2013, before passage of the Business Court Modernization Act (BCMA). The BCMA established that, for all cases designated as mandatory complex business cases after 1 October 2014, appeals from the North Carolina Business Court would come directly to this Court, rather than to the Court of Appeals. A second action involving essentially the same factual allegations and similar legal claims, *Sykes v. Blue Cross & Blue Shield of North Carolina* (*Sykes II*), was filed after the effective date of the BCMA, and therefore the appeal in that case lay in this Court. We granted review of this case before a determination by the Court of Appeals, thus giving us jurisdiction over the appeals in both *Sykes* actions. Plaintiffs filed a motion to consolidate the two actions in the Business Court, which the Business Court never addressed before dismissing both lawsuits entirely.

The Business Court dismissed the claims here (*Sykes I*) in two different stages. Several months after plaintiffs filed their first amended complaint, the court on 5 December 2013 ordered limited discovery on the issue of market definition for the purposes of plaintiffs' antitrust claims. This limited discovery took place between February 2014 and August 2015. Following fact and expert discovery on market definition, plaintiffs filed their *Sykes II* complaint on 26 May 2015 and their second amended complaint in this action on 16 July 2015. Defendants here filed a motion to dismiss and for partial summary judgment, which the court granted in part and denied in part in its 18 August 2017 order and opinion. In that document, the court granted summary judgment for defendants on any claims stemming from their participation in plaintiffs' three proffered relevant submarkets but denied summary judgment on antitrust claims related to the North Carolina Market and on other claims connected to those remaining antitrust claims. The court also dismissed plaintiffs' breach of fiduciary duty claim as well as plaintiffs' claim for declaratory relief to the extent that claim was based on violations of Chapter 58. Finally, the court ordered supplemental briefing on whether plaintiffs had adequately alleged market power within the one relevant market, the North Carolina Market. Following receipt of

that supplemental briefing, the court filed a second decision on 5 April 2018 dismissing all of plaintiffs' remaining claims. Plaintiffs appeal from both the 18 August 2017 and the 5 April 2018 orders and opinions of the Business Court.

Analysis

I. Standard of Review

This Court reviews de novo legal conclusions of a trial court, including orders granting or denying a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) or a motion for summary judgment under Rule 56. *See, e.g.*, *Azure Dolphin, LLC v. Barton*, ___ N.C. ___, ___, 821 S.E.2d 711, 725 (2018); *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012).

"We review a dismissal under Rule 12(b)(6) de novo, 'view[ing] the allegations as true and . . . in the light most favorable to the nonmoving party.' Dismissal is proper when the complaint 'fail[s] to state a claim upon which relief can be granted.' 'When the complaint on its face reveals that no law supports the claim . . . or discloses facts that necessarily defeat the claim, dismissal is proper.' " *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5, 802 S.E.2d 888, 891 (2017) (first, second, and fourth alterations in original) (first quoting *Kirby v. N.C. DOT*, 368 N.C. 847, 852, 786 S.E.2d 919, 923 (2016); then quoting *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7-8 (2015) (third alteration in original)). 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) (2017). "All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party. The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense . . . ." *Variety Wholesalers*, 365 N.C. at 523, 723 S.E.2d at 747 (ellipsis in original) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). Thus, we do not defer to the conclusions of the Business Court but conduct our own independent inquiry into the legal issues that resulted in the Business Court's orders dismissing all of plaintiffs' claims. We now affirm the Business Court's rulings for the reasons set out below.

II. Antitrust Claims

[1] As to plaintiffs' antitrust claims, the members of the Court are equally divided; accordingly, the decision of the Business Court on these claims stands without precedential value. *See, e.g.*, *Faires v. State Bd. of Elections*, 368 N.C. 825, 825, 784 S.E.2d 463, 464 (2016) (per curiam) (affirming on this basis the judgment of a three-judge panel of the Superior Court, Wake County); *Burke v. Carolina & Nw. Ry. Co.*, 257 N.C. 683, 683, 127 S.E.2d 281, 281 (per curiam) (1962) ("The other Justices, being equally divided as to the propriety of the nonsuit, the judgment of the superior court is affirmed without the decision becoming a precedent."); *see also Piro v. McKeever*, 369 N.C. 291, 291, 794 S.E.2d 501, 501 (2016) (per curiam) (affirming a Court of Appeals opinion without precedential value by an equally divided vote); *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 56, 790 S.E.2d 657, 663 (2016) (same).

III. Unfair Trade Practices

[2][3] Plaintiffs allege that defendants have committed a number of unfair trade practices in violation of N.C.G.S. § 75-1.1. Some of these allegations describe the same conduct that is the subject of plaintiffs' antitrust claims. Thus, per our discussion above, to the extent that these allegations overlap, we affirm the trial court's dismissal of plaintiffs' N.C.G.S. § 75-1.1 claims. Plaintiffs' remaining allegations under section 75-1.1 are rooted in various provisions of the Insurance Law, found in Chapter 58 of the North Carolina General Statutes. Specifically, plaintiffs allege that HNS has engaged in unfair trade practices through its failure to meet the licensure and utilization review requirements set out in N.C.G.S. §§ 58-65-50 and 58-50-61 and through other acts, which plaintiffs contend fall within the unfair and deceptive *insurance* practices that are catalogued at N.C.G.S. § 58-63-15. We do not need to directly address whether the alleged violations of Chapter 58 can support plaintiffs' claims of unfair trade practices because we conclude, as the Business Court did, that plaintiffs' claims are barred by the learned profession exemption.[3]

Section 75-1.1 states, in pertinent part:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

3. We will address plaintiffs' reliance on the Insurance Law further in our discussion of their claims for declaratory relief.

> (b) For purposes of this section, "commerce" includes all business activities, however denominated, *but does not include professional services rendered by a member of a learned profession.*
>
> . . . .
>
> (d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

N.C.G.S. § 75-1.1 (2017) (emphasis added).

This Court has not previously addressed the language of section 75-1.1(b) exempting professional services rendered by "learned professionals" from the coverage of our state's unfair and deceptive trade practices (UDTP) statute. However, as our Court of Appeals has recognized, we conduct a two-part inquiry to determine whether the "learned profession" exemption applies: "[F]irst, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services." *Wheeless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 584, 589, 768 S.E.2d 119, 123 (2014) (quoting *Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000)), *appeal dismissed and disc. rev. denied*, 368 N.C. 247, 771 S.E.2d 284 (2015). In determining what sort of conduct is exempted, the Court of Appeals has also explained that "a matter affecting the professional services rendered by members of a learned profession . . . falls within the exception in N.C.G.S. § 75-1.1(b)." *Burgess v. Busby*, 142 N.C. App. 393, 407, 544 S.E.2d 4, 11-12 (citations omitted), *appeal dismissed*, 353 N.C. 525, 549 S.E.2d 216, *and disc. rev. improvidently allowed per curiam*, 354 N.C. 351, 553 S.E.2d 679 (2001).

Our Court of Appeals has long held that members of health care professions fall within the learned profession exemption to N.C.G.S. § 75-1.1, and "[t]his exception for medical professionals has been broadly interpreted." *Shelton v. Duke Univ. Health Sys., Inc.*, 179 N.C. App. 120, 126, 633 S.E.2d 113, 117 (2006) (first citing *Phillips v. A Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 377-79, 573 S.E.2d 600, 604-05 (2002); then citing *Burgess*, 142 N.C. App. 393, 544 S.E.2d 4 (2001); then citing *Gaunt v. Pittaway*, 139 N.C. App. 778, 534 S.E.2d 660 (2000); then citing *Abram v. Charter Med. Corp. of Raleigh, Inc.*, 100 N.C. App. 718, 722-23, 398 S.E.2d 331, 334 (1990); and then citing *Cameron v. New Hanover Mem'l Hosp., Inc.*, 58 N.C. App. 414, 447, 293 S.E.2d 901, 921 (1982)), *disc. rev. denied*, 643 S.E.2d 591 (N.C. 2007). For example, in *Wheeless v. Maria Parham Medical Center, Inc.*, the Court of Appeals

determined that the learned profession exemption barred a section 75-1.1 claim by a medical doctor against a hospital and individual physicians in which the plaintiff physician alleged that the defendants had made an anonymous complaint about him to the North Carolina Medical Board. 237 N.C. App. at 585-86, 768 S.E.2d at 121. The court rejected Wheeless's argument that the exemption did not apply "because, by 'illegally access[ing], shar[ing], and us[ing] Plaintiff's peer review materials and patients' confidential medical records out of malice and for financial gain for illegal improper purpose[,]' " defendants did not render professional services. *Id.* at 589, 768 S.E.2d at 123 (alterations in original). Rather, the court viewed "defendants' alleged conduct in making a complaint to the Medical Board as integral to their role in ensuring the provision of adequate medical care"; accordingly, the learned profession exemption barred plaintiff's action. *Id.* at 591, 768 S.E.2d at 124.

Plaintiffs argue that the exemption should not apply here because, although the individual defendants are all licensed chiropractors, HNS itself is not a member of a learned profession and, in any event, HNS's role as an intermediary between providers and insurers is a business activity that cannot be properly described as "render[ing]" professional services.

Plaintiffs point us to the recently decided case of *Hamlet H.M.A., LLC v. Hernandez*, ___ N.C. App. ___, 821 S.E.2d 600 (2018), *disc. rev. denied*, ___ N.C. ___, 822 S.E.2d 637 (2019), *and disc. rev. denied*, ___ N.C. ___, 822 S.E.2d 640 (2019), in support of their argument that the activities alleged in this case do not fall within the ambit of "professional services rendered." In *Hamlet* the Court of Appeals considered whether a physician's UDTP counterclaim rooted in a dispute over an employment contract was barred by the learned profession exemption. *Id.* at ___, 821 S.E.2d at 602-03. The Court of Appeals concluded that the learned profession exemption did not bar the claim, reasoning that "cases addressing UDTP claims in a medical context do not suggest that negotiations regarding a business arrangement, even between a physician and a hospital, are '*professional services rendered* by a member of a learned profession' " under N.C.G.S. § 75-1.1(a). *Id.* at ___, 821 S.E.2d at 608. The Court of Appeals further concluded: "If we were to interpret the learned profession exception as broadly as plaintiffs suggest we should, any business arrangement between medical professionals would be exempted from UDTP claims. The learned profession exception does not cover claims simply because the participants in the contract are medical professionals." *Id.* at ___, 821 S.E.2d at 608.

While we agree that the mere status of a defendant as a member of a "learned profession" does not shield that defendant from any claim under N.C.G.S. § 75-1.1 regardless of how far removed the claim is from that defendant's professional practice, we conclude that the conduct alleged here does fall within the exemption. All individual defendants, as well as all members of HNS, are licensed chiropractors, thus meeting the exemption's first prong. We also agree with defendants and the court below that the activity alleged in the second amended complaint constitutes rendering of professional services under the statute.

The alleged conduct that is at the heart of this action is directly related to providing patient care. Plaintiffs argue that HNS is engaged both in violations of our state's antitrust laws and in conduct forbidden under our Insurance Law, in that HNS terminates providers' in-network access to patients when those providers exceed a certain average cost per patient. Thus, plaintiffs contend, in order to retain in-network status with the insurance payors with whom HNS contracts, chiropractic providers must limit their average cost of services per patient and, thus, the number of treatments provided to their patients. If a particular chiropractor renders services to patients who require, on average, more extensive chiropractic care than the patients of other providers who contract with HNS, that provider risks exceeding HNS's allowable average cost and losing access to patients served via the networks of the various payors.

In addition, plaintiffs allege that—through the operation of HNS's monopsony—chiropractic services are being reduced, meaning that North Carolinians who were previously receiving care from providers in HNS's network have either ceased receiving this care or have received fewer services due to HNS's enforcement of its average cost cap on providers. Since the basis for plaintiffs' UDTP claim is that chiropractors are reducing the level of services patients receive, we conclude that the conduct alleged in the second amended complaint is sufficiently related to patient care to fall within the rendering of professional services, as that term has been previously interpreted by the courts of this state. Thus, we affirm the Business Court's dismissal of plaintiffs' unfair trade practice claims under N.C.G.S. § 75-1.1.

IV. Declaratory Judgment

[4] In their second amended complaint, plaintiffs also sought relief under the Declaratory Judgment Act as follows:

> a. HNS is an unlicensed medical service corporation without the authority to enter into an agreement to provide chiropractic services to the Insurers;

b. HNS is an unlicensed medical service corporation without the authority to enter into participation agreements with Providers;

c. HNS is not licensed or authorized to provide utilization review of chiropractors including the Providers;

d. The purported agreements between HNS and Providers are illegal and unenforceable;

e. The purported agreements between HNS and Providers are an illegal restraint of trade and anti-competitive;

f. The purported agreements between HNS and the Insurers are illegal and unenforceable;

g. The purported agreements between HNS and the Insurers are an illegal restraint of trade and anti-competitive;

h. The exclusivity provisions of the contracts and the exclusivity practices between HNS and the Insurers are illegal, anti-competitive unreasonable restraints of trade, unfair trade practices, and unenforceable;

i. HNS's Utilization Review Process is an illegal unfair trade practice;

and

j. Defendants have restrained trade, committed unfair trade practices, and monopsonized the market for chiropractic services in violation of N.C. Gen. Stat. §§ 75-2 and 75-2.1.

As demonstrated above, much of the declaratory relief plaintiffs seek comes in the form of legal conclusions that we have already addressed in our earlier discussion of plaintiffs' antitrust claims and their claim that defendants have engaged in unfair trade practices under N.C.G.S. § 75-1.1. Thus, we also affirm the Business Court's denial of declaratory relief to the extent that claim relates to plaintiffs' Chapter 75 claims.

[5] Several of the declarations sought by plaintiffs, however, relate to their claims that defendants fail to comply with various provisions of the state's Insurance Law found in Chapter 58 of the North Carolina General Statutes. The Business Court ruled that Chapter 58 does not provide plaintiffs a private cause of action, meaning that their claims for declaratory relief under Chapter 58 must be dismissed. We agree.

As discussed by the Business Court, a statute may authorize a private right of action either explicitly or implicitly, *see Lea v. Grier*, 156 N.C. App. 503, 508-09, 577 S.E.2d 411, 415-16 (2003), though typically, "a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute," *Time Warner Entm't Advance/Newhouse P'ship v. Town of Landis*, 228 N.C. App. 510, 516, 747 S.E.2d 610, 615 (2013) (quoting *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 338 n.2, 511 S.E.2d 41, 44 n.2, *cert. denied*, 350 N.C. 851, 539 S.E.2d 13 (1999).

Chapter 58 does not explicitly provide a private cause of action and, as noted by the Business Court, several decisions in recent years from both our Court of Appeals and our state's federal district courts have determined that no private cause of action exists under other portions of Chapter 58. *See*, *e.g.*, *Cobb v. Pa. Life Ins. Co.*, 215 N.C. App. 268, 281, 715 S.E.2d 541, 552 (2011) (finding no private cause of action under N.C.G.S. § 58-3-115); *Defeat the Beat, Inc. v. Underwriters at Lloyd's London*, 194 N.C. App. 108, 117-18, 669 S.E.2d 48, 54 (2008) (stating that no private right of action exists under N.C.G.S. § 58-21-45(a)). Rather, courts have previously concluded that alleged violations of this Chapter may only be remedied through action by the Commissioner of Insurance. Thus, the Business Court concluded that there was "no legislative implication that sections 58-50-61, 58-65-1, and 58-65-50 allow for enforcement by a private party."

Plaintiffs seek declarations that HNS is required to be licensed as a medical service corporation under N.C.G.S. § 58-65-50 or as a utilization review organization defined by N.C.G.S. § 58-50-61(a)(18). Section 58-65-50 states that "[n]o corporation subject to the provisions of this Article and Article 66 of this Chapter shall issue contracts for the rendering of hospital or medical and/or dental service to subscribers, until the Commissioner of Insurance has, by formal certificate or license, authorized it to do so" and then describes the materials to be provided to the Commissioner as part of the licensure application. N.C.G.S. § 58-65-50 (2017).

Section 58-50-61 governs the procedures for utilization review, defined as "a set of formal techniques designed to monitor the use of or evaluate the clinical necessity, appropriateness, efficacy or efficiency of health care services, procedures, providers, or facilities." *Id.* § 58-50-61(a)(17) (2017). A "utilization review organization" is "an entity that conducts utilization review under a managed care plan, but does not mean an insurer performing utilization review for its own health benefit plan." *Id.* § 58-50-61(a)(18). According to N.C.G.S. § 58-50-61(o), a violation of the utilization review provisions is subject to the penalties set out in

N.C.G.S. § 58-2-70. Section 58-2-70, in turn, provides that "[w]henever the Commissioner has reason to believe that any person has violated any of the provisions of this Chapter, . . . the Commissioner may, after notice and opportunity for a hearing, proceed under the appropriate subsections of this section." *Id.* § 58-2-70(b) (2017).

Plaintiffs argue that our state's Declaratory Judgment Act gives them a path to declaratory relief, notwithstanding Chapter 58's language vesting enforcement authority in the Commissioner of Insurance. In addition, plaintiffs argue that the Business Court erred in ignoring a line of cases declining to enforce contracts entered into by unlicensed professionals. For example, plaintiffs point us to *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E.2d 507 (1968) (recognizing that state law bars an unlicensed contractor from maintaining a breach of contract action against the owner of a building valued at more than the minimum sum specified in the licensing statutes governing general contractors) and *Gower v. Strout Realty, Inc.*, 56 N.C. App. 603, 289 S.E.2d 880 (1982) (recognizing that our courts have held contracts by unlicensed real estate brokers to be invalid).

We conclude that the language of the statutory provisions, as well as the previous cases interpreting other portions of Chapter 58, vest enforcement of the requirements of the statutory sections identified by plaintiffs in the Commissioner of Insurance, meaning that plaintiffs do not have a private right of action for declaratory relief under these provisions. We also agree with the Business Court that the cases cited by plaintiffs are distinguishable in that "[t]hose cases did not seek to substitute a court's judgment for that of a regulatory agency to which the legislature has entrusted enforcement." Thus, we conclude that the Business Court properly denied all of plaintiffs' claims for declaratory relief.

V. Breach of Fiduciary Duty

[6] Finally, plaintiffs contend that defendants breached a fiduciary duty that they owed to plaintiffs and all members of the putative class.[4] To establish a claim for breach of fiduciary duty, a plaintiff must show that: (1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff. *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013). Thus, to make out a claim for breach of a fiduciary duty, plaintiffs must first allege facts that, taken as true,

4. This claim necessarily applies only to those plaintiffs who participated at one time in the HNS network.

demonstrate that a fiduciary relationship existed between the parties. A fiduciary relationship "has been broadly defined by this Court as one in which 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). "The very nature of some relationships, such as the one between a trustee and the trust beneficiary, gives rise to a fiduciary relationship as a matter of law. The list of relationships that we have held to be fiduciary in their very nature is a limited one, and we do not add to it lightly." *CommScope Credit Union*, 369 N.C. at 52, 790 S.E.2d at 660 (first citing *Wachovia Bank & Tr. Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967); then citing *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014)). Our courts have been clear that general contractual relationships do not typically rise to the level of fiduciary relationships. "[P]arties to a contract do not thereby become each other's fiduciaries; they generally owe no special duty to one another beyond the terms of the contract . . . ." *Branch Banking & Tr. Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (citations omitted), *disc. rev. denied*, 332 N.C. 482, 421 S.E.2d 350 (1992).

Plaintiffs allege that they have a fiduciary relationship with defendants because they entered into a joint venture with HNS. In the alternative, plaintiffs argued before the Business Court and this Court that a fiduciary relationship was created under agency law, in that HNS purported to act as plaintiffs' agent in negotiations with the insurance payors. We agree with the Business Court that plaintiffs' allegation of a fiduciary duty—and, therefore, their claim of a breach of that duty—fails as a matter of law.

We begin by addressing plaintiffs' alternative argument: that agency principles dictate that HNS was acting as an agent for plaintiffs as a matter of law when negotiating the terms governing in-network providers' relationship with the medical payors. As discussed above, typical contractual relationships do not give rise to the special status of a fiduciary relationship. We believe that plaintiffs' agency argument ignores this principle and seeks to establish a fiduciary relationship arising out of the operation of a general business relationship.

Next we address plaintiffs' argument that they are in a fiduciary relationship with HNS by virtue of a joint venture. As the Business Court pointed out, plaintiffs cannot show that they are in a joint venture with defendants for two reasons. First, "[a] joint venture exists when there is: '(1) an agreement, express or implied, to carry out a single business

venture *with joint sharing of profits*, and (2) an *equal right of control* of the means employed to carry out the venture.' " *Rifenburg Constr., Inc. v. Brier Creek Assocs. Ltd. P'ship*, 160 N.C. App. 626, 632, 586 S.E.2d 812, 817 (2003), *aff'd per curiam*, 358 N.C. 218, 593 S.E.2d 585 (2004) (quoting *Rhoney v. Fele*, 134 N.C. App. 614, 620, 518 S.E.2d 536, 541 (1999), *disc. rev. denied*, 351 N.C. 360, 542 S.E.2d 217 (2000)). Plaintiffs' own allegations of lack of control and unequal sharing of profits and losses defeat this argument. Second, as the Business Court points out, plaintiffs' own agreements with HNS specifically disclaim any joint venture between the parties, stating that "[n]o work, act, commission, or omission of either party pursuant to the terms and conditions of this Agreement shall make or render HNS or Participant an agent, servant, or employee of, *or joint venture* with the other." (Emphasis added.) Thus, on the face of their contracts with HNS, plaintiffs agreed that no joint venture was formed via the parties' contractual relationship.

Plaintiffs seek to avoid the plain language of their agreements with HNS through their broader argument that these contracts are illegal because HNS has not complied with the licensure requirements of Chapter 58 and thus had no authority to enter into the agreements at issue here. Because we have concluded that the licensure provisions of Chapter 58 fall squarely within the purview of the Commissioner of Insurance and that, therefore, the General Statutes do not provide plaintiffs a private right of action to seek a declaratory judgment that their agreements with HNS are void, we have already rejected plaintiffs' collateral challenge to the contracts. Thus, based on the joint venture elements that are not met here as well as the language of the contracts, we are persuaded that plaintiffs have no joint venture with defendants. Because plaintiffs' contractual relationship with HNS is insufficient to establish a fiduciary relationship as a matter of law, we affirm the Business Court's dismissal of plaintiffs' breach of fiduciary duty claim.

Conclusion

Because we affirm the Business Court's rulings dismissing each of plaintiffs' substantive claims alleged in their second amended complaint, as well as all derivative claims, we affirm the Business Court's orders dismissing plaintiffs' entire action. As noted above, the members of the Court being equally divided on plaintiffs' antitrust claims, including the derivative claim of civil conspiracy, the Business Court's dismissal of these claims stands without precedential value.

AFFIRMED.

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

Justice EARLS concurring in part and dissenting in part.

I dissent from the holding of Section III of the majority opinion concerning the extent to which plaintiffs' allegations of unfair and deceptive trade practices that are not based on the same allegations as their antitrust claims are barred by the "learned profession" exclusion of N.C.G.S. § 75-1.1(a). In all other respects I concur with the remainder of the opinion. This Court has not previously interpreted the scope of the statutory learned profession exception to the general prohibition on unfair methods of competition and unfair and deceptive trade practices. In my view, the specific allegations of the complaint relating to that claim in this case do not properly fall within the scope of that exception because the alleged unfair and deceptive conduct in question was not the rendering of professional services, namely chiropractic services, to patients. Therefore, I would reverse the 18 August 2017 ruling of the business court, *Sykes v. Health Network Solutions, Inc.*, No. 13 CVS 2595, 2017 WL 3601347 (N.C. Super. Ct. Forsyth County (Bus. Ct.) Aug. 18, 2017) (*Sykes I*), with regard to claims under the unfair and deceptive trade practices act, N.C.G.S. § 75-1.1 (UDTP) that are based on allegations separate and distinct from the antitrust claims, and remand for further proceedings on those claims.

Most of the allegations in this case relate to plaintiffs' claims that defendant Health Network Solutions, Inc. (HNS) operates an intermediary network for chiropractic services that functions as a monopsony, a buyer-side form of restraint of trade to control competition, supply, and the pricing of chiropractic services in North Carolina. Indeed, almost all of the trial court's first order, which is the order dismissing the UDTP claims, actually addresses the antitrust claims. There has been scant attention to the UDTP allegations that are separate and apart from the antitrust claims.

The UDTP claim for relief in plaintiffs' second amended complaint alleges thirteen grounds, of which seven relate to antitrust violations and anticompetitive conduct.[1] Of the remaining six, one is a conclusory

1. The antitrust and anticompetitive conduct are alleged in subparagraphs a-c, f, h, k, & *l* of paragraph 162 of the Second Amended Class Action Complaint filed on 20 July 2015.

characterization that does not specify any particular behavior.[2] The five allegations based on distinct conduct not encompassed by the antitrust claims are that "Defendants' actions and conduct that constitute unfair and deceptive trade practices include, but are not limited to:"

> d. implementing a utilization review procedure without being authorized or licensed to do so;
>
> e. failing to follow statutory requirements for utilization review;
>
> . . . .
>
> g. organizing a medical service corporation without being licensed to do so;
>
> . . . .
>
> i. failing to disclose their conflicts of interest;
>
> j. misrepresenting their services and the benefits provided to Providers participating in the HNS Network[.]

Plaintiffs make additional allegations relevant to this claim, including that defendants were engaged in commerce and that these unfair and deceptive practices have caused plaintiffs damages in excess of $10,000. Thus, on a motion to dismiss under Rule 12(b)(6), reviewed de novo by this Court, the question is whether, if true, the allegations state a claim for relief under some legal theory. *Corwin ex rel. Corwin Tr. v. British Am. Tobacco PLC*, ___ N.C. ___, ___, 821 S.E.2d 729, 736 (2018) (citing *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016)).

The General Assembly enacted N.C.G.S. § 75-1.1 almost exactly fifty years ago, stating that:

> The purpose of this Section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings

2. Paragraph 162(m) alleges that defendants have violated the UDTP by "acting unfairly and oppressively toward Plaintiff and the Class in their dealings with them in an abuse of power and position to achieve ends and using means contrary to the public policy of this State."

> between buyers and sellers at all levels of commerce be had in this State.

Act of June 12, 1969, ch. 833, sec. 1(b), 1969 N.C. Sess. Laws 930, 930. In 1977 the statute was "amended . . . to define 'commerce' inclusively as 'business activit[ies], *however denominated*,' " *Bhatti v. Buckland*, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991), subject to the express limitation for "professional services rendered by a member of a learned profession," Act of June 27, 1977, ch. 747, sec. 2, 1977 N.C. Sess. Laws 984, 984. As this Court explained in *Bhatti*, consistent with the purpose of the law to protect the consuming public and the generally broad definition of the term "business," the statute is intended to have an inclusive scope, 328 N.C. at 245-46, 400 S.E.2d at 443-44, and the 1977 amendments in particular were "intended to expand the potential liability for certain proscribed acts," *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049, 1057 (E.D.N.C. 1980), *aff'd*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054 (1981).

The statute is not limited to cases involving consumers only. "After all, unfair trade practices involving only businesses affect the consumer as well." *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988). The Court has previously explained that " '[b]usiness activities' is a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). Moreover, " '[c]ommerce' in its broadest sense comprehends intercourse for the purposes of trade in any form." *Sara Lee Corp. v. Carter*, 351 N.C. 27, 32, 519 S.E.2d 308, 311 (1999) (quoting *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 261, 266 S.E.2d 610, 620 (1980)).

Our courts have employed a three-prong test to establish a prima facie case under this statute. *Spartan Leasing Inc. of N.C. v. Pollard*, 101 N.C. App. 450, 400 S.E.2d 476 (1991). A plaintiff must show "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff." *Id.* at 460-61, 400 S.E.2d at 482 (citing *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981)); *see also First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998) (same). Unfair competition has been described generally as conduct "which a court of equity would consider unfair." *Pinehurst, Inc. v. O'Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 59, 338 S.E.2d 918, 923 (citing William B. Aycock, *North Carolina Law on Antitrust and Consumer*

Protection, 60 N.C. L. Rev. 207, 217 (1982)), *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986). "[A] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Barbee v. Atl. Marine Sales & Serv.*, 115 N.C. App. 641, 646, 446 S.E.2d 117, 121 (quoting *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403), *disc. rev. denied*, 337 N.C. 689, 448 S.E.2d 516 (1994). "[A]ll the facts and circumstances surrounding the transaction" are relevant to determining "[w]hether an act or practice is unfair or deceptive." *Id.* at 646, 436 S.E.2d at 121 (citing *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403). Bad faith or deliberate acts of deceit do not need to be shown. *Boyd v. Drum*, 129 N.C. App. 586, 593, 501 S.E.2d 91, 97 (1998) (citing *Forsyth Mem'l Hosp., Inc. v. Contreras*, 107 N.C. App. 611, 614, 421 S.E.2d 167, 169-70 (1992), *disc. rev. denied*, 333 N.C. 344, 426 S.E.2d 705 (1993)), *aff'd per curiam*, 350 N.C. 90, 511 S.E.2d 304 (1999).

In this case, plaintiffs' allegations, as summarized in subparagraphs d, e, g, i, and j of the claim for relief (hereinafter "the non-antitrust conduct") if true, establish all three elements of a prima facie case of unfair and deceptive trade practices affecting commerce that have injured plaintiffs. The only argument made by defendants on the motion to dismiss, and the only ground found by the trial court, was that none of these allegations can support a claim for relief because chiropractors are learned professionals and "[t]he impact of the Plaintiffs' claim is to fundamentally change the marketplace in which chiropractors deliver their services and the way in which insurance companies contract for the delivery of those services." Thus, the only question before this Court is whether defendants' actions as alleged, summarized in those five counts of the claim for relief and as more fully described throughout the second amended complaint, are subject to the exception for "professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b) (2017).

I agree with the majority that our Court of Appeals has followed, and we do well to adopt, a two-part inquiry to determine whether the "learned profession" exclusion applies: "[F]irst, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services." *Wheeless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 584, 589, 768 S.E.2d 119, 123 (2014) (quoting *Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000) (citation omitted)). I also agree that the first prong is met here even though HNS is itself an association of chiropractors acting as an intermediary between providers and insurers.

What seems clear to me is that the non-antitrust conduct alleged in the complaint does not involve providing professional services. Therefore, the second prong of the test is not met here.

The Court of Appeals cases addressing this question have held that when a doctor or lawyer or other member of a learned profession is engaging in business negotiations or contractual arrangements, advertising his or her practice, or buying real estate, even though those activities "affect" the provision of professional services, they are not themselves *professional services* entitled to an exemption. *See Hamlet H.M.A., LLC v. Hernandez*, ___ N.C. App. ___, ___ 821 S.E.2d 600, 608 (2018) ("This case involves a business deal, not rendition of professional medical services."), *disc. rev. denied*, ___ N.C. ___, 822 S.E.2d 637, *and disc. rev. denied*, ___ N.C. ___, 822 S.E.2d 640 (2019). In *Reid v. Ayers*, for example, while the conduct at issue involved the provision of professional services by an attorney, the Court of Appeals explained that:

> [N]ot all services performed by attorneys will fall within the exemption. Advertising is not an essential component to the rendering of legal services and thus would fall outside the exemption. *See* 47 N.C. Op. Att'y Gen. 118, 120 (1977) ("Advertising by an attorney is a practice apart from his actual performance of professional services. Indeed, it is not a professional practice at all, but rather a commercial one."). Likewise, the exemption would not encompass attorney price-fixing. *Id.* Although no bright line exists, we think that the exemption applies anytime an attorney or law firm is acting within the scope of the traditional attorney-client role. It would not apply when the attorney or law firm is engaged in the entrepreneurial aspects of legal practice that are geared more towards their own interests, as opposed to the interests of their clients.

138 N.C. App. at 267-68, 531 S.E.2d at 236 (citing *Short v. Demopolis*, 103 Wash. 2d 52, 60-61, 691 P.2d 163, 168 (1984) (en banc)). The dividing line between what is, and what is not, the rendering of professional services should turn on whether learned professional knowledge and judgment that the ordinary person does not possess is required to provide the services at issue. That is what distinguishes cases involving staff privileges at hospitals and complaints to medical boards, as were at issue in *Cameron v. New Hanover Memorial Hospital, Inc.*, 58 N.C. App. 414, 293 S.E.2d 901, *appeal dismissed and disc. rev. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982), and *Wheeless*, respectively, from this case and from *Hamlet H.M.A.* "The rendering of a professional service is limited

to the performance of work '[c]onforming to the standards of a profession' and 'commanded or paid for by another.' " *Phillips v. A Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 381, 573 S.E.2d 600, 605 (2002) (citations omitted), *aff'd per curiam in part and disc. rev. improvidently allowed in part*, 357 N.C. 576, 597 S.E.2d 669 (2003). In *Cameron*, the Court of Appeals explained that the actions complained of by the plaintiffs were not commercial activities subject to UDTP coverage because they involved professional judgments about the competency of podiatrists.

> This evidence indicates that defendants were acting in large measure pursuant to an "important quality control component" in the administration of the hospital. As one court described it, the hospital's obligation is "to exact professional competence and the ethical spirit of Hippocrates as conditions precedent to . . . staff privileges." We conclude that the nature of this consideration of whom to grant hospital staff privileges is a necessary assurance of good health care; certainly, this is the rendering of "professional services" which is now excluded from the aegis of G.S. 75-1.1.

Cameron, 58 N.C. App. at 446-447, 293 S.E.2d at 920-921 (alteration in original) (first quoting Walter Wadlington, Jon R. Waltz, & Roger B. Dworkin, *Cases and Materials on Law and Medicine* 209 (1980); then quoting *Sosa v. Bd. of Managers of Val Verde Mem'l Hosp.*, 437 F.2d 173, 174 (5th Cir. 1971)). Clearly it takes medical knowledge to be able to assess the skills and competency of medical doctors. But, in this case, ironically, it is precisely the lack of professional judgment in HNS's utilization management procedures that has led plaintiffs here to allege that the organization is committing an unfair trade practice. Plaintiffs allege that, instead of using professional judgment to decide what services in-network patients need, HNS is simply using a mathematical formula based on the average costs of all its providers. But more fundamentally, if HNS is indeed failing to identify conflicts of interest in some manner that is deceptive, or misrepresenting its services and benefits to providers, those are matters relating to how it conducts its business dealings. To illustrate this principle, if HNS had a routine practice of repeatedly leasing medical office space without disclosing that the buildings were uninhabitable, the learned professions exception would not apply even though the routine practice might keep them in business, which, in turn, would facilitate insured patients receipt of chiropractic services. *Cf. Creekside Apts. v. Poteat*, 116 N.C. App. 26, 36-38, 446 S.E.2d 826,

833-34 (failure to maintain dwellings in a safe, fit, and habitable condition while demanding rent is an unfair and deceptive trade practice), *disc. rev. denied*, 338 N.C. 308, 451 S.E.2d 632 (1994). Typically, specialized medical knowledge is not necessary to ascertain that a building is uninhabitable. Similarly, specialized medical knowledge is not necessary to determine whether HNS is implementing a utilization review procedure without being authorized or licensed to do so or is failing to follow statutory requirements for utilization review.

It may be that plaintiffs cannot prove their allegations, but the sufficiency of their evidence is not at issue here. The allegations of the complaint, taken as true, establish a UDTP claim independent of the antitrust allegations. Expanding the learned profession exception to apply here goes further than what the General Assembly intended when it amended the statute in 1977. When chiropractors are treating patients, the learned profession exception should apply. But when they are running a business processing, administering, and negotiating payments by insurance companies to networked chiropractors, they are in commerce like every other business and should be governed accordingly.

Chief Justice BEASLEY joins in this opinion.

TOWN OF NAGS HEAD
v.
WILLIAM W. RICHARDSON AND WIFE, MARTHA W. RICHARDSON

No. 244A18

Filed 14 June 2019

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. ___, 817 S.E.2d 874 (2018), reversing a judgment notwithstanding the verdict entered on 17 October 2016 by Judge Gary E. Trawick in Superior Court, Dare County, and remanding for a new trial. Heard in the Supreme Court on 29 May 2019 in session in the State Capitol Building in the City of Raleigh.

Hornthal, Riley, Ellis & Maland, L.L.P., by Benjamin M. Gallop and M.H. Hood Ellis, for plaintiff-appellant/appellee.

Nexsen Pruet, PLLC, by David P. Ferrell and Norman W. Shearin, for defendant-appellants/appellees.

PER CURIAM.

For the reasons stated in the majority opinion, this Court affirms the decision of the Court of Appeals. Further, to clarify the remand order, the sole issue on remand is the fair market value of the easement or, as presented to the jury, "What was the fair market value of the 10-year beach nourishment easement on the Richardsons' property taken by the Town of Nags Head at the time of taking?". *See* N.C.G.S. § 40A-64(b)(ii) (2017) ("If there is a taking of less than the entire tract, the measure of compensation is . . . the fair market value of the property taken.").

AFFIRMED.

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

IN RE F.S.T.Y.

[372 N.C. 350 (2019)]

IN THE MATTER OF F.S.T.Y., A.A.L.Y.	)	1. RESPONDENT FATHER:
	)	PETITION FOR WRIT OF
	)	CERTIORARI TO REVIEW
	)	ORDER OF DISTRICT COURT,
	)	DAVIDSON COUNTY
	)	
	)	2. GAL'S MOTION TO
	)	DISMISS APPEAL

129A19

SPECIAL ORDER

The motion to dismiss is ALLOWED, and respondent father's petition for writ of certiorari is ALLOWED. The previously established briefing schedule in this matter remains unchanged.

By order of the Court in Conference, this the 11th day of June, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of June, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

IN RE Z.W.

[372 N.C. 351 (2019)]

IN THE MATTER OF	)	
	)	
Z.W., Z.W.	)	
	)	From Durham County
	)	
	)	
	)	

No. 116A19

ORDER

On 12 December 2018, the District Court, Durham County terminated respondent-father's paternal rights, and respondent gave notice of appeal on 7 January 2019. In his notice of appeal, respondent designated the Court of Appeals as the reviewing court rather than this Court. This Court allows respondent's petition for writ of certiorari that recognizes this Court is now statutorily designated to hear the appeal. This Court ratifies the existing briefing schedule as set for the appeal. Respondent has already filed the settled record and his appellant brief; the appellee brief is due on 3 June 2019. Should appellant wish to file a reply brief, the reply brief will be due on 17 June 2019.

By order of the Court in Conference, this 22nd day of May, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of May, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

11 JUNE 2019

002A19	State v. John Thomas Coley	1. State's Motion for Temporary Stay (COA18-234) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/04/2019** 2. Allowed **03/28/2019** 3. ---
006A19	State v. Patrick Mylett	Motion to Admit Eugene Volokh *Pro Hac Vice*	Allowed
011A19	State v. Tyler Deion Greenfield	1. Def's Notice Of Appeal Based Upon a Dissent (COA17-802) 2. State's PDR Under N.C.G.S § 7A-31 3. State's Motion for Temporary Stay 4. State's Petition for *Writ of Supersedeas* 5. Joint Motion to Stay Briefing	1. --- 2. Allowed 3. Allowed **01/23/2019** 4. Allowed **01/23/2019** 5. Allowed **01/29/2019**
022P19-2	State v. Jennifer Jimenez/April Myers	1. Def's *Pro Se* Motion for Review 2. Def's *Pro Se* Motion to Proceed as Indigent	1. Dismissed 2. Allowed
030P19	State v. Robert Paul DeLair	1. Def's Motion for Temporary Stay (COA18-124) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Allowed **01/23/2019** Dissolved **06/11/2019** 2. Denied 3. --- 4. Denied 5. Allowed **Davis, J., recused**
042A19	Accardi v. Hartford Underwriters Insurance Company	1. Motion to Admit Gary E. Mason *Pro Hac Vice* 2. Motion to Admit Daniel R. Johnson *Pro Hac Vice* 3. Motion to Admit Gary M. Klinger *Pro Hac Vice*	1. Allowed **05/15/2019** 2. Allowed **05/15/2019** 3. Allowed **05/15/2019**

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

11 JUNE 2019

045P19	D.A.N. Joint Venture Properties of North Carolina, LLC v. N.C. Grange Mutual Insurance Company	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-265) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
046P19	In the Matter of E.M.	1. State's Motion for Temporary Stay (COA18-685) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Respondent's Motion for Extension of Time to File Response to PDR	1. Allowed **01/31/2019** Dissolved **06/11/2019** 2. Denied 3. Denied 4. Allowed **03/04/2019**
050P19	Jonathan E. Brunson v. Office of the District Attorney for the 12th Prosecutorial District, the North Carolina Department of Social Services, and the State of North Carolina	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-658)	Denied
051P19	Ted P. Chappell and Sarah S. Chappell v. North Carolina Department of Transportation	Def's PDR Prior to a Determination of the COA	Allowed
057P19	Jonathan E. Brunson v. North Carolina Department of Justice, North Carolina Department of Public Safety, and the State of North Carolina	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-837)	Denied
061P19	Jonathan E. Brunson v. North Carolina Department of Justice and State of North Carolina	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-656)	Denied
064P19	State v. Tony Johnell Mills	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-315) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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

11 JUNE 2019

069P19	Propst Bros. Dists., Inc., Plaintiff v. Shree Kamnath Corp., Defendant and McDonalds Corp., Third-Party Intervenor	Def and Third-Party Intervenor's PDR Under N.C.G.S. § 7A-31 (COA18-519)	Denied
071P19	Hartley Ready Mix Concrete Manufacturing, Inc. v. Timothy Aaron Coble and Forsyth Redi-Mix, Inc.	1. Def's (Forsyth Redi-Mix, Inc.) Petition for *Writ of Certiorari* to Review Order of the COA (COA18-580) 2. Plt's Motion to Strike Reply to Response to Petition for *Writ of Certiorari*	1. Denied 2. Dismissed as moot
088P19	State v. Thomas T. Dillard, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorar*i to Review Order of the COA (COAP19-26) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed as moot **06/06/2019** 2. Allowed **06/06/2019**
091P19	State v. Wayne Lee Davis	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA (COAP19-111) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Richmond County 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed as moot
099P19	Gwendolyn Dianette Walker, Widow of Robert Lee Walker, Deceased Employee v. K&W Cafeterias, Employer, Liberty Mutual Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-429)	Allowed
102P19	State v. Christopher Lee Neal	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
103P19	State v. Jasmine L. Burton	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Person County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot

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

11 JUNE 2019

116A19	In the Matter of Z.W., Z.W.	Respondent-Father's Conditional Petition for *Writ of Certiorari* to Review Order of District Court, Durham County	Special Order **05/22/2019**
121P15-3	State v. Aggrey Winston Manning	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA (COAP16-824)	Dismissed **Ervin, J., recused** **Davis, J., recused**
125P19	Tillie Stewart v. James R. Shipley, DPM, Instride Mt. Airy Foot and Ankle Specialists, PLLC D/B/A Mt. Airy Foot & Ankle Center, and Northern Hospital District of Surry County	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-745)	Denied **Davis, J., recused**
125PA18	In the Matter of E.D.	Motion to Stay Mandate & Order Remand to the COA	Denied **05/28/2019** **Davis, J., recused**
129A19	In the Matter of: F.S.T.Y., A.A.L.Y.	1. Respondent-Father's Petition for *Writ of Certiorari* to Review Order of District Court, Davidson County 2. GAL's Motion to Dismiss Appeal	1. Special Order 2. Special Order
131P16-11	State v. Somchai Noonsab	Def's *Pro Se* Motion to Dismiss of Judicial Notice	Dismissed
137P19	Jane Doe v. Wake County, et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-109)	Denied
139P19	State v. Tariq Elijah Everette	Def's *Pro Se* Motion for PDR	Dismissed
141A19	State v. Jeff David Steen	1. Def's Notice of Appeal Based Upon a Dissent (COA18-233) 2. Def's PDR as to Additional Issues	1. --- 2. Allowed **Davis, J., recused**

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

11 JUNE 2019

143P19	State v. Lacedric Jamal Lane	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-444) 2. Def's Motion for Leave to File Reply in Support of PDR	1. Denied 2. Dismissed
156A17-2	DiCesare, et al. v. The Charlotte-Mecklenburg Hospital Authority	1. Plt's Motion to Admit Kathleen Konopka *Pro Hac Vice* 2. Plt's Motion to Admit Alexander L. Simon *Pro Hac Vice* 3. Plt's Motion to Admit Benjamin E. Shiftan *Pro Hac Vice* 4. Plt's Motion to Admit Daniel Seltz *Pro Hac Vice* 5. Plt's Motion to Admit Adam Gitlin *Pro Hac Vice* 6. Plt's Motion to Admit Brendan P. Glackin *Pro Hac Vice*	1. Allowed **06/11/2019** 2. Allowed **06/11/2019** 3. Allowed **06/11/2019** 4. Allowed **06/11/2019** 5. Allowed **06/11/2019** 6. Allowed **06/11/2019**
164P19	State v. Ronald P. Cameron	Def's *Pro Se* Motion to Dismiss Prosecution	Dismissed
165P19-2	In re Bart F. McClain	1. Petitioner's *Pro Se* Motion for Emergency Appeal 2. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed **06/04/2019** 2. Denied **06/04/2019**
166P19	State v. Darwin Newkirk	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA18-670) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Petition in the Alternative for *Writ of Certiorari* to Review Decision of the COA	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
168A19	Cardiorentis AG v. IQVIA LTD. and IQVIA RDS, Inc.	1. Defs' Motion to Admit Michael Joseph Klisch *Pro Hac Vice* 2. Defs' Motion to Admit Robert Thomas Cahill, Jr. *Pro Hac Vice* 3. Defs' Motion to Admit Joshua M. Siegel *Pro Hac Vice*	1. Allowed 2. Allowed 3. Allowed
176P19	State v. Derrick Lamonz Downey	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/10/2019**
177P19	Ricky Ray Rich, Jr. v. Mike Slagel (Superintendent)	Petitioner's *Pro Se* Motion for Notice of Appeal (COAP19-269)	Dismissed **05/14/2019**

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

11 JUNE 2019

178P19	State v. Anthony Ray Solomon	Def's *Pro Se* Motion for PDR	Dismissed
179P19	State v. Joseph Donald Carroll	Def's *Pro Se* Motion for Appropriate Relief	Dismissed
181A93-4	State v. Rayford Lewis Burke	*Amicus*' (ACLU-NCLF) Motion to Substitute Counsel	Allowed **Ervin, J., recused**
181P19	State v. Shane Evilsizer	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County	Dismissed
182P19	Thomas Gilson v. Kathleen Deschenes	1. Def's *Pro Se* Motion for Emergency Appeal 2. Def's *Pro Se* Motion to Waive Fee	1. Dismissed **05/16/2019** 2. Allowed **05/16/2019**
183P19	State v. Coriante Pierce	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
187P19	State v. Joe Willard Williamson, Jr.	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA18-521) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
188A19	State v. Jeffery Martaez Simpkins	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/21/2019** 2. Allowed **06/05/2019**
194P19-1	David Ezell Simpson v. Sheriff McFadden, State of North Carolina	Chapter 17 *Writ of Habeas Corpus* Article I Constitutional Provisions	Dismissed without prejudice **05/24/2019**
194P19-2	David Ezell Simpson v. Sheriff McFadden, State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed without prejudice **06/11/2019**
195A19	State v. Chad Cameron Copley	1. Application for Temporary Stay (COA18-895) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/23/2019** 2.

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

11 JUNE 2019

196A19	State v. David Leroy Carver	1. Motion for Temporary Stay 2. Petition for *Writ of Supersedeas*	1. Allowed **05/28/2019** 2.
201A19	State v. David Alan Keller	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **06/04/2019** 2.
203P19	State v. Frederick Lynn Ingram	1. Def's *Pro Se* Motion for Petition for Appeal 2. Def's *Pro Se* Motion for Arrest Judgment	1. Denied **06/04/2019** 2. Denied **06/04/2019**
206A19	State v. Ben Lee Capps	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/05/2019** 2.
233P12-2	State v. Montrez Benjamin Williams	1. State's Motion for Temporary Stay (COA16-178) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion for Temporary Stay 5. Def's Petition for *Writ of Supersedeas* 6. Def's PDR Under N.C.G.S. § 7A-31 7. Def's Alternative Notice of Appeal Based Upon a Constitutional Question 8. State's Motion to Dismiss	1. Allowed **10/05/2018** 2. Allowed 3. Allowed 4. Allowed **10/05/2018** 5. Allowed 6. Allowed 7. — 8. Allowed
233P14-2	State v. Domenico Alexander Lockhart	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP19-160) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Guilford County 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed 3. Dismissed as moot **Ervin, J., recused** **Davis, J., recused**

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

11 JUNE 2019

244A18	Town of Nags Head v. William W. Richardson and Wife, Martha W. Richardson	1. Plt's Notice of Appeal Based Upon a Dissent (COA17-498) 2. Defs' Notice of Appeal Based Upon a Dissent 3. Defs' Amended Notice of Appeal Based Upon a Dissent 4. Defs' PDR Under N.C.G.S. § 7A-31 5. Defs' Petition for *Writ of Certiorari* to Review Decision of the COA 6. Plt's Motion to Dismiss and Strike Defs' Cross-Appeal and PDR 7. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Dismissed as moot 3. Dismissed *ex mero motu* 4. Dismissed 5. Denied 6. Dismissed as moot 7. Denied **03/27/2019** **Davis, J., recused**
249P17-2	Columbus County Department of Social Services v. Calvin Tyrone Norton	1. Def's *Pro Se* Motion for Notice of Appeal Based on a Dissenting Opinion (COA18-642) 2. Plt's Motion to Dismiss Appeal	1. --- 2. Allowed
261P18-2	North Carolina State Conference of the National Association for the Advancement of Colored People v. Tim Moore, in his official capacity, Philip Berger, in his official capacity	Plt's PDR Prior to a Determination of the COA (COA19-384)	Denied
361P18	Celina Quevedo-Woolf v. Merry Eileen Overholser and Daniel Carter	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-1344, 17-675) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion for Temporary Stay 4. Plt's Petition for *Writ of Supersedeas* 5. Plt's Motion for Addendum 6. Plt's Motion to Stay 6 November 2018 Trial Court Hearing	1. Dismissed *ex mero motu* 2. Denied 3. Allowed **11/05/2018** Dissolved **06/11/2019** 4. Denied 5. Dismissed as moot 6. Denied **11/05/2018**

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

11 JUNE 2019

362P18	State v. Douglas Nelson Edwards	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-337) 2. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover County	1. Denied 2. Dismissed
378P18-3	State v. Napier Sandford Fuller	1. Def's *Pro Se* Motion for Notice and Request for Disability Accommodations to Ensure Due Process 2. Def's *Pro Se* Motion for Petition for Rehearing of an Administrative Matter	1. Dismissed 2. Dismissed
388P18-2	Adam T. Cheatham, Sr. v. Town of Taylortown	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA18-625) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
400P18	State v. William Davis	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1340) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
428P18	State v. Raymond Joiner	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-186)	Denied
437PA18	Chavez, et al. v. Carmichael	1. ACLU of NC Legal Foundation's Motion to Admit Cody Wofsy *Pro Hac Vice* 2. ACLU of NC Legal Foundation's Motion to Admit Daniel Galindo *Pro Hac Vice* 3. ACLU of NC Legal Foundation's Motion to Admit Omar Jadwat *Pro Hac Vice* 4. ACLU of NC Legal Foundation's Motion to Admit Spencer Amdur *Pro Hac Vice*	1. Allowed **06/06/2019** 2. Allowed **06/06/2019** 3. Allowed **06/06/2019** 4. Allowed **06/06/2019**
438P18	James A. Bradley, Employee v. Cumberland County, Employer, Self-Insured (Key Risk Management Services, Inc., Servicing Agent)	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-334)	Denied

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

11 JUNE 2019

448P18	State v. Justin Delane Kraft	1. State's Motion for Temporary Stay (COA18-330) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/21/2018** Dissolved **06/11/2019** 2. Denied 3. Denied
482P13-3	State v. Carl Lynn Williams	Application for *Writ of Habeas Corpus*	Denied **05/28/2019**
597P01-5	State v. Maechel Shawn Patterson	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP17-245)	Denied **Ervin, J., recused**
629P01-8	State v. John Edward Butler	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Robeson County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Denied **05/20/2019** 2. Allowed **05/20/2019** 3. Dismissed as moot **05/20/2019** 4. Denied **05/20/2019** **Davis, J., recused**

ANDREA KIRBY CROWELL
v.
WILLIAM WORRELL CROWELL

No. 31A18

Filed 16 August 2019

Divorce—equitable distribution—distributive award—separate property

The trial court erred in an equitable distribution action by making a distributive award of separate property to pay a marital debt where the trial court noted that both parties were in their seventies and might not be able to pay their debts before their deaths. While N.C.G.S. § 50-20(e) neither explicitly allowed or excluded the use of separate property to satisfy a distributive award, the rest of the equitable distribution statute allowed for the distribution only of marital and divisible property. It would be inconsistent to read into this section the authority to use separate property to satisfy a distributive award.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 809 S.E.2d 325 (N.C. Ct. App. 2019), affirming in part and vacating in part a judgment and order entered on 15 August 2016 by Judge Christy T. Mann in District Court, Mecklenburg County. On 20 September 2018, the Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court on 14 May 2019 in session in the Pitt County Courthouse in the City of Greenville pursuant to section 18B.8 of Chapter 57 of the 2017 Session Laws of the State of North Carolina.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, for plaintiff-appellant.

Hamilton Stephens Steele + Martin, PLLC, by Amy E. Simpson, for defendant-appellee.

BEASLEY, Chief Justice

In this case, we consider whether the Court of Appeals erred by upholding the trial court's distributive award in an equitable distribution action which contemplates the use of a spouse's separate property. We hold that it did. Plaintiff raised an additional issue for discretionary

review pertaining to corporate standing under North Carolina's equitable distribution statute, which we granted. We conclude that discretionary review of this issue was improvidently allowed.

I. Factual and Procedural Background

Plaintiff Andrea Crowell and defendant William Crowell were married in 1998 and divorced in 2015. Plaintiff initiated this action by filing a complaint on 17 February 2014 in District Court, Mecklenburg County, seeking equitable distribution of the parties' marital property, alimony, and postseparation support. Defendant filed an answer and counterclaim for equitable distribution. Following a three-day hearing, on 15 August 2016, the trial court entered an equitable distribution order and an order denying plaintiff's request for an award of alimony, the latter of which was not appealed. The trial court's decision regarding equitable distribution is the only decision on appeal.

The trial court found that the parties married in July 1998, legally separated in September 2013, and divorced in April 2015. No children were born of their marriage. The court found that defendant started several small real estate and development companies before the parties were married which he claimed were his separate property on the date of separation, but plaintiff claimed that she had a marital interest in each of them. The trial court found that after their marriage, the parties maintained a lavish lifestyle and lived significantly beyond their means. To fund their lifestyle, defendant sold his separate real and personal property and procured loans from the companies he owned.

When defendant began suffering from memory loss and dementia in 2011, his daughter from a previous marriage, Elizabeth Temple, was named president of the companies. Temple reviewed the company books and determined that both parties were borrowing money from the companies to the detriment of the companies and the other shareholders. Moreover, the companies were paying defendant inordinately high salaries and distributions. The court found that the loans "were made during the parties' marriage and most of the loaned money can be traced through deposits directly into the parties' personal joint bank account, to pay off personal credit cards, to purchase real estate in their personal name[s], and to [pay] expenses that had to be theirs personally." Although plaintiff claimed at trial that she had no knowledge of these loans, the court found her testimony not credible.

On the date of separation, the parties had incurred a significant amount of marital debt, which the trial court's findings detailed. This included debts to a majority of the companies in which defendant held

an ownership interest. The marital home, the primary marital asset, was sold after the date of separation for $1,075,000, the net proceeds of which were $230,657. Of that amount, $144,794 was distributed to plaintiff and $85,863 was distributed to defendant. The trial court found that plaintiff possessed two pieces of separate property at the time of separation—14212 Stewart's Bend Lane and 14228 Stewart's Bend Lane, in Charlotte, North Carolina (hereinafter, the "Stewart's Bend Properties"). The court noted that the parties also had stipulated to this effect in the final pretrial order.

The record indicates and the parties do not dispute that both of the Stewart's Bend Properties were acquired in the early 2000s by CKE Properties, LLC ("CKE").[1] According to the final pretrial order, plaintiff is "100% Owner" of CKE" and "the [o]nly purpose of the company is to own the real estate she purchased through a 1031 exchange using her separate funds." At issue in this appeal is the trial court's disposition of these two pieces of plaintiff's property.

14212 Stewart's Bend Lane

Plaintiff obtained two loans applicable to the 14212 Stewart's Bend Lane property. Although these loans were in plaintiff's name only, the trial court concluded that they were marital debts because the loans were obtained during the marriage and the proceeds were used for a marital purpose. The court distributed the debts, along with this parcel of separate real property to plaintiff; however, the court gave defendant credit for payments he made towards these loans between the dates of separation and divorce.

14228 Stewart's Bend Lane

As to the 14228 Stewart's Bend property, the trial court found that defendant obtained a loan secured by the property during the marriage but the proceeds were used for a marital purpose. The court distributed this marital debt to plaintiff, along with the underlying separate real property. Defendant made payments towards the loan between the dates of separation and divorce, and the court gave him credit for those payments.

The trial court noted that before the date of divorce in 2015, husband asked plaintiff to sell the house and lot at this address to eliminate the marital debt and divide the proceeds between them, but plaintiff

1. The final pretrial order states that CKE purchased both properties in 2002. The Rule 9(d) supplement to the record contains warranty deeds and property appraisals purporting to show that these properties were acquired in 2003.

refused to do so. Shortly after that, plaintiff "gifted" the home to her son Gentry Kirby.[2] The court found that at the time of this gift, the property was worth $390,000, "resulting in a $100,000 'gift' of equity to Mr. Kirby." The court found the transfer to be fraudulent as intended to deceive creditors and that Kirby was not a good faith purchaser. Therefore, the court found that the home and/or equity in the property may be considered when "determining the equitable distribution of the property and/or the distributive award that Plaintiff/Wife may be required to pay." The court further found that "Mr. Kirby does not need to be a party to this lawsuit in order for the Court to consider this property and the disposition thereof as part of this litigation."

Distributive Award

Ultimately, the trial court determined that the property should be divided equally, and that, to accomplish this result, plaintiff must pay defendant a distributive award of $824,294. The court noted that both parties are in their mid-seventies, that neither party was employed at the time, that defendant would not be able to obtain employment because of his physical condition, and that "[n]either party has any liquid marital property left." The court further found that due to a number of factors, "[t]here was no choice but to distribute all the debts to Defendant/Husband . . . which results in a heavy burden he may never be able to pay before his death and a distributive award owed by Plaintiff/Wife that she may never be able to pay before her death."

Noting that plaintiff lacks the means and ability to pay the $824,294 distributive award in full, the trial court stated in pertinent part:

> 198. . . . The Court finds [plaintiff] has the ability to pay the distributive award only as follows:
>
> . . . .
>
> **b) 145 Myer's Mill & 14212 Stewart's Bend:**
>
> Plaintiff/Wife shall be entitled to keep 14512 Myer's Mill so that she may continue to reside there. Plaintiff/Wife will sell 14212 Stewart's Bend and pay the net proceeds to Defendant/Husband.
>
> **c) 14228 Stewart's Bend:** Plaintiff/Wife can obtain a deed to this house back from Mr. Kirby, sell the property and distribute the net proceeds to Defendant/Husband

2. Plaintiff transferred 14228 Stewart's Bend Lane to Kirby on or about 29 May 2015.

> or she can have Mr. Kirby pay to Defendant/Husband $90,000 which represents the majority of equity he gained during the fraudulent "gift/transfer" to him of this property.

In the distributive portion of the order, the trial court ordered plaintiff to do as follows:

> **b) . . . 14212 Stewart's Bend:** Within thirty (30) days of the date of the execution of this Judgment/Order Plaintiff/Wife shall sign a listing agreement with a realtor selected by Defendant/Husband and will take all efforts to sell 14212 Stewart's Bend for fair market value. Plaintiff/Wife will cooperate with price reductions and repair requests recommended by the real estate agent and will accept any unconditional offer made within 2% of the then asking price. All of the net proceeds shall be paid to Defendant/Husband.
>
> **c) 14228 Stewart's Bend:** Within sixty (60) days of the date of the execution of this Judgment/Order Plaintiff/Wife shall sign a listing agreement with a realtor selected by Defendant/Husband and will take all efforts to sell this home for fair market value; OR Mr. Kirby will pay to Defendant/Husband $90,000 which represents the majority of the equity he gained during the fraudulent "gift/transfer" to him of this property.

Plaintiff appealed.

In a partially divided decision filed on 2 January 2018, the Court of Appeals affirmed in part and vacated in part the trial court's equitable distribution judgment and order. *Crowell*, 809 S.E.2d 325. In relevant part, the majority upheld the portion of the order directing plaintiff to sell the Stewart's Bend Properties. *Id.* at 331, 339. It determined that

> where the trial court was properly considering—not distributing—plaintiff's separate property in distributing the marital estate, specifically considering plaintiff's ability to pay a distributive award to defendant, the trial court did not abuse its discretion in ordering plaintiff to liquidate separate property in order to pay the distributive award.

Id. at 339. On this basis, the majority also concluded that neither CKE nor Kirby was a necessary party to the action in order for the trial court to order plaintiff to take action affecting title to the Stewart's Bend Properties, notwithstanding any respective ownership interests in those

properties they may possess. *Id.* at 333–334. As to the alternate $90,000 amount that Kirby was ordered, in the alternative, to pay, the panel unanimously concluded that the trial court lacked jurisdiction to require Kirby to pay funds to defendant where he was not a party to the action, and struck that portion of the order. *Id.* at 334.

In a separate opinion concurring in part and dissenting in part, Judge Murphy dissented from the majority's determinations that CKE was not a necessary party and that Kirby was not a necessary party except as to the alternative money judgment against him. *Id.* at 339 (Murphy, J., concurring in part and dissenting in part). The dissent disagreed with the majority's determination that "the trial court . . . merely considered the separate [Stewart's Bend Properties] in distributing the marital estate." *Id.* at 340. Rather, the dissent concluded that "[i]nstead of considering the separate property, the trial court improperly restricted the abilities and rights of CKE," which "must list the property at 14212 Stewart's Bend and pay proceeds to [d]efendant," and "Kirby, [who] must transfer title of 14228 Stewart's Bend to [p]laintiff" to be sold. *Id.* Thus, as the dissenting judge reasoned, the trial court improperly "entered an equitable distribution judgment and order affecting the rights and interests of parties not joined in the action." *Id.*[3] In sum, the dissent concluded that "CKE and Kirby are necessary parties to this action, and the trial court lacked the power to require their action or affect their rights without first being joined as parties." *Id.*

Plaintiff appealed as of right based upon the dissenting opinion. She also sought discretionary review of additional issues, which this Court granted in part on 20 September 2018.

II. Discussion

Plaintiff contends that the Court of Appeals erred by sanctioning the trial court's distribution of her separate property contrary to North Carolina law. This is a question of statutory interpretation, and where questions of statutory interpretation exist, this Court reviews them de novo. *In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012). We agree with plaintiff.

In equitable distribution actions, Section 50-20 of the North Carolina General Statutes authorizes trial courts to distribute marital

3. The dissent opined that, in addition, the trial court's order prevents these non-parties from raising defenses and protections under the Uniform Fraudulent Transfer Act or exercising their constitutional rights to a jury trial. *Crowell*, 809 S.E.2d 340. As we resolve this case upon other grounds, we need not reach this additional basis for the dissenting opinion.

and divisible property between divorcing parties. *See* N.C.G.S. § 50-20(a) (2017) ("Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section."). "Marital property" is "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties, and presently owned." N.C.G.S. § 50-20(b). "Separate Property" constitutes "all real and personal property acquired by a spouse before marriage." *Id.*

"Following classification, property classified as marital is distributed by the trial court, while separate property remains unaffected." *McLean v. McLean*, 323 N.C. 543, 545, 374 S.E.2d. 376, 378 (1988) (citing *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E.2d 228, 232 (1987)). "Pursuant to the Equitable Distribution Act, the trial court is only permitted to distribute marital and divisible property." *Mugno v. Mugno*, 205 N.C. App. 273, 277, 695 S.E.2d. 495, 498 (2010) citing N.C.G.S. § 50-20(a); *Hagler*, 319 N.C. at 289, 354 S.E.2d. 232. Separate property may not be distributed. *See Clark v. Dyer*, 236 N.C. App. 9, 21, 762 S.E.2d 838, 844 (2014) (observing that the trial court correctly declined to distribute real property it considered to be separate property "since the trial court cannot distribute separate property."). Here, the trial court found, and the parties stipulated, that both the Stewart's Bend Properties were plaintiff's separate property.

The issue is whether the trial court distributed separate property for purposes of Section 50-20 when it ordered plaintiff to liquidate her separate property to pay a distributive award. We hold that it did. We further conclude that there is no distinction to be made between "considering" and "distributing" a party's separate property in making a distribution of marital property or debt where the effect of the resulting order is to divest a party of property rights she acquired before marriage.

As an initial matter, the idea that the trial court may "consider" a spouse's separate property in making a distribution of the marital property appears to have originated in *Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990). There, the Court of Appeals held that a spouse who failed to support his claim that certain debt was marital did not meet his burden to "present evidence from which the trial court can classify, value and distribute the property" because

> [t]he requirements that the trial court (1) classify and value all property of the parties, both separate and marital, (2) *consider the separate property in making a distribution of*

> *the marital property*, and (3) distribute the marital property, necessarily exist only when evidence is presented to the trial court which supports the claimed classification, valuation and distribution.

Id. at 80, 387 S.E.2d at 184 (emphasis added). While this language has been frequently quoted by the Court of Appeals, until the present case, it has been in the context of the type of issue presented in *Miller*—a failure of one party to present evidence of the proper classification of property as marital, divisible, or separate.[4] *See, e.g.*, *Cushman v. Cushman*, 244 N.C. App. 555, 566, 781 S.E.2d 499, 506 (2016); *Young v. Gum*, 185 N.C. App. 642, 649 S.E.2d 469 (2007).

N.C.G.S. § 50-20 provides that the trial court making an equitable distribution will consider separate property in one context only: the trial court must consider "[a]ny direct contribution to an increase in value of separate property which occurs during the course of the marriage." N.C.G.S. § 50-20(c)(8). Thus, a party who, during the marriage, causes an increase in value in her spouse's separate property can receive some credit for that increase in value during the equitable distribution proceeding. *See Turner v. Turner*, 64 N.C. App. 342, 346, 307 S.E.2d 407, 409 (1983) ("If . . . an equity in [separate] property developed during the marriage because of improvements or payments contributed to by defendant, that equity (as distinguished from a mere increase in value of separate property, excluded by the statute) could be marital property, in our opinion, upon appropriate, supportable findings being made. *And if not marital property, such equity, if it developed, would be a factor requiring consideration by the court, along with the other factors specified in the statute, before determining how much of the marital property each party is entitled to receive.*" (emphasis added)).

Here, the trial court's "consideration" of plaintiff's separate property did not occur in the context of whether defendant contributed to an increase in the property's value or determining the amount of marital property and debt that should be distributed to each party. Instead, the trial court ordered plaintiff to *use* specific items of separate property to satisfy marital debt, immediately affecting her rights in that property. As a result, to ascertain the legality of this order, we must further determine

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4. Taken in context, the reference to "consideration" of separate property contained in *Miller* is clearly intended to recognize a trial judge's undoubted authority to consider the amount of separate property held by each party in determining the amount of marital property and debt that should be distributed to each party at the conclusion of the equitable distribution process.

whether a court's distributive award may reach separate property in this way.

To resolve the issue, we consider the plain language of the equitable distribution statute and, to the extent there is any ambiguity, its apparent purpose. *Diaz v. Div. of Soc. Servs. & Div. of Med. Assistance, N.C. Dep't of Health & Human Servs.*, 360 N.C. 384, 386–87, 628 S.E.2d 1, 3 (2006). Section 50-20(a) states that the trial court "shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section." Regarding distributive awards, subsection (e) of the statute provides that, where the presumption in favor of in-kind distribution is rebutted,

> the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

N.C.G.S. § 50-20(e). While we note that the text of this subsection does not exclude the requiring the use of separate property to satisfy a distributive award, it does not explicitly allow such a use either. However, an intent to avoid directly affecting a party's rights in separate property can be inferred from the text of section 50-20, which provides only for "distribution of the *marital property and divisible property* between the parties." N.C.G.S. § 50-20(a) (emphasis added). Our courts cannot "delete words used" or "insert words not used" in a statute. *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). In light of the fact that the rest of the equitable distribution statute allows for the distribution of only marital and divisible property, it is inconsistent to read into this subsection the authority for the trial court to order the use of separate property to satisfy a distributive award, and we decline to do so today.

As this Court has long observed, only marital property is to be distributed and separate property is to "remain[ ] *unaffected*." *McLean*, 323 N.C. at 545, 374 S.E.2d. at 378 (emphasis added). Therefore, we conclude that trial courts are not permitted to disturb rights in separate property in making equitable distribution award orders. Here, the trial court ordered plaintiff to liquidate the Stewart's Bend Properties "to pay down the distributive award." Because this component of the trial court's order unquestionably disturbed plaintiff's rights in her separate

property, the trial court's actions amounted to an impermissible distribution of that property. The Court of Appeals' determination to the contrary is overruled.

We acknowledge that where a marriage is in debt, it is difficult to envision a scenario in which the making of a distributive award will not affect a party's separate property in some manner. Nevertheless, within the confines of N.C.G.S. § 50-20, the trial court in this case was only permitted to use that debt in calculating the amount of the distributive award, not to dictate how the debt was to be paid.[5] Accordingly, we reverse the Court of Appeals' holding that the trial court did not err by issuing a distributive award ordering plaintiff to liquidate the Stewart's Bend Properties, and we remand for further proceedings.

Plaintiff further argues, based upon the Court of Appeals' dissenting opinion, that the trial court could not exercise jurisdiction over CKE and Kirby when they were not joined as parties in the equitable distribution action. The parties stipulated and the trial court found that the Stewart's Bend Properties were plaintiff's separate property on the date of separation. In light of our holding that the trial court lacked statutory authority to order disposition of plaintiff's separate property, it is not necessary to reach this issue.

In sum, we hold: (1) the Court of Appeals erred in upholding the trial court's order directing plaintiff to liquidate her separate property to pay down the distributive award because it effectively distributed her separate property and (2) discretionary review of whether N.C.G.S. § 50-20 grants corporations standing to seek reimbursement for debts was improvidently allowed.

Accordingly, we reverse the holding of the Court of Appeals and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

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5. This is not intended to modify or limit the ordinary civil contempt power of the trial court pursuant to N.C.G.S. § 5A-21 should plaintiff fail to comply with the distribution order. Under that authority, all of plaintiff's assets may be taken into account when assessing her ability to comply with the order.

IN RE B.O.A.

[372 N.C. 372 (2019)]

IN THE MATTER OF B.O.A.

No. 264PA18

Filed 16 August 2019

Termination of Parental Rights—failure to make reasonable progress—direct or indirect factors leading to removal

The Court of Appeals erred by reversing the trial court's order terminating respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2) for failure to make reasonable progress in correcting the conditions that led to her daughter's removal from her home. "Conditions of removal," as contemplated by N.C.G.S. § 7B-1111(a)(2), includes all of the factors that directly or indirectly contributed to causing the juvenile's removal from the parental home. Where an act of domestic violence and the discovery of an unexplained bruise on the daughter's arm led to her removal from her home, respondent-mother's failure to make reasonable progress to comply with her court-ordered case plan—for example, by abusing her Adderall prescription, failing to pass or submit to drug tests, and failing to complete a neuro-psychological examination or participate in therapy—supported the trial court's termination of her parental rights.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 818 S.E.2d 331 (N.C. App. 2018), reversing and remanding an order terminating parental rights entered on 8 September 2017 by Judge Caroline S. Burnette in District Court, Granville County. Heard in the Supreme Court on 28 May 2019 in session in the State Capitol Building in the City of Raleigh.

Hicks & Wrenn, PLLC, by C. Gill Frazier, II, and N. Kyle Hicks for petitioner Granville County Department of Social Services, and Bell, Davis & Pitt, P.A., by Derek M. Bast, Guardian ad Litem Program attorney for the minor child, appellants.

Edward Eldred Attorney at Law, PLLC, by Edward Eldred, for respondent-appellee mother.

Elizabeth Kennedy-Gurnee and Jamie Hamlett for North Carolina Association of Social Services Attorneys, amicus curiae.

ERVIN, Justice.

The issue before the Court in this case is whether the Court of Appeals correctly held that the trial court had erred by determining that the parental rights of respondent-mother Lauren B. in her daughter, B.O.A.,[1] were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) on the grounds that respondent-mother had failed to make reasonable progress in correcting the conditions that led to Bev's removal from her home. After careful consideration of the relevant legal authorities in light of the record evidence, we reverse the Court of Appeals' decision.

Bev was born to respondent-mother and Harry A.[2] on 4 April 2015. On 9 August 2015, the Butner Department of Public Safety was called to the family home after respondent-mother sought emergency assistance to deal with assaultive conduct in which the father was engaging against her. As a result of this altercation, both parties were placed under arrest. In view of the fact that Bev was present in the family home at the time of the disturbance and had a lengthy bruise on her arm, investigating officers notified the Granville County Department of Social Services about what had occurred. On 10 August 2015, DSS filed a petition alleging that Bev was a neglected juvenile because she lived "in an environment injurious to the juvenile's welfare." On the same date, Judge Daniel F. Finch entered an order granting nonsecure custody of Bev to DSS based upon the fact that Bev had a bruised right arm.

On 20 August 2015, a social worker met with respondent-mother for the purpose of developing an Out of Home Service Agreement, or case plan.[3] In the resulting case plan, respondent-mother agreed, among other things, to obtain a mental health assessment; complete domestic violence counseling and avoid situations involving domestic violence; complete a parenting class and utilize the skills learned in the class during visits with the child; remain drug-free; submit to random drug screenings; participate in weekly substance abuse group therapy meetings; continue to attend medication management sessions; refrain from engaging in criminal activity; and maintain stable income for at least

1. The juvenile will be referred to throughout the remainder of this opinion as "Bev," which is a pseudonym used for ease of reading and to protect the juvenile's privacy.

2. Bev's father, Harry A., voluntarily relinquished his parental rights to Bev on 9 November 2016 and is not currently a party to this proceeding.

3. Although the case plan to which respondent-mother and DSS agreed does not appear in the record, its contents are reflected in a report that DSS submitted on 14 January 2016.

three months. After a hearing held on 17 and 18 December 2015, Judge J. Henry Banks entered an order on 12 January 2016, in which he found, among other things, that the home maintained by Bev's parents constituted an "injurious environment"; that respondent-mother was "in therapy for domestic violence, addiction, ADHD/ADD and rape"; and that respondent-mother was being prescribed medication, and concluded that Bev was a neglected juvenile as defined in N.C.G.S. § 7B-101(15). As a result, Judge Banks adjudicated Bev to be a neglected juvenile, required that Bev remain in DSS custody, permitted respondent-mother to participate in supervised visitations with Bev on a weekly basis, and "continue[d] the remainder of the dispositional phase of the hearing" to allow DSS to modify its dispositional recommendations following an additional meeting with the parents. On 5 February 2016, Judge Finch entered a dispositional order in which he ordered that Bev remain in DSS custody, that the existing visitation arrangements be continued, and that respondent-mother comply with the provisions of the case plan to which she had agreed with DSS.

Over the course of the ensuing year, periodic review proceedings were conducted, each of which resulted in the entry of orders requiring DSS to attempt to reunify Bev with respondent-mother. After a review hearing held on 15 December 2016, Judge Carolyn J. Thompson entered an order on 11 January 2017 discontinuing reunification efforts and changing Bev's permanent plan from reunification to adoption. On 24 January 2017, DSS filed a petition seeking to have respondent-mother's parental rights in Bev terminated on the grounds that respondent-mother had neglected Bev and had "willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to removal of the juvenile."

The termination petition came on for hearing before the trial court on 13 July 2017 and 17 August 2017. On 8 September 2017, the trial court entered an order in which it found as fact, among other things, that:

> 9. [Respondent-mother] signed a[case plan] with [DSS] on August 20, 2015, but she has not met the terms of that Agreement.
>
> 10. [Respondent-mother] completed a domestic violence class . . . but has not demonstrated the skills she was to learn in that. In the last six months, [respondent- mother]

has called the police on her live-in boyfriend and father of her new born child.

11. [Respondent-mother] has not remained free of controlled substances, and has continued to test positive for controlled substances (even during her recent pregnancy).

12. [Respondent-mother] admitted that she does not take her medications as prescribed and takes her prescriptions, "when she feels like it[.]"

13. [Respondent-mother] has tested positive for extremely high levels of amphetamines . . . .

. . . .

29. [Respondent-mother] was to engage in therapy as part of her [case plan] and there is no credible evidence of therapy.

30. [T]here is no credible evidence that [respondent-mother] is able to protect her child.

31. [Respondent-mother] was to complete a neuropsychological examination as part of her [case plan], but [she] never rescheduled her examination appointment after having the examination explained to her by the social worker and the psychologist.

32. [Respondent-mother] declined a visit with the juvenile on December 27, 2016 after [DSS] changed the plan to adoption and ceased reunification efforts.

33. [Respondent-mother] continues to make excuses and cannot demonstrate what she has learned during her parenting classes and continues to shift her focus away from the juvenile during multiple visitations.

34. [Respondent-mother] exhibits delusional tendencies, as evidenced by her statement to the court that she "could pass the Bar today."

35. [Respondent-mother] has remained hostile and combative to [DSS] and has not completed her [case plan].

36. [Respondent-mother] has not demonstrated an ability to put her child first.

> 37. [Respondent-mother] revoked her consent for [DSS] to have access to her mental health records.
>
> 38. [Respondent-mother] continues to make inconsisten[t statements] regarding her medical diagnosis.
>
> 39. [Respondent-mother] has willfully left the minor child in an out of home placement for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile, pursuant to N.C.G.S. §7B-1111(a)(2).

After determining that respondent-mother's parental rights in Bev were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2)[4] and that the termination of respondent-mother's parental rights in Bev would be in Bev's best interests, the trial court ordered that respondent-mother's parental rights in Bev be terminated. Respondent-mother noted an appeal to the Court of Appeals from the trial court's termination order.

In seeking relief from the trial court's termination order before the Court of Appeals, respondent-mother argued that the trial court had erred by terminating her parental rights in Bev pursuant to N.C.G.S. § 7B-1111(a)(2) given that the trial court's findings of fact did not support its conclusion that she had failed to show reasonable progress in correcting the conditions that led to Bev's removal. *In re B.O.A.*, 818 S.E.2d 331, 333 (N.C. Ct. App. 2018). More specifically, respondent-mother contended that Bev had been removed from the parental home as the result of concerns relating to domestic violence and the bruising of Bev's arm and that the trial court's findings of fact did not establish that she had failed to address these concerns. *Id.*

In reversing the trial court's termination order, the Court of Appeals began by determining that a number of the trial court's findings of fact lacked sufficient evidentiary support and failed to support its ultimate conclusion that respondent-mother had failed to correct the domestic violence-related problems that had led to Bev's removal from respondent-mother's home. *Id.* at 334–36. For example, the Court of Appeals held with respect to Finding of Fact No. 10 that respondent-mother's decision to call the police based upon the abusive conduct of her live-in boyfriend did not reflect a failure to learn how to address domestic violence-related

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4. The trial court did not address the allegation that respondent-mother's parental rights in Bev were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) in its termination order.

problems given the absence of any evidence tending to show "that the incident involved violence, force, or any actions constituting domestic violence under [N.C.G.S. § 50B-1(a)]." *Id.* at 335. Similarly, the Court of Appeals held that the trial court had erred in making Finding of Fact No. 30, which referred to the absence of "credible evidence" tending to show that respondent-mother was "able to protect her child," on the grounds that DSS bore the burden of proving that respondent-mother's parental rights in Bev were subject to termination and that "DSS did not present any evidence to support a conclusion that [r]espondent[-mother] was not capable of protecting Bev." *Id.* at 335. Moreover, the Court of Appeals determined that the trial court had erred by making Finding of Fact No. 33, which addressed the extent to which respondent-mother had had difficulty focusing upon the juvenile during her visits with Bev given that "Bev was not removed from the home due to [r]espondent's lack of focus with the child, but rather for domestic violence between the parents and an unexplained bruise." *Id.* at 336. Finally, after acknowledging that the case plan to which respondent-mother had agreed with DSS attempted to address issues "pertaining to substance abuse, medication management, mental health/psychological issues, and parenting skills," the Court of Appeals noted that, since these concerns were not enunciated "in either the nonsecure custody order or neglect petition [so as] to put [r]espondent on notice of these conditions," such concerns could not be considered as having contributed to Bev's removal from respondent-mother's home for purposes of N.C.G.S. § 7B-1111(a)(2) given that "[t]he plain language [of the relevant statute] states that the court may terminate parental rights if the parent willfully fails to make reasonable progress 'in correcting those conditions which led to the removal of the juvenile.' " *Id.* (quoting N.C.G.S. § 7B-1111(a)(2)). Thus, the Court of Appeals determined that respondent-mother's failure to make progress with respect to her substance abuse, mental health, income, and other problems in the manner enumerated in the case plan to which she had agreed with DSS was "not relevant in determining whether grounds exist under [N.C.G.S. §] 7B-1111(a)(2) to terminate her parental rights for failure to make reasonable progress to alleviate the conditions that led to Bev's removal." *Id.* As a result, the Court of Appeals reversed the trial court's termination order. On 5 December 2018, this Court granted DSS's request for discretionary review of the Court of Appeals' decision in this case.

In seeking to persuade us to reverse the Court of Appeals' decision, DSS and the Guardian ad Litem argue that the Court of Appeals had erroneously construed N.C.G.S. §7B-1111(a)(2) in an overly constricted manner and had, for that reason, defined the "conditions which led to a

juvenile's removal" in an excessively narrow way. More specifically, DSS and the Guardian ad Litem contend that the Court of Appeals' holding rests upon the flawed assumption that the conditions of removal for purposes of N.C.G.S. § 7B-1111(a)(2) are limited to those which constituted the triggering event that led to DSS's involvement with the family and which were expressly delineated in the initial abuse and neglect petition. According to DSS and the Guardian ad Litem, the Court of Appeals erroneously focused its analysis exclusively upon the issue of whether respondent-mother had made reasonable progress addressing issues relating to domestic violence, and had declined to consider respondent-mother's substance abuse, mental health, and parenting difficulties, all of which were, in DSS's view, properly understood to be among the conditions that led to Bev's removal from respondent-mother's home. As a result, DSS and the Guardian ad Litem contend that the Court of Appeals erred by refusing to treat respondent-mother's failure to comply with the court-ordered case plan to which she had agreed with DSS as relevant to the issue of whether respondent-mother had failed to make reasonable progress in correcting the conditions that led to Bev's removal from the family home for purposes of N.C.G.S. § 7B–1111(a)(2).

Respondent-mother, on the other hand, asserts that the Court of Appeals properly interpreted the "clear and unambiguous" language of N.C.G.S. § 7B–1111(a)(2) by focusing its analysis upon the issue of domestic violence, which was the only condition that could have reasonably been understood to have resulted in Bev's removal from the family home. According to respondent-mother, the relevant statutory language necessarily refers to nothing more than the event or circumstance that resulted in the juvenile's physical removal from the family home. For that reason, respondent-mother further contends that the conditions of removal to which reference is made in N.C.G.S. § 7B-1111(a)(2) must have been known to DSS at the time of the juvenile's removal and must have been reflected in the petition that led to the placement of the juvenile in the custody of some person other than his or her parents. In view of the fact that DSS did not know of any condition, other than issues relating to domestic violence, that would have led to Bev's removal from the family home at the time that it filed its initial petition, the fact that DSS never amended its petition to allege additional grounds for removal, and the fact that the District Court never specified additional grounds for removal in any subsequent order, respondent-mother asserts that the Court of Appeals properly held that the only conditions that the trial court was entitled to consider in determining whether respondent-mother's parental rights in Bev were subject to termination pursuant N.C.G.S. § 7B–1111(a)(2) were those relating

to domestic violence and the presence of a bruise on Bev's arm. Moreover, even if other conditions, such as substance abuse, are generally related to the existence of domestic abuse, respondent-mother argues that the record is devoid of any evidence tending to show that such conditions played any part in Bev's removal from respondent-mother's home in this case. As a result, respondent-mother asserts that the Court of Appeals correctly determined that the trial court's findings failed to support its conclusion that she had failed to make sufficient progress toward correcting the conditions that led to Bev's removal from the family home.

Finally, while acknowledging that a trial judge is authorized by N.C.G.S. § 7B-904(d1)(3) to adopt case plans aimed at addressing the possible causes of a juvenile's removal from the family home and the particular needs of the juvenile's family, respondent-mother argues that a parent's failure to comply with those aspects of a case plan that do not address the conditions that led to the juvenile's removal from the family home are irrelevant to the ground for termination of a parent's parental rights enunciated in N.C.G.S. § 7B–1111(a)(2). According to respondent-mother, a parent's failure to comply with any case plan provision that is not directly related to domestic violence and the bruise found upon Bev's arm might well be relevant to a determination that her parental rights in Bev were subject to termination for neglect pursuant to N.C.G.S. § 7B–1111(a)(1), but would not support a determination that her parental rights in Bev were subject to termination for failure to make reasonable progress pursuant to N.C.G.S. § 7B–1111(a)(2). As a result, respondent-mother urges us to uphold the Court of Appeals' decision in this case.

According to well-established law, this Court reviews trial court orders in cases in which a party seeks to have a parent's parental rights in a child terminated by determining whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the trial court's conclusions of law. *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982). A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding. *Id.* at 403–04, 293 S.E.2d at 132.

A termination of parental rights proceeding consists of an adjudication stage that is followed by a dispositional stage. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudication stage, the trial court must "take evidence, find the facts, and . . . adjudicate the existence or nonexistence of any of the circumstances set forth in [N.C.G.S. §] 7B-1111 which authorize the termination of parental rights of the

respondent." N.C.G.S. § 7B-1109(e); *see In re D.H.*, 232 N.C. App. 217, 219, 753 S.E.2d 732, 734 (2014). According to N.C.G.S. § 7B–1111(a)(2), a trial judge may terminate a parent's parental rights in a child in the event that it finds that "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B–1111(a)(2). As the Court of Appeals has consistently held, a finding by the trial court that any one of the grounds for termination enumerated in N.C.G.S. § 7B–1111(a) exists is sufficient to support a termination order. *See In re C.M.S.*, 184 N.C. App. 488, 491, 646 S.E.2d 592, 594 (2007) (citing *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233–34 (1990)); *see also Moore*, 306 N.C. 404, 293 S.E.2d 133 (stating that, "[i]f either of the three grounds aforementioned is supported by findings of fact based on clear, cogent and convincing evidence, the order appealed from should be affirmed"). Assuming that the trial court finds that one or more of the grounds for termination set out in N.C.G.S. § 7B-1111(a) exist, it must proceed to the dispositional stage, during which it must "determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110; *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 615 (1997).

The ultimate issue before us in this case revolves around the manner in which the reference to "those conditions that led to the removal of the juvenile" contained in N.C.G.S. § 7B-1111(a)(2) should be construed. In construing statutory language, "it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (citing *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009)). "Legislative intent controls the meaning of a statute," *Brown v. Flowe*, 349 N.C. 250, 522, 507 S.E.2d 894, 895 (1998) (quoting *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81, 347 S.E.2d 824, 828 (1986)), with the legislative intent to be determined "first from the plain language of the statute, then from the legislative history, 'the spirit of the act and what the act seeks to accomplish.' " *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "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." *Diaz v. Div. of Soc. Servs. & Div. of Med. Assistance, N. Carolina Dep't of Health & Human Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006).

In overturning the trial court's determination that respondent-mother's parental rights in Bev were subject to termination pursuant

to N.C.G.G. § 7B-1111(a)(2), the Court of Appeals appears to have concluded that the relevant statutory language is "clear and unambiguous" and can be "implemented according to the plain meaning of its terms." *B.O.A.*, 818 S.E.2d at 336 (quoting *Lanvale Properties, LLC v. Cty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809 (2012)). However, nothing in the relevant statutory language suggests that the only "conditions of removal" that are relevant to a determination of whether a particular parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) are limited to those which are explicitly set out in a petition seeking the entry of a nonsecure custody order or a determination that a particular child is an abused, neglected, or dependent juvenile. Instead, the relevant statutory language appears to us to be subject to a number of potentially possible interpretations in addition to that adopted by the Court of Appeals. For example, the relevant statutory language can easily be read to encompass all of the conditions that led to the child's removal from the parental home, including both those inherent in the events immediately surrounding the child's removal from the home and any additional underlying factors that contributed to the difficulties that resulted in the child's removal. A careful examination of the relevant statutory language in the context of other related statutory provisions suggests that a more expansive reading of the reference to "those conditions that led to the removal of the juvenile" contained in N.C.G.S. § 7B-1111(a)(2) is the appropriate one.

According to N.C.G.S. § 7B-904(d1)(3), a trial judge has the authority to require the parent of a juvenile who has been adjudicated to be abused, neglected, or dependent to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker." After examining N.C.G.S. § 7B-904(d1)(3), we believe that the General Assembly clearly contemplated that, in the event that a juvenile is found to have been abused, neglected, or dependent, the trial judge has the authority to order a parent to take any step needed to remediate the conditions that "led to or contributed to" either the juvenile's adjudication or the decision to divest the parent of custody. Put another way, the trial judge in an abuse, neglect, or dependency proceeding has the authority to order a parent to take any step reasonably required to alleviate any condition that directly or indirectly contributed to causing the juvenile's removal from the parental home. In addition, N.C.G.S. §7B-904(d1)(3) authorizes the trial judge, as he or she gains a better understanding of the relevant family dynamic, to modify and update a parent's case plan in subsequent review proceedings conducted pursuant to N.C.G.S. § 7B-906.1. Thus, the

relevant statutory provisions appear to contemplate an ongoing examination of the circumstances that surrounded the juvenile's removal from the home and the steps that need to be taken in order to remediate both the direct and the indirect underlying causes of the juvenile's removal from the parental home, an approach that is simply inconsistent with the one-time determination that is assumed to be appropriate by the Court of Appeals' decision in this case. As a result, in the interests of remaining consistent with the overall statutory scheme for dealing with juvenile abuse, neglect, and dependency issues, we conclude that the "conditions of removal" contemplated by N.C.G.S. § 7B-1111(a)(2) include all of the factors that directly or indirectly contributed to causing the juvenile's removal from the parental home.

In addition to its reliance upon what it believed to be the plain meaning of the relevant statutory language, the Court of Appeals justified its decision to overturn the trial court's termination order on certain notice-related considerations. In essence, the Court of Appeals held that the trial court was not entitled to consider certain of the "conditions" addressed in respondent-mother's court-approved case plan because "DSS failed to allege any of these conditions in either the nonsecure custody order or neglect petition to put [r]espondent on notice of these conditions." *B.O.A.*, 818 S.E.2d at 336. Although a trial court would clearly err by terminating a parent's parental rights in a child for failure to make reasonable progress pursuant to N.C.G.S. § 7B–1111(a)(2) in the event that this ground for termination had not been alleged in the termination petition or motion, *see In re S.R.G.*, 195 N.C. App. 79, 83, 671 S.E.2d 47, 50 (2009) (holding that the failure to allege that the parent's parental rights were subject to termination pursuant to N.C.G.S. § 7B–1111(a)(2) deprived the trial court of the right to terminate the parent's parental rights on the basis of that statutory ground for termination), no such error occurred in this case. On the contrary, DSS explicitly alleged that respondent-mother's parental rights in Bev were subject to termination on the grounds

> [t]hat the parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to removal of the juvenile.

In view of the fact that nothing in the relevant statutory provisions limits the "conditions for removal" to those specified in any initial abuse, neglect, or dependency petition or any subsequent amendment to that

petition and the fact that DSS adequately alleged that it was seeking to terminate respondent-mother's parental rights in Bev pursuant to N.C.G.S. § 7B-1111(a)(2), we are not persuaded that the notice-related concerns expressed by the Court of Appeals justify overturning the trial court's termination order.

The broader reading of the relevant statutory language that we believe to be appropriate is also consistent with the manner in which those provisions have been applied by our state's appellate courts in the past. As an initial matter, we note that N.C.G.S. § 7B-904(d1)(3) has traditionally been construed very broadly. For example, in *In re A.R.*, 227 N.C. App. 518, 522, 742 S.E.2d 629, 632–33 (2013), the Court of Appeals upheld a trial court order entered in an abuse and neglect proceeding requiring the parents to comply with a case plan that instructed them to obtain substance abuse evaluations, participate in drug screenings, and comply with the treatment recommendations made by the relevant medical and mental health professionals despite the fact that the juveniles were initially removed from their parents' home as the result of domestic violence concerns on the grounds that compliance with these requirements would "assist respondents in both understanding and resolving the possible underlying causes of respondents' domestic violence issues." *Id.* at 520, 522, 742 S.E.2d at 631–33. As a result, the Court of Appeals has clearly recognized that the trial court's authority to adopt a case plan pursuant to N.C.G.S. § 7B-904(d1)(3) is sufficiently broad to permit rectification of both the immediate cause of the need for governmental intervention into the family's life and the conditions that contributed in a more indirect way to that need for governmental intervention.

In addition, the Court of Appeals has treated parental compliance with a broadly drafted case plan as pertinent to the inquiry required by N.C.G.S. § 7B-1111(a)(2). For example, in *In re J.G.B.*, 177 N.C. App. 375, 380–81, 628 S.E.2d 450, 455 (2006), the Court of Appeals upheld the trial court's decision to consider a mother's failure to make reasonable progress toward compliance with her case plan in determining whether her parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) even though that case plan addressed issues beyond those that immediately led to the juvenile's removal from the family home. After noting that the order placing the juveniles in nonsecure custody stated that "there was a reasonable factual basis to believe that [the child] was 'exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, or custodian . . . failed to provide, or is unable to provide, adequate supervision or protection' " and that the provisions of the mother's case plan required her to maintain stable

employment, obtain and maintain safe housing, provide medical care for the juvenile, attend weekly visitations, and demonstrate appropriate parenting skills, *id.* at 377–78, 628 S.E.2d at 452–53, the trial court found that, even though the mother had visited with the juvenile on numerous occasions, she had maintained employment only for a short period of time, had failed to maintain sustainable housing arrangements, and had attended some, but not all, of the juvenile's medical appointments. *Id.* at 380, 628 S.E.2d at 455. Based upon these and other findings, the trial court determined that, "[a]lthough the [mother] has made some progress toward her case plan goals, the amount of progress she has made is not reasonable under the circumstances and in fact, she has not completed any of her case plan goals," *id.* at 380–81, 628 S.E.2d at 455, and concluded that the mother's parental rights in the child were subject to termination on the grounds of both neglect, N.C.G.S. § 7B-1111(a)(1), and failure to make reasonable progress in correcting the conditions that led to the child's removal from the parental home pursuant to N.C.G.S. § 7B–1111(a)(2). *Id.* at 381, 628 S.E.2d at 455. Had the Court of Appeals, in the course of deciding *In re J.G.B.*, construed N.C.G.S. § 7B-1111(a)(2) consistently with the approach adopted by the Court of Appeals in this case, it would likely have reversed, rather than affirmed, the trial court order at issue in that case.

A careful review of relevant decisions by both the Court of Appeals and this Court, *see D.L.W.*, 368 N.C. at 845, 788 S.E.2d at 168 (holding that a trial court could correctly determine that a parent whose children had been removed from the family home because of domestic violence and a failure to provide adequate housing and meet the children's minimal needs were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) based, in part, upon the parent's failure to comply with a case plan provision ordering the parent to create a budgeting plan), reflects a consistent judicial recognition that parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B–1111(a)(2) even when there is no direct and immediate relationship between the conditions addressed in the case plan and the circumstances that led to the initial governmental intervention into the family's life, as long as the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home. The adoption of a contrary approach would amount to turning a blind eye to the practical reality that a child's removal from the parental home is rarely the result of a single, specific incident and is, instead, typically caused by the confluence of multiple factors, some of which are immediately apparent

and some of which only become apparent in light of further investigation. A restrictive construction of the relevant provisions of N.C.G.S. § 7B-1111(a)(2) of the type adopted by the Court of Appeals in this case would fail to recognize the complexity of the issues that must frequently be resolved in abuse, neglect, and dependency cases and would unduly handicap our trial courts in their efforts to rectify the effects of abuse, neglect, and dependency.

We do not, of course, wish to be understood as holding that a trial judge's authority to adopt a case plan pursuant to N.C.G.S. § 7B-904(d1)(3) is unlimited or that the reference to the "conditions of removal" contained in N.C.G.S. § 7B-1111(a)(2) has no meaning whatsoever.[5] Instead, a trial judge should refrain from finding that a parent has failed to make "reasonable progress . . . in correcting those conditions which led to the removal of the juvenile" simply because of his or her "failure to fully satisfy all elements of the case plan goals." *In re J.S.L.*, 177 N.C. App. 151, 163, 628 S.E.2d 387, 394 (2006). On the other hand, a trial court has ample authority to determine that a parent's "extremely limited progress" in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2); *see*, *e.g.*, *In re S.N.*, 194 N.C. App. 142, 149, 669 S.E.2d 55, 60 (2008), *aff'd*, 363 N.C. 368, 677 S.E.2d 455 (2009) (upholding the termination of a mother's parental rights in a child pursuant to N.C.G.S. § 7B-1111(a)(2) given that the mother only made limited progress in correcting the conditions that led to the child's removal from her home and made no attempt to regain custody of her children until after she became at risk of losing them). As a result, as long as a particular case plan provision addresses an issue that, directly or indirectly, contributed to causing the juvenile's removal from the parental home, the extent to which a parent has reasonably complied with that case plan provision is, at minimum, relevant to the determination of whether that parent's parental rights in his or her child are subject to termination for failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2).

A careful review of the record satisfies us that the necessary nexus between the components of the court-approved case plan with which respondent-mother failed to comply and the "conditions which led to [Bev's] removal" from the parental home exists in this case. Admittedly,

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5. For example, requiring a parent with no history of substance abuse and whose alleged parenting deficiencies do not appear to be drug-related to submit to random drug screening or to submit to drug treatment might well exceed allowable grounds.

the triggering event that led to Bev's placement in DSS custody was an act of domestic violence and the discovery of an unexplained bruise located on Bev's arm. However, a careful examination of the record clearly reflects that a much broader list of concerns contributed to causing the events that directly and immediately contributed to Bev's adjudication as a neglected juvenile and her removal from the parental home. In the initial adjudication order, Judge Banks found that respondent-mother was "currently in therapy for domestic violence, addiction, ADHD/ADD and rape and is prescribed medication" and that the entry of a dispositional order should be continued until DSS had had an opportunity "to further modify its recommendations after a CFT meeting with" the parents. Similarly, Judge Finch found in the subsequent dispositional order that "there continue[ ] to be concerns with substance abuse, domestic violence and visitations." A report submitted by DSS that was accepted into the record at the adjudication hearing indicates, among other things, that respondent-mother was "in a substance abuse program for which she is taking Suboxone," that respondent-mother "was extremely disruptive with [ ] extensive crying and interrupting others" during a meeting involving DSS personnel and others, that respondent-mother admitted that she suffered from ADHD, that one of the individuals who initially provided domestic violence services to respondent-mother recommended that respondent-mother receive outpatient therapy, and that respondent-mother had previously been diagnosed as suffering from severe ADHD, post-traumatic stress disorder, and borderline intellectual functioning. Moreover, a report that was submitted by DSS and accepted into the record at the dispositional hearing indicates that respondent-mother was receiving treatment for anxiety and depressed mood, that respondent-mother had been diagnosed as suffering from post-traumatic stress disorder, that respondent-mother was not complying with the requirements of her Suboxone regimen, and that respondent-mother became angry and acted out with regularity during her dealings with DSS personnel and others. Finally, respondent-mother voluntarily agreed upon a case plan with DSS and never contended prior to the termination hearing that its components did not address issues that contributed to causing the conditions that led to Bev's removal from her home.

The various reports and orders contained in the record reflect an early recognition of the fact that a complex series of interrelated factors contributed to causing the conditions that led to Bev's removal from respondent-mother's home. There is widespread recognition that post-traumatic stress disorder can result from domestic violence. Similarly, common sense indicates that certain mental disorders and unaddressed

substance abuse problems can make an individual more susceptible to domestic violence. Thus, the history shown in these reports and orders reveals the existence of a sufficient nexus between the conditions that led to Bev's removal from respondent-mother's home and the provisions of the court-ordered case plan relating to respondent-mother's mental health issues, substance abuse treatment, and medication management problems. As a result, we are fully satisfied that the trial court had an adequate basis for finding the required relationship between the components of respondent-mother's case plan and the "conditions that led to [Bev's] removal" from respondent-mother's home for purposes of N.C.G.S. § 7B-1111(a)(2) existed in this case.

The trial court's termination order contained multiple findings of fact detailing respondent-mother's failure to comply with numerous components of her court-ordered case plan. Although respondent-mother challenged a number of the trial court's findings of fact as lacking in sufficient evidentiary support, the record provides ample justification for the trial court's determination that respondent-mother had entered into a judicially approved case plan with DSS and "ha[d] not met the terms of that [a]greement." Among other things, the trial court found "ample evidence that [respondent-mother had] abuse[d] her Adderall prescription" and had "admitted that she does not take her medications as prescribed and takes her prescriptions, 'when she feels like it.' " In addition, the trial court made findings of fact concerning respondent-mother's failure to pass random drug tests or failure to submit to drug tests and to refrain from using illegal substances. In addition, the trial court found that respondent-mother had failed to complete the required neuropsychological examination or to participate in required therapy sessions. Similarly, the trial court found that respondent-mother was unable to "demonstrate what she has learned during her parenting classes and continue[d] to shift her focus away from the juvenile during multiple visitations." A careful review of these unchallenged findings of fact satisfies us that respondent-mother failed to comply with all but the most minimal requirements of her court-ordered case plan and that the limited progress that she did make cannot be fairly described as reasonable. As a result, we conclude that the trial court's unchallenged findings of fact amply demonstrate that respondent-mother's parental rights were subject to termination for failing to make reasonable progress toward correcting the conditions that resulted in Bev's removal from the family home pursuant to N.C.G.S. § 7B-1111(a)(2).

Thus, we hold that the trial court's unchallenged findings of fact, including those regarding respondent's failure to comply with the

provisions of her court-ordered case plan, adequately supported the trial court's conclusion that respondent-mother willfully left Bev in DSS custody for a period of twelve months without making reasonable progress toward correcting the conditions that led to Bev's removal from respondent-mother's home and that the Court of Appeals erred by reaching a contrary result. As a result, we reverse the Court of Appeals' decision in this case.

REVERSED.

IN THE MATTER OF E.H.P. AND K.L.P.

No. 70A19

Filed 16 August 2019

Termination of Parental Rights—willful abandonment—due consideration of dispositional factors

Sufficient evidence existed to support the termination of respondent's parental rights based upon the willful abandonment and willful failure to pay child support. The trial court did not abuse its discretion in determining that termination would be in the children's best interests.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 14 January 2019 by Judge Monica Leslie in District Court, Graham County. This matter was calendared for argument in the Supreme Court on 1 August 2019 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee mother.

Wendy C. Sotolongo, Parent Defender, by Annick Lenoir-Peek, Deputy Parent Defender, for respondent-appellant father.

DAVIS, Justice.

This case involves a termination of parental rights proceeding initiated by petitioner-mother (petitioner) against respondent-father (respondent). In this appeal, we consider whether the trial court erred

by terminating respondent's parental rights based upon the grounds of willful abandonment and willful failure to pay child support. Because we conclude that sufficient evidence existed to support the termination of respondent's parental rights on the basis of willful abandonment and that the trial court did not abuse its discretion in determining that termination of respondent's parental rights would be in the children's best interests, we affirm the trial court's orders.

Factual and Procedural Background

Petitioner and respondent were married in 2007 and had two daughters together. Kelly and Emily (the children) were born in 2006 and 2009, respectively.[1] The parties separated in 2012.

In August 2013, petitioner filed a motion for temporary emergency custody of the children. In the Temporary Custody Judgment entered in District Court, Graham County on 17 December 2013, petitioner was awarded sole temporary custody of the children "until such time as this matter is resolved by the Court through a permanent custody hearing." The Temporary Custody Judgment contained the following pertinent findings of fact:

> 5. [Respondent] did not appear for the hearing of this matter and has never filed any form of responsive pleading, motion, or other such documentation in response to [petitioner's] Complaint.
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> 6. The Court takes Judicial notice . . . that the [respondent] was in fact validly served and provided Notice of this hearing by the Sheriff of Loudon County, Tennessee, where [respondent] had been incarcerated.
>
> . . . .
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> 9. Throughout the relationship of the parties, the [respondent] committed numerous acts of domestic violence against the [petitioner].
>
> 10. The parties separated on July 23, 2012 due to the [respondent's] drug addiction and a series of acts of domestic violence by the [respondent] . . . against the [petitioner] wherein the [respondent] choked the [petitioner] and hit her in the face with his elbow

1. Pseudonyms are used throughout this opinion to protect the identities of the minor children.

causing bruising and a laceration to the person of the [petitioner].

11. The minor children of the parties were present while the [respondent] engaged in the acts of violence against the [petitioner].

. . . .

14. The [respondent] is addicted to methamphetamine and currently has charges pending against him in the State of North Carolina and Tennessee for larceny, assault on a female by strangulation, and drug related charges.

The Temporary Custody Judgment further provided that respondent "shall have no contact with the minor children until allowed such by further Order of this Court." Respondent never filed any motions seeking to alter the custody arrangement set forth in the Temporary Custody Judgment.

On 25 June 2018, petitioner filed petitions seeking to terminate respondent's parental rights to both children on the grounds of willful failure to pay child support and willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(4) and (7), respectively. Petitioner alleged that respondent had willfully failed to pay child support for a continuous period of six months immediately preceding the filing of the petitions. She further alleged that respondent had neither attempted to see or communicate with the children during the six years preceding the filing of the petitions nor sent the children any cards or presents during that time period.

Respondent was served with the petitions at the Sampson County Correctional Institution in Clinton, North Carolina, where he had been incarcerated since January 2018 and was serving an eight-month sentence for violating his probation. On 17 July 2018, he filed answers to the petitions in which he denied that grounds existed to terminate his parental rights.

A hearing was held on the petitions to terminate respondent's parental rights in District Court, Graham County on 17 October 2018 before the Honorable Monica Leslie. At the hearing, the trial court received testimony from petitioner, respondent, the children's stepfather, the guardian *ad litem* for each child, and respondent's brother.

At the conclusion of the hearing, the trial court informed the parties that it was terminating respondent's parental rights to both children

on the ground of willful abandonment. The court stated as follows with regard to the ground of willful failure to pay child support:

> [T]here was not a child support order introduced as evidence nor was there any payment schedule or any evidence of when payments were made that were introduced to the Court, and the Court isn't able to determine what, if any, payments have or have not been made within the past six months . . . prior to the filing of the petition.
>
> . . . .
>
> Based on the high standard of proof and the lack of evidence about either an order or what payments have been made, the Court does not find by clear, cogent, and convincing evidence the nonsupport ground. However, the Court, having found one ground for termination of parental rights, will move on to the dispositional phase of the proceeding.

On 14 January 2019, the trial court entered adjudication and disposition orders as to each juvenile terminating respondent's parental rights. However, contrary to the statements made by the court at the 17 October hearing in announcing its ruling, the court's written orders stated that sufficient evidence existed to support termination based upon both grounds alleged in the petitions. Respondent gave timely notice of appeal to this Court pursuant to N.C.G.S. § 7B-1001(a1)(1).[2]

Analysis

On appeal, respondent argues that the trial court erred by both finding that grounds existed to terminate his parental rights to the children and concluding that the termination of his parental rights was in the children's best interests. We disagree.

Our Juvenile Code sets forth a two-step process for the termination of parental rights. At the adjudication stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence that grounds exist for termination pursuant to section 7B-1111 of the General Statutes. N.C.G.S. § 7B-1109(e) (2017). If the trial court finds that grounds exist for termination, it then proceeds to the dispositional stage at which it

2. Effective 1 January 2019, appeals taken from orders granting or denying a motion or petition to terminate parental rights lie directly with this Court. *See* N.C.G.S. § 7B-1001(a1)(1) (2017).

must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id. § 7B-1110(a) (2017).

We review a trial court's adjudication under N.C.G.S. § 7B-1111 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed for abuse of discretion. *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013)).

I. Adjudicatory Phase

Here, the trial court determined that two grounds existed to terminate respondent's parental rights: willful failure to pay child support pursuant to N.C.G.S. § 7B-1111(a)(4) and willful abandonment under N.C.G.S. § 7B-1111(a)(7). "If either of the [two] grounds aforesaid is supported by findings of fact based on clear, cogent and convincing evidence, the order[s] appealed from should be affirmed." *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133; *see also* N.C.G.S. § 7B-1111(a) (2017) ("The court may terminate the parental rights upon a finding of one or more [grounds for termination.]").

We first address the trial court's ruling that grounds existed to terminate respondent's parental rights based upon willful abandonment. Termination pursuant to this ground requires proof that "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." N.C.G.S § 7B-1111(a)(7)

(2017). We have held that "[a]bandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986)); *see also Pratt v. Bishop*, 257 N.C. 486, 502, 126 S.E.2d 597, 608 (1962) ("Abandonment requires a wilful intent to escape parental responsibility and conduct in effectuation of such intent."). "It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.* at 501, 126 S.E.2d at 608.

In its 14 January 2019 orders, the trial court took judicial notice of the Temporary Custody Judgment. Both 14 January adjudication orders also contained the following pertinent findings of fact:

> 4. That within the [Temporary Custody] Order, the Court ordered that the Respondent was to have no contact with the minor children until allowed such by further Order of the Court. That the Respondent never filed a Motion asking for contact with the minor children.
>
> 5. Respondent Father states that he tried to provide some gifts for the minor children for 3 years after the separation, but the Petitioner did not accept the gifts so Respondent stopped trying.
>
> 6. That Respondent ha[d] no substance abuse issue for the past year, but has struggled throughout the minor children's life with substance abuse.
>
> . . . .
>
> 9. . . . That the Respondent has not made a regular child support payment for more than year [sic] or preceding the filing of this petition.
>
> . . . .
>
> 11. That Respondent acknowledged that he was not at a good point in his life as to why he has not tried to contact the children or filed anything with the Court.

Based upon these findings of fact, the trial court concluded that sufficient grounds existed to terminate respondent's parental rights to both children pursuant to N.C.G.S. § 7B-1111(a)(7).

Respondent concedes that he had no contact with the children from 25 December 2017 to 25 June 2018—the relevant six-month period for purposes of N.C.G.S. § 7B-1111(a)(7). *See In re Young*, 346 N.C. at 251, 485 S.E.2d at 617 ("[S]ince the petition for terminating respondent's parental rights was filed on 6 May 1994, respondent's behavior between 6 November 1993 and 6 May 1994 is determinative" for purposes of an abandonment determination.). He contends, nevertheless, that the trial court erred by determining he willfully abandoned the children because he was forbidden to contact them under the provisions of the Temporary Custody Judgment.

We are satisfied that sufficient evidence supported the trial court's determination that respondent willfully abandoned his children pursuant to N.C.G.S. § 7B-1111(a)(7). By his own admission, respondent had no contact with his children during the statutorily prescribed time period. In addition, he made no effort to have any form of involvement with the children for several consecutive years following the entry of the Temporary Custody Judgment. While respondent ascribes this inaction to the no-contact provision contained in the Temporary Custody Judgment, this argument is unavailing. A temporary custody order is by definition provisional, and the order at issue here expressly contemplated the possibility that the no-contact provision would be modified in a future order. No attempt was made by respondent, however, to alter the terms of the Temporary Custody Judgment so as to allow contact between him and the children.

Similarly, the fact that respondent was incarcerated for almost the entirety of the six-month period preceding the filing of the termination petition does not preclude a finding of willful abandonment under N.C.G.S. § 7B-1111(a)(7). *See In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) ("Our precedents are quite clear—and remain in full force—that '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.' " (alteration in original) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006)). Indeed, the record reveals that respondent was aware during his incarceration of his ability to seek relief from the trial court's orders. Respondent testified that he filed a motion while he was incarcerated asking the trial court to suspend his child support obligations. When asked by petitioner's counsel why he never filed a similar motion seeking a custody modification or visitation rights with his children, he stated that he "wasn't in a place in [his] life to -- to really be a father or a parent."

Thus, we conclude that respondent's conduct meets the statutory standard for willful abandonment and affirm the trial court's adjudication

pursuant to N.C.G.S. § 7B-1111(a)(7). As previously noted, an adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights. *See In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133; *see also* N.C.G.S. § 7B-1110(a). Therefore, we need not address respondent's contention that the trial court erred in determining that grounds likewise existed to support termination based on willful failure to pay child support. *See In re P.L.P.*, 173 N.C. App. at 8, 618 S.E.2d at 246 ("[W]here the trial court finds multiple grounds on which to base a termination of parental rights, and 'an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds.' " (quoting *In re Clark*, 159 N.C. App. 75, 78 n.3, 582 S.E.2d 657, 659 n.3 (2003))).

II. Dispositional Phase

Respondent's final argument is that the trial court erred by concluding the termination of his parental rights is in the children's best interests. He asserts that he is "now able to meet his legal and financial obligations" and contends that in the event his parental rights are terminated and the children are not adopted by their stepfather "they will lose any benefits they could have received from [respondent]." Once again, we disagree.

Prior to the 17 October 2018 termination hearing, the guardian *ad litem* appointed for each child submitted written reports to the court recommending that respondent's parental rights be terminated. At the hearing, the trial court heard testimony from the children's stepfather, who attested to his love for the children and his desire to adopt them.

In its termination orders, the trial court made detailed findings of fact addressing the dispositional criteria set forth in N.C.G.S. § 7B-1110(a). Specifically, the court found "there is a strong likelihood that the children will be adopted by their step[-]father" if respondent's parental rights are terminated; that the children have "no bond" with respondent and are "extremely bonded with the Petitioner and their step[-]father"; and that the children have all of their "medical, physical and emotional needs . . . met" in their current environment.

The trial court also made findings that "Respondent's home is extremely unstable" and that his conduct "has been such as to demonstrate that he would not promote the healthy and orderly physical and emotional wellbeing of the [children]." Respondent has not challenged any of these findings, and they are therefore binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)). Thus,

we are satisfied that the trial court's findings reflect due consideration of the dispositional factors in N.C.G.S. § 7B-1110(a) and constitute a valid exercise of its discretion in determining that the termination of respondent's parental rights is in the best interests of the children.

Conclusion

For the reasons set out above, we affirm the 14 January 2019 orders of the trial court terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF L.E.M.

No. 383A18

Filed 16 August 2019

1. Termination of Parental Rights—no-merit brief—independent review of issues by appellate court

The Court of Appeals erred by dismissing respondent-father's appeal from an order terminating his parental rights where respondent's attorney filed a no-merit brief pursuant to N.C. Rule of Appellate Procedure 3.1(d). The Supreme Court concluded that Rule 3.1(d) mandates an independent review on appeal of the issues contained in a no-merit brief, and it overruled the Court of Appeals decision to the contrary in *In re L.V.*, 814 S.E.2d 928 (N.C. Ct. App. 2018).

2. Termination of Parental Rights—no-merit brief—error by Court of Appeals—review of merits by Supreme Court—goal of resolving case expeditiously

After determining that the Court of Appeals erred in a termination of parental rights case by failing to conduct an independent review of the issues set out in a no-merit brief, the Supreme Court elected to conduct its own review of those issues in the interest of expeditiously resolving the case. The Supreme Court concluded that the trial court's order was supported by competent evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 820 S.E.2d 577 (N.C. Ct. App. 2018), dismissing an appeal from a termination of parental rights order

entered on 5 January 2018 by Judge John K. Greenlee in District Court, Gaston County. Heard in the Supreme Court on 28 May 2019 in session in the State Capitol Building in the City of Raleigh.

Elizabeth Myrick Boone for petitioner-appellee Gaston County Department of Social Services.

Nelson Mullins Riley & Scarborough LLP, by Reed J. Hollander, for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by Annick Lenoir-Peek, Deputy Parent Defender, for respondent-appellant father.

DAVIS, Justice.

In this case we consider whether Rule 3.1 of the North Carolina Rules of Appellate Procedure requires our appellate courts to independently review the issues presented in a "no-merit" brief filed in an appeal from an order terminating a respondent's parental rights. Based on our determination that Rule 3.1 mandates an independent review on appeal of the issues contained in a no-merit brief, we vacate the decision of the Court of Appeals.

Factual and Procedural Background

In September 2015, the Gaston County Department of Social Services (DSS) became involved with respondent-father (respondent) and his family in order to assist with the medical care of one of respondent's two children. As of 4 January 2016, both respondent and the mother of the children were incarcerated, and the children were placed in foster care. An adjudication hearing was held on 23 February 2016 in District Court, Gaston County before the Honorable John K. Greenlee. Following the hearing, both of the children were adjudicated neglected and dependent. The court awarded DSS continued custody of the juveniles and directed respondent to comply with the terms of his DSS case plan as a condition of regaining custody. Respondent was able to satisfy some of the conditions of the case plan, but on 1 June 2016, he was arrested and subsequently extradited to West Virginia.

On 11 April 2017, the trial court entered an order ceasing reunification efforts with respondent. The following day, DSS filed a petition to terminate the parental rights of respondent as to his son, L.E.M. The petition alleged that respondent's parental rights should be terminated based upon three separate grounds: (1) neglect, (2) failure to make

reasonable progress to correct the conditions that led to the removal of the juvenile, and (3) dependency. *See* N.C.G.S. § 7B-1111(a)(1), (2), (6) (2017). A termination of parental rights hearing was held on 13 November 2017, and on 5 January 2018, the trial court entered an order terminating respondent's parental rights on the basis of neglect and failure to make reasonable progress. Respondent appealed the trial court's order to the Court of Appeals.

At the Court of Appeals, respondent's attorney filed a no-merit brief pursuant to North Carolina Rule of Appellate Procedure 3.1(d). In this brief, counsel conceded that, based upon her review of the record, she did not believe any meritorious issues existed that could support respondent's appeal. Nevertheless, the brief identified three issues for appellate review.

Despite acknowledging that the no-merit brief was in compliance with Rule 3.1(d), the Court of Appeals dismissed respondent's appeal. Citing the Court of Appeals' decision in *In re L.V.*, 814 S.E.2d 928 (N.C. Ct. App. 2018), the majority held that it lacked the authority to consider respondent's appeal because "[n]o issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure." *In re L.E.M.*, 820 S.E.2d 577, 579 (N.C. Ct. App. 2018) (alteration in original) (quoting *In re L.V.*, 814 S.E.2d at 929).

In an opinion concurring in the result only, Judge Arrowood agreed with the majority that the panel was required to dismiss the appeal based on *In re L.V.* but expressed his belief that *In re L.V.* "erroneously altered the jurisprudence of cases arising under Rule 3.1 of the North Carolina Rules of Appellate Procedure." *Id.* (Arrowood, J., concurring). Judge Arrowood observed that the Court of Appeals "has consistently interpreted Rule 3.1(d) to require our Court to conduct an independent review in termination of parental rights cases in which counsel filed a no-merit brief and the respondent-parent did not file a *pro se* brief." *Id.* at 580.

Chief Judge McGee issued a dissenting opinion, stating her belief that the Court of Appeals was not bound by *In re L.V.* because that opinion is "contrary to settled law from prior opinions of this Court." *Id.* at 581 (McGee, C.J., dissenting). Respondent appealed to this Court as of right based upon the dissent.

Analysis

[1] In this appeal respondent contends that the Court of Appeals erred in dismissing his appeal instead of conducting an independent review of

the issues identified in his counsel's no-merit brief. In analyzing respondent's argument, it is helpful to first examine the origin of no-merit briefs in North Carolina.

The concept of the no-merit brief originated in the United States Supreme Court's decision in *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967). In *Anders*, an indigent defendant was convicted of felony possession of marijuana and sought to appeal. After determining that there was no legitimate basis upon which to appeal the conviction, the defendant's attorney wrote a letter to the appellate court stating that his review of the record did not reveal the existence of any meritorious appellate issues and seeking leave to withdraw from the case. *Id.* at 739–40, 742, 18 L. Ed. 2d at 495, 497.

Based on its desire to ensure that a criminal defendant's right to counsel was appropriately safeguarded while simultaneously seeking to prevent the filing of frivolous appeals, the Supreme Court adopted the following rule:

> [I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Id. at 744, 18 L. Ed. 2d at 498.

This Court first expressly applied *Anders* in reviewing a criminal defendant's no-merit brief in *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). The Court of Appeals in 2000 declined to apply *Anders*-like procedures in appeals from orders terminating parental rights. *See In re Harrison*, 136 N.C. App. 831, 833, 526 S.E.2d 502, 503 (2000). Seven years later, the Court of Appeals once again held that, based on its previous

holding in *In re Harrison*, it lacked authority to extend *Anders* protections to the filing of no-merit briefs in termination of parental rights cases. *In re N.B.*, 183 N.C. App. 114, 117, 644 S.E.2d 22, 24 (2007). In its opinion, however, the Court of Appeals urged the "Supreme Court or the General Assembly to reconsider this issue." *Id.* at 117, 644 S.E.2d at 24. In 2009, Rule 3.1(d) was adopted, which stated as follows:

> **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.

N.C. R. App. P. 3.1(d) (2018).[1]

Between the adoption of Rule 3.1(d) in 2009 and the Court of Appeals' decision in *In re L.V.*, the Court of Appeals issued numerous unpublished opinions and three published decisions reviewing no-merit briefs in termination of parental rights cases and in other cases arising under our Juvenile Code involving the abuse, neglect, or dependency of children. *See, e.g.*, *In re A.A.S.*, 812 S.E.2d 875, 879 (N.C. Ct. App. 2018); *In re M.J.S.M.*, 810 S.E.2d 370, 374–75 (N.C. Ct. App. 2018); *In re M.S.*, 247 N.C. App. 89, 94, 785 S.E.2d 590, 593–94 (2016).

In *In re L.V.*, however, the Court of Appeals—for the first time since the adoption of Rule 3.1(d)—refused to consider the issues raised in a

1. The Rules of Appellate Procedure were amended in December 2018. As of 1 January 2019, the provision authorizing no-merit briefs previously contained in Rule 3.1(d) is now codified in subsection (e). While the language addressing no-merit briefs as set out in Rule 3.1(e) differs in certain respects from that formerly contained in Rule 3.1(d), the two provisions are substantially similar.

properly filed no-merit brief on appeal from an order terminating parental rights. In its analysis the Court of Appeals stated the following:

> Respondent appeals from orders terminating her parental rights to the minor children L.V. and A.V. On appeal, Respondent's appellate counsel filed a no-merit brief pursuant to Rule 3.1(d) stating that, after a conscientious and thorough review of the record on appeal, he has concluded that the record contains no issue of merit on which to base an argument for relief. N.C. R. App. P. 3.1(d). Respondent's counsel complied with all requirements of Rule 3.1(d), and Respondent did not exercise her right under Rule 3.1(d) to file a *pro se* brief. No issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure.

In re L.V., 814 S.E.2d at 928–29 (footnotes omitted). The Court of Appeals then dismissed the respondent's appeal. *Id.* at 929.

Since *In re L.V.* was decided, panels of the Court of Appeals have differed in their approach to no-merit briefs filed under Rule 3.1(d). *See*, *e.g.*, *In re I.B.*, 822 S.E.2d 472 (N.C. Ct. App. 2018) (finding no requirement for an independent review but exercising discretion to review no-merit brief and affirming trial court's termination of parental rights order); *In re I.P.*, 820 S.E.2d 586 (N.C. Ct. App. 2018) (dismissing appeal filed pursuant to Rule 3.1(d)); *In re A.S.*, 817 S.E.2d 798, 2018 WL 4201062 (N.C. Ct. App. 2018) (per curiam) (unpublished) (summarily affirming trial court's adjudication of neglect order on basis that all appellate issues had been abandoned); *In re M.V.*, 817 S.E.2d 507, 2018 WL 3734805 (N.C. Ct. App. 2018) (unpublished) (conducting an independent review of issues raised in no-merit brief and affirming trial court's termination of parental rights order).

In determining the proper interpretation of Rule 3.1(d), we must be mindful of the fundamental interests implicated in a proceeding involving the termination of parental rights. The United States Supreme Court has recognized that "[w]hen the State initiates a parental rights termination proceeding . . . . '[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one.' " *Santosky v. Kramer*, 455 U.S. 745, 759, 71 L. Ed. 2d 599, 610 (1982) (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27, 68 L. Ed. 2d 640, 650 (1981)); *see Atkinson v. Downing*, 175 N.C. 244, 246, 95 S.E. 487, 488 (1918) ("It is fully recognized in this State that parents have prima facie the right of the custody and control of their . . . children, a

natural and substantive right not to be lightly denied or interfered with except when the good of the child clearly requires it.").

We conclude that the text of Rule 3.1(d) plainly contemplates appellate review of the issues contained in a no-merit brief. Rule 3.1(d) expressly authorizes counsel to file a no-merit brief identifying issues that could potentially support an appeal and requires an explanation in such briefs as to why counsel believes the identified issues do not require reversal of the trial court's order. Rule 3.1(d) further mandates that counsel provide the parent copies of the no-merit brief along with the record on appeal and the transcript of the proceedings in the trial court. Counsel are further directed to inform the parent in writing that he or she is permitted to submit a pro se brief to the appellate court within thirty days of the filing of the no-merit brief. *See* N.C. R. App. P. 3.1(d).

These specific requirements governing the filing of no-merit briefs clearly suggest that such briefs will, in fact, be considered by the appellate court and that an independent review will be conducted of the issues identified therein. In our view, it would be inconsistent with both the language and purpose of Rule 3.1(d) to construe this provision as either foreclosing independent appellate review of the issues set out in the no-merit brief entirely or making appellate review of those issues merely discretionary. Our interpretation of the Rule is further supported by the fact that while it requires that parents be advised by counsel of their opportunity to file a pro se brief, Rule 3.1(d) neither states nor implies that appellate review of the issues set out in the no-merit brief hinges on whether a pro se brief is actually filed by a parent. Accordingly, we overrule the Court of Appeals' decision in *In re L.V.*

Our holding today furthers the significant interest of ensuring that orders depriving parents of their fundamental right to parenthood are given meaningful appellate review. We observe that our General Assembly has expressly recognized the importance of protecting the interests of parents in termination proceedings by conferring upon them a right to appointed counsel in such cases. *See* N.C.G.S. § 7B-1101.1 (2017).

[2] Having determined that the Court of Appeals erred in failing to conduct an independent review of the issues set out in the no-merit brief filed by respondent's counsel, we would normally remand this case to the Court of Appeals with instructions for it to conduct such a review. But in furtherance of the goals of expeditiously resolving cases arising under our Juvenile Code and obtaining permanency for the juvenile in this case, we instead elect to conduct our own review of the issues raised in the no-merit brief.

In her twenty-five page brief, respondent's attorney identified three issues that could arguably support an appeal but stated why she believed each of those issues lacked merit. Based upon our careful review of the issues identified in the no-merit brief in light of our consideration of the entire record, we are satisfied that the trial court's 5 January 2018 order was supported by competent evidence and based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

Conclusion

For the reasons set out above, we hereby affirm the trial court's order terminating respondent's parental rights. The opinion of the Court of Appeals dismissing respondent's appeal is vacated.

VACATED.

IN THE MATTER OF T.N.H.

No. 92A19

Filed 16 August 2019

Termination of Parental Rights—neglected juvenile—sufficiency of evidence

The trial court's conclusion that grounds existed pursuant to N.C.G.S. § 78-1111(a)(9) was sufficient in and of itself to support termination of respondent's parental rights. Furthermore, the trial court made sufficient findings in determining that termination was in the best interests of the child.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 17 December 2018 by Judge Monica Bousman in District Court, Wake County. This matter was calendared in the Supreme Court on 1 August 2019 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Office of the Wake County Attorney, by Mary Boyce Wells, for petitioner-appellee Wake County Human Services.

Everett Gaskins Hancock LLP, by Katherine A. King, for appellee Guardian ad Litem.

Mercedes O. Chut for respondent-appellant mother.

EARLS, Justice.

Respondent mother appeals from the trial court's order terminating her parental rights to T.N.H. (Troy).[1] We affirm.

On 24 September 2015, Wake County Human Services (WCHS) obtained non-secure custody of Troy and his sister, T.B.,[2] after receiving reports of alleged domestic violence between respondent and Troy's father C.H. WCHS subsequently filed a petition in which it claimed that Troy and T.B. were neglected juveniles. The petition claimed that respondent alleged that C.H. had assaulted her and threatened to kill Troy and T.B. WCHS further noted that respondent had a history of sixteen prior Child Protective Services (CPS) reports of neglect dating back to 2000. Several of respondent's older children have been removed from her care due to neglect and have not been returned to her care.

On 18 November 2015, based on stipulations made by the parties, Troy and T.B. were adjudicated to be neglected juveniles. On 8 January 2016, the trial court entered a dispositional order in which it left custody of Troy and T.B. with WCHS and ordered respondent to comply with an out of home family services agreement. Troy and T.B. were placed in foster care and respondent was ordered to comply with a visitation plan that included visitation to be supervised by WCHS. On 13 September 2016, the trial court adopted an initial primary permanent plan of reunification with a secondary permanent plan of adoption.

On 10 July 2017, the trial court held a review hearing regarding Troy pursuant to N.C.G.S. § 7B-906.1. At that time, Troy had been placed with his paternal grandmother, J.H., for approximately eight and a half months and was thriving in his placement with her. The trial court found, however, that respondent was not making adequate progress towards satisfying the requirements of her case plan within a reasonable amount of time, that respondent had acted in a manner inconsistent with Troy's health or safety, and that it was unlikely that Troy could return to her care within six months. The trial court determined that the best primary permanent plan for Troy was guardianship and that Troy should

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b)(1).

2. Respondent's parental rights to T.B. were terminated by order entered on 6 September 2017. That order is not the subject of this appeal.

be placed in the guardianship of J.H. Respondent and C.H. were granted visitation with Troy, which was to be supervised and monitored by J.H.

On 9 January 2018, WCHS received a report that Troy was neglected and had received improper supervision. Upon investigation, WCHS determined that in December 2017, J.H. had allowed Troy to stay unsupervised with his parents in a motel room where they had been living, in violation of the trial court's orders. During Troy's stay with his parents, he left the motel room and met a man. The man took Troy to a store, bought Troy a toy, then took Troy back to his motel room where he bathed him, washed his genitals, and took photos of Troy naked. Following this incident, J.H. noticed regression in Troy's behavior and Troy told J.H. about the incident. J.H. notified Troy's father about the disclosure and C.H. soon told respondent about the incident. However, neither respondent, C.H., or J.H. contacted WCHS to report the suspected sexual abuse. Troy's disruptive behavior subsequently became so severe that he was hospitalized at UNC Hospital on 21 January 2018 and transferred to Central Regional Hospital on 24 January 2018. On 14 February 2018, WCHS obtained non-secure custody of Troy and filed a petition alleging that Troy was a neglected juvenile. On 7 June 2018, the trial court adjudicated Troy to be a neglected juvenile, terminated J.H.'s guardianship, and continued custody with WCHS. Respondent was not allowed visitation with Troy.

On 14 August 2018, WCHS filed a motion to terminate respondent's and C.H.'s parental rights on two grounds. The first ground was neglect. *See* N.C.G.S. § 7B-1111(a)(1) (2017). The second ground was that respondent's parental rights with respect to another child had been terminated involuntarily and she lacked the ability or willingness to establish a safe home. *See* N.C.G.S. § 7B-1111(a)(9) (2017). The trial court held a hearing on the motion to terminate on 13 December 2018, but C.H. could not attend because he was hospitalized so the hearing was continued as to C.H. On 17 December 2018, the trial court entered an order finding that the evidence in the case established facts sufficient to support the termination of respondent's parental rights on both grounds alleged in the motion. The trial court further concluded it was in Troy's best interests that respondent's parental rights be terminated. Accordingly, the trial court terminated respondent's parental rights. Respondent gave timely notice of appeal to this Court pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1).

Respondent argues on appeal that the trial court erred in terminating her parental rights because it did not receive sufficient evidence or make adequate findings of fact.

Our Juvenile Code provides for a two-stage process for the termination of parental rights: the adjudicatory stage and the dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2017). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes. N.C.G.S. § 7B-1109(e), (f) (2017). We review a trial court's adjudication under N.C.G.S. § 7B-1109 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). "If [the trial court] determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

Here, the trial court made extensive findings of fact in support of its determination that grounds existed to support the termination of respondent's parental rights. The court found that respondent had a history of CPS reports for neglect and that at least four of her children had been removed from her care. Troy was born prematurely at thirty weeks and respondent tested positive for both cocaine and marijuana at Troy's birth. Another child of respondent's was born prematurely at twenty-seven weeks and tested positive for cocaine at birth. Over the years there were several reports concerning respondent regarding: improper care, lack of housing, and substance abuse by respondent and C.H. There were also reports that C.H. was violent in the home and that he abused drugs in front of respondent's child. One of respondent's other sons was alleged to have been sexually abused by an individual in the neighborhood. Another report alleged that respondent allowed a registered sex offender to come into the home and that he sexually assaulted one of respondent's children.

In addition to past reports of neglect, the court found that Troy came into foster care after respondent alleged that C.H. grabbed Troy and threatened to "snap off [his] head[.]" C.H. then allegedly bit respondent and chased her with a meat cleaver. Despite this violent incident, respondent dismissed the domestic violence protective order against C.H. Respondent failed to make sufficient progress towards reunification with Troy and as a result, Troy's paternal grandmother J.H. was awarded guardianship. However, in 2018 Troy was adjudicated to

be a neglected juvenile for the second time after the court found that J.H. had allowed Troy's parents to have unsupervised contact with him, which resulted in Troy being sexually abused. The sexual abuse experienced by Troy was never reported by respondent, C.H., or J.H. As a result, all three individuals were charged with felony child abuse. Troy was diagnosed with post-traumatic stress disorder (PTSD) following an evaluation due to the sexual abuse. Another physician diagnosed Troy with anxiety disorder based on PTSD and noted Troy experienced aggression, oppositional behavior, frequent nightmares, and bowel incontinence. Despite the physicians' findings, respondent, C.H., and J.H. did not believe that Troy had been sexually abused.

Finally, the court found during the 2018 adjudication of neglect for Troy that respondent had not remedied many of the same problems that she faced in the 2015 adjudication of neglect for Troy. Respondent continued to lack safe, stable housing, failed to make progress in demonstrating appropriate parenting skills, and failed to acquire treatment for substance abuse, mental health, and domestic violence. Respondent was diagnosed with cocaine, cannabis, and alcohol use disorder. The court also found that respondent continued to be incarcerated for the felony child abuse charge against her. Because Troy had been adjudicated to be neglected twice, the court found that there was a high likelihood that Troy would be neglected again if he returned to respondent's care.

Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)). Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights. *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133.

Our Juvenile Code places a duty on the trial court as the adjudicator of the evidence. It mandates that "[t]he court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C.G.S. § 7B-1109(e) (2017). Section 1A-1, Rule 52(a)(1) of the North Carolina General Statutes provides in pertinent part: "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law[.]" N.C.G.S. § 1A-1, Rule 52(a)(1) (2017). This Court has held:

> [W]hile Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate

> facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Quick v. Quick, 305 N.C. 446, 451–52, 290 S.E.2d 653, 658 (1982) (emphasis in original).

Respondent makes several challenges to the findings of fact in this case. Respondent first argues that findings of fact 9–13, 15, 20–23, and 25–27 were improper because they merely recite prior allegations, describe what various people not in court, or unidentified, believed about certain events, and do not meet the standard for evidentiary findings sufficient to support conclusions of law. Respondent references a Court of Appeals case where the respondent similarly argued that the trial court failed to make sufficient findings of fact, but instead merely recited the testimony of witnesses at the hearing. *See In re C.L.C.*, 171 N.C. App. 438, 445–446, 615 S.E.2d 704, 708 (2005), *aff'd per curiam in part and disc. rev. improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006). In that case, the Court of Appeals, applying Rule 52(a)(1) of the North Carolina Rules of Civil Procedure and this Court's opinion in *Quick*, determined that:

> While the trial court did include findings of fact that summarized the testimony, the court also made the necessary ultimate findings of fact. There is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes. The testimony summaries were not the ultimate findings of fact; those findings were found elsewhere in the order.

C.L.C., 171 N.C. App. at 446, 615 S.E.2d at 708. Here, the challenged findings include procedural facts about the case, for example, finding of fact 11 states: "On January 9, 2002 three of [respondent's] older children were taken into foster care for neglect and those children were not returned to the care of [respondent]." In large part they include findings of fact from prior orders in the case, such as finding of fact 20: "The parents did not take sufficient precautions to prevent [Troy] from leaving the motel room unaccompanied." Rather than being summaries of testimony which occurred in *C.L.C.*, the trial court in this case relied partly on evidence from prior proceedings and findings in earlier orders, which as discussed below, is proper and appropriate.

Respondent further argues that findings 12 and 13 were insufficiently explanatory. Specifically, respondent contends that finding of fact 12[3] fails to establish the conditions which led to Troy's removal in 2012, merely stating "*concerns* with a lack of housing, improper care, and substance abuse." Finding of fact 13[4] described a report about a sexual offender who is "believed" to have sexually abused one of respondent's older children. However, these findings do contain specific allegations and they, as well as other findings challenged by respondent, were stipulated to by respondent when Troy was adjudicated neglected in 2015 and the trial court made the same findings in its 2015 and 2018 adjudications. *See In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 14, 249 S.E.2d 698, 706 (1978) ("[S]tipulations constitute judicial admissions binding on the parties and dispense with the necessity of proving the stipulated fact. Such stipulations continue in force for the duration of the controversy and preclude the later assertion of a position inconsistent therewith." (citations omitted)). Furthermore, respondent did not appeal from the trial court's adjudication order. Therefore, respondent is bound by the doctrine of collateral estoppel from re-litigating these findings of fact. *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (Under the doctrine of collateral estoppel, parties "are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.").

Respondent next argues that the trial court improperly relied on findings from dispositional orders, where the evidence was subject to a lower standard of proof, to establish that respondent had not made adequate progress towards reunification and had not corrected the conditions that led to Troy's removal. Respondent further contends that WCHS did not offer sufficient evidence at the termination hearing to enable the trial court to make an independent determination that she had not made

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3. Finding of Fact 12 states: "On April 9, 2009 there were concerns with a lack of housing, improper care, and substance abuse on the part of [respondent] and [C.H.]. On September 18, 2012 there were concerns that [C.H.] was violent and aggressive in the home and that [respondent] and [C.H.] were abusing drugs in the presence of [respondent]'s child, [T.B.]."

4. Finding of Fact 13 states: "[Troy] was born premature at thirty weeks and [respondent] tested positive for cocaine and marijuana at [Troy's] birth. There were also concerns that [respondent]'s son [Tq. B.] had been sexually abused by someone in the neighborhood and that the family was facing eviction December 27, 2012. On July 5, 2013 there was a report that [C.H.] was smoking marijuana on a daily basis in the presence of the children and [Troy], who had respiratory problems. On October 14, 2013 there was a report that [respondent] was allowing [A.J.] in the home and [A.J.] is a registered sex offender who is believed to have sexually assaulted one of [respondent]'s older children."

progress towards satisfying the requirements of her case plan. However, the evidence is more extensive than respondent acknowledges.

A trial court may take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard because where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence. *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981). As this Court has stated:

> [E]vidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights. The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect.

In re Ballard, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). We agree with the Court of Appeals' precedent holding that the trial court may not rely solely on prior court orders and reports but must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented. *In re A.M.*, *J.M.*, 192 N.C. App. 538, 541–42, 665 S.E.2d 534, 536 (2008), *appeal after remand*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (unpublished).

Here, the trial court took judicial notice of the record. We note, however, that several of the trial court's findings of fact regarding respondent's lack of progress were not taken from prior dispositional orders, which have a lower standard of proof, but from the 2018 adjudicatory order in which the findings were proven by the higher standard of "clear and convincing evidence." N.C.G.S. § 7B-805 (2017). In the 2018 adjudicatory order, while recounting the historical facts of the case, the trial court found as fact that respondent "did not make sufficient progress towards remedying the conditions which brought [Troy] into the custody of WCHS and failed to complete the Out of Home Family Services Agreement and comply with all of the orders of the Court in order to timely reunify with [Troy]." In addition to taking judicial notice of the record, the social worker assigned to the case testified at the hearing regarding respondent's historical and current lack of progress, and respondent testified that she had not yet taken any parenting classes. The trial court's findings of fact appear to be based, at least in part, on testimony provided at the hearing, sufficient to demonstrate that the trial court made an independent determination regarding the evidence presented. Accordingly, we conclude that respondent's argument is without merit.

Respondent alternatively argues that, even assuming *arguendo* the trial court's findings were not merely based solely on prior dispositional orders, the evidence generally does not support findings of fact 15, 28, 31, 32, 35[a], and 35[b] (the trial court's order erroneously contained two findings of fact 35). Our review of the record evidence indicates that there is support for each of these findings.

For example, the social worker testified in detail and without contradiction about the events which led to WCHS assuming non-secure custody in February 2018. The social worker testified that while Troy was placed in guardianship with J.H., respondent was given unsupervised visitation with Troy in violation of the trial court's orders and that Troy was sexually abused while in respondent's care. The social worker additionally testified as to respondent's case plan, her persistent failure to comply with her case plan, her various diagnoses, and her failure to make progress. Finally, the social worker testified that in her opinion, if Troy were returned to respondent's custody, there was a high likelihood that there would be a repetition of neglect.

Respondent specifically argues, regarding finding of fact 15, that the trial court erred by finding that she may still be in a relationship with C.H. At the termination hearing, when asked whether she and C.H. considered themselves to still be "together," respondent replied: "We communicate." This Court has previously held that it is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn from the testimony. *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68. Even if an inference that respondent is still "in a relationship" with C.H. is not reasonably drawn from the "we communicate" answer, this fact is not determinative of the ultimate conclusion that grounds exist to terminate respondent's parental rights. In other words, even if respondent is no longer in a relationship with C.H., the remaining findings in the case are more than sufficient to support the ultimate termination order.

Respondent further contends that there was no evidence that she had no plans "to live independently for the foreseeable future." Yet, respondent herself testified that she planned to live with an aunt upon her release from prison and she did not offer any plan for transitioning to independent living. Accordingly, we conclude the clear and convincing evidence in the record supported the trial court's findings of fact on this point.

Respondent separately argues that the trial court wholly failed to find as fact that Troy was sexually abused. However, the trial court specifically found in finding of fact 19 and finding of fact 35 that while in

respondent's care, Troy was sexually abused. Thus, respondent's contention is without merit.

We next turn to whether the trial court's findings of fact support its conclusion that grounds existed to terminate respondent's parental rights. The trial court adjudicated the existence of two grounds to terminate respondent's parental rights. First, neglect under N.C.G.S. § 7B-1111(a)(1). Second, that respondent's parental rights to another child had previously been terminated and respondent lacked the ability or willingness to establish a safe home for Troy under N.C.G.S. § 7B-1111(a)(9). "If either of the [two] grounds aforesaid is supported by findings of fact based on clear, cogent and convincing evidence, the order appealed from should be affirmed." *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133.

Section 7B-1111(a)(9) allows for the termination of parental rights where "[t]he parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home." N.C.G.S. § 7B-1111(a)(9) (2017). A "safe home" is defined by the Juvenile Code as one "in which the juvenile is not at substantial risk of physical or emotional abuse or neglect." N.C.G.S. § 7B-101(19) (2017).

Here, respondent does not dispute that her parental rights to another child were terminated by a court of competent jurisdiction. Rather, respondent argues the record does not support a finding that she lacked the ability or was unwilling to establish a safe home for Troy. The record shows that at the time of the termination hearing, respondent was still incarcerated with an unknown release date and had no stable home to provide for Troy upon her release from incarceration. This Court recognizes that "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006)) (citation omitted). However, the record indicates that respondent had a history of unstable housing, that she had not satisfactorily completed her case plan, and that Troy was sexually abused while in respondent's care during a time when she was living in a motel room. The record further demonstrates that respondent did not believe Troy was sexually abused, that she did not report the abuse, that she does not understand the trauma that Troy suffered or the seriousness of his mental health needs, and that she will be unable to meet his needs. We thus conclude the record supports the trial court's finding that respondent lacked the willingness or ability to establish a safe home. Accordingly, we hold the trial court did not err by concluding that grounds

existed pursuant to N.C.G.S. § 7B-1111(a)(9) to terminate respondent's parental rights.

The trial court's conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(9) is sufficient in and of itself to support termination of respondent's parental rights. Furthermore, the trial court made sufficient findings in determining that the termination of respondent's parental rights was in Troy's best interest. *See* N.C.G.S. § 7B-1110(a) (2017). Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF T.T.E.[1]

No. 238A18

Filed 16 August 2019

1. Juveniles—delinquency—petition—disorderly conduct—sufficient allegation

Where the delinquency petition charging a juvenile with disorderly conduct substantially tracked the language of the statute, N.C.G.S. § 14-288.4, the juvenile and his parents had sufficient notice of, and the trial court had subject matter jurisdiction over, the charged offense.

2. Juveniles—delinquency—disorderly conduct—sufficiency of evidence

There was sufficient evidence to withstand a juvenile's motion to dismiss a charge of disorderly conduct where the State presented evidence tending to show that the juvenile threw a chair at his brother across a high school cafeteria where other students were present; the juvenile then ran out of the cafeteria; the juvenile cursed at the school resource officer, who handcuffed him; other students became involved and cursed at the officer; and the officer arrested another student during the confrontation.

Justice EARLS dissenting.

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1. Pursuant to North Carolina Rule of Appellate Procedure 3.1(a), we use initials to refer to the juvenile discussed in this opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 818 S.E.2d 324 (N.C. Ct. App. 2018), vacating adjudication and disposition orders entered on 27 February 2017 by Judge Susan M. Dotson-Smith in District Court, Buncombe County. Heard in the Supreme Court on 28 May 2019 in session in the State Capitol Building in the City of Raleigh.

Joshua H. Stein, Attorney General, by Janelle E. Varley, Assistant Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Heidi E. Reiner, Assistant Appellate Defender, for juvenile-appellee.

MORGAN, Justice.

This juvenile delinquency case concerns the sufficiency of evidence required to survive a juvenile's motion to dismiss a petition alleging disorderly conduct. In light of the relatively low threshold of evidence needed to send such a matter to the finder of fact, we conclude that the district court here did not err in denying the juvenile's motion to dismiss that charge. Accordingly, we reverse the decision of the Court of Appeals with respect to this issue.

Factual Background and Procedural History

On 8 November 2016, two juvenile petitions were filed in the District Court, Buncombe County, alleging that the juvenile T.T.E. was delinquent because of his commission of the offenses of (1) disorderly conduct and (2) resisting a public officer. The disorderly conduct petition alleged that the juvenile, a junior at Clyde A. Erwin High School (EHS), "did intentionally cause a public disturbance at [EHS], Buncombe County NC, by engaging in violent conduct. This conduct consisted of throwing a chair toward another student in the school's cafeteria." The petition regarding the allegation of resisting a public officer stated that the juvenile was delinquent as a result of "[f]leeing the scene of a disorderly conduct incident, resisting the officer's attempts to escort him to the office, having to be handcuffed to be safe, and cursing at the officer."

At the adjudication hearing that was conducted on 20 and 23 February 2017, the State called two witnesses. Deputy Mickey Ray of the Buncombe County Sheriff's Office was the school resource officer at EHS on the date of the juvenile's allegedly delinquent behavior. Deputy Ray testified that on the date of the incident giving rise to the juvenile petition, he was in the cafeteria during "Warrior period," a time slot during the school day when students can receive tutoring and "get to just come

out and relax a little bit, maybe hang out in the cafeteria, or hang out on other parts of the campus, just to get a little break from everything else." Deputy Ray stated that he saw the juvenile "pick up a chair and throw it across the cafeteria" before the juvenile ran out of the room. Deputy Ray pursued the juvenile for twenty-five to thirty yards, and once Deputy Ray caught up to the student, the officer grabbed the juvenile while still behind him. In response to Deputy Ray's instruction to "come back with me," the juvenile "resisted," saying, "No. No. No."

Deputy Ray brought the juvenile to the school lobby and searched him, at which point "all the other kids started trying to get involved." According to the officer's testimony, the juvenile was cursing at Deputy Ray, who decided to put handcuffs on the juvenile. Other students also began to yell at the officer, and Deputy Ray felt the need to handcuff and later to arrest one of the students who had tried to involve himself in the situation with the juvenile. When asked, "Based on . . . how the other students reacted" to the juvenile's act of throwing the chair and then resisting Deputy Ray's attempt to stop and question him, whether the incident "in any way disrupt[ed] or disturb[ed] the process of the school," specifically with regard to students' efforts to go to classes, Deputy Ray responded, "Yes, sir. Absolutely."

Upon further examination at trial, Deputy Ray provided additional details about the school cafeteria incident. He related that the juvenile "chucked" the chair underhandly, but he was unable to say whether the juvenile had thrown the chair "at" anyone in particular; however, the juvenile told Deputy Ray that he had thrown the chair at the juvenile's brother—another EHS student—in the course of "playing or something." Regarding his perception of the juvenile's intent behind the act of throwing the chair, Deputy Ray was asked the following question at trial and responded as follows:

> Q. Did it appear to you that, based on what you saw with the chair throwing incident, that [juvenile] was playing, or did it seem like something that was a little more violent?
>
> A. I couldn't really tell, because just like I told you at the beginning, it's just something I ain't never seen before in my 10 years of working as an SR [school resource officer] in the city schools and the county schools. That's the first time I've seen something like that.

On cross-examination, Deputy Ray testified that he did not see any students have to duck or otherwise maneuver to avoid the chair

thrown by the juvenile. Deputy Ray also tempered the testimony that he offered on direct examination by stating that he could not definitively say whether the juvenile's actions were actually disruptive to other students as they went to class.

In addition to Deputy Ray's account, the district court also heard testimony from the State's witness Tate McQueen, a history teacher and soccer coach at EHS. McQueen did not see the chair-throwing incident in the cafeteria but did observe Deputy Ray pursuing the juvenile after the occurrence. McQueen followed Deputy Ray in order to provide assistance as the situation unfolded. At trial, McQueen offered his description of what he observed:

> When I rounded the corner from the main foyer to the language arts, or foreign language hall, I observed Officer Ray with a student. At that time, the student was pulling away from Officer Ray. I did not see the moment in which they first came in contact. I observed Officer Ray telling the student to come with him. The student was pulling away.
>
> And as the student and Officer Ray were coming back into the main foyer towards the office, we had a significant safety issue with students gravitating towards that situation. Officer Ray was trying to deal with one student, and there were, I would say, three, four, upwards of five students that were now engaging in this process. Others were stopping instead of going to class. Once that release bell rings, they have about five minutes to get to class. If you've been to Erwin, you know how expansive our building is, so if they are not moving, they are going to be late for class. They will be late for instruction. At that time, I turned as a buffer for Officer Ray. I was parroting what he was saying, which is "Go to class," while also trying to get the student to calm down and stop. There was a lot of profanity that was being directed at Officer Ray from [juvenile], and there were others. My involvement at that point was to plead with the student to please stop, and to be calm, and that he was making it worse. "Just stop and breathe. You are making it worse."
>
> At this point, another student reaches in and physically grabs [juvenile] to pull him. Officer Ray is turning to tell students to go to class. The student that has made contact with [juvenile] to pull him is refusing to go to class

> and comply. At that point, Officer Ray took a hand and grabbed that student and had both students, essentially, held. They slid down the wall maybe two feet, maybe three, to the conference room. They went in. I went in behind them, so I observed that part of the process.

The juvenile did not testify or present any evidence. Through counsel, the juvenile moved to dismiss both petitions on the basis that the State had presented insufficient evidence to support an adjudication of delinquency.

The district court denied the motion to dismiss and found as fact that "[j]uvenile threw a chair in the cafeteria where students and teacher[s] were present and ran away [illegible]. Juvenile refused to cooperate with officer when asked and became belligerent. Juvenile delayed the investigation and caused a scene instead of cooperating." The district court adjudicated the juvenile to be delinquent for disorderly conduct and for resisting a public officer. On 27 February 2017, the district court entered an order imposing a Level 1 disposition. The juvenile gave notice of appeal.

In the Court of Appeals, the juvenile argued that his petition for disorderly conduct under N.C.G.S. § 14-288.4 was defective because it did not specify the subsection of the statute that he had allegedly violated. The juvenile also challenged on appeal the district court's denial of his motion to dismiss both petitions due to insufficiency of the evidence. The entire Court of Appeals panel agreed that the evidence was insufficient to support the juvenile's adjudication of delinquency for resisting a public officer, and the court therefore vacated the adjudication and disposition for this charge. *In re T.T.E.*, 818 S.E.2d 324, 328–29 (N.C. Ct. App. 2018).[2] However, the Court of Appeals panel divided regarding the sufficiency of the evidence to support the disorderly conduct adjudication. The majority agreed with the juvenile that

> [t]he evidence was not sufficient to show that the juvenile fought, engaged in violent conduct, or created an imminent risk of fighting or other violence. Although there were other students in the cafeteria—a very large room—when the juvenile threw a chair, no other person was nearby, nor did the chair hit a table or another chair or anything else. Juvenile then ran out of the cafeteria. This is not "violent conduct or . . . conduct creating the threat

2. The resolution of the alleged offense of resisting a public officer is not before this Court.

> of imminent fighting or other violence." No one was hurt or threatened during the event and juvenile did not escalate the situation by yelling, throwing other things, raising fists, or other such conduct that along with the throwing of the chair could be construed to indicate escalating violent behavior. Throwing a single chair with no other person nearby and without attempting to hit another person and without hitting even any other item in the cafeteria is not disorderly conduct as defined by North Carolina General Statute § 14-288.4(a)(1).

Id. at 327–28 (citing and quoting N.C.G.S. § 14-288.4(a)(1)). The Court of Appeals consequently vacated the juvenile's adjudication of delinquency on the charge of disorderly conduct as well as the disposition that the district court had entered upon that delinquency adjudication. *Id.* at 328. In light of this outcome, the majority did not address the juvenile's contention that there was a fatal defect in the disorderly conduct petition.

The dissenting judge disagreed with the majority regarding the sufficiency of the evidence on the charge of disorderly conduct, opining that

> viewing this evidence in the light most favorable to the State, the safety resource officer's testimony that juvenile threw a chair, which the juvenile admitted he was throwing at another student, his brother, provided substantial evidence of violent conduct, from which the trial court could reasonably determine that juvenile's act of throwing a chair at another student amounted to violent conduct.

Id. at 330 (Arrowood, J., concurring in part and dissenting in part). Regarding the alleged defect in the disorderly conduct petition, the dissenting judge further opined:

> The petition at issue alleged juvenile violated N.C. Gen. Stat. § 14-288.4 when he "did intentionally cause a public disturbance at Clyde A. Erwin High School, Buncombe County NC, by engaging in violent conduct. This conduct consisted of throwing a chair toward another student in the school's cafeteria." Because this language closely tracks the statutory language of N.C. Gen. Stat. § 14-288.4(a)(1), "[d]isorderly conduct is a public disturbance intentionally caused by any person who . . . [e]ngages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence[,]" and the petition lists the offense as N.C. Gen. Stat.

> § 14-288.4, I would hold that, based on the totality of the circumstances, the petition averred the charge with sufficient specificity that juvenile was clearly apprised of the conduct for which he was charged. *See State v. Simpson*, 235 N.C. App. 398, 402-403, 763 S.E.2d 1, 4-5 (2014) (holding an indictment was not fatally defective even though it did not list which subsection of a statute the defendant was charged with violating because it was clear from the indictment which subsection was charged). Therefore, the petition was not fatally defective, and the trial court had jurisdiction to enter the adjudication and disposition orders against juvenile.

Id. at 329–30.

The State filed a motion for temporary stay and a petition for writ of *supersedeas* on 1 August 2018. This Court allowed the motion to stay on 2 August. On 21 August 2018, the State filed its notice of appeal in this Court based upon the dissent in the lower appellate court. We allowed the State's petition for writ of *supersedeas* on 4 September 2018.

Analysis

[1] As an initial matter, we briefly address the question of whether the delinquency petition charging disorderly conduct sufficiently alleged a violation of N.C.G.S. § 14-288.4. "[A] petition in a juvenile action serves essentially the same function as an indictment in a felony prosecution and is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity that the accused is clearly apprised of the conduct for which he is being charged." *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004); *see also In re Burrus*, 275 N.C. 517, 530, 169 S.E.2d 879, 887 (1969) ("Notice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding; that is, notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity." (citation omitted)), *aff'd sub nom. McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (plurality opinion). As the dissenting opinion in the present case correctly noted, the petition here closely tracked the language of N.C.G.S. § 14-288.4. This Court has long held that

> the "true and safe rule" for prosecutors in drawing indictments is to follow strictly the precise wording of the statute because a departure therefrom unnecessarily raises doubt

> as to the sufficiency of the allegations to vest the trial court with jurisdiction to try the offense. Nevertheless, it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime. Thus, . . . an indictment shall not be quashed "by reason of any informality or refinement" if it accurately expresses the criminal charge in "plain, intelligible, and explicit" language sufficient to permit the court to render judgment upon conviction.

State v. Sturdivant, 304 N.C. 293, 310–11, 283 S.E.2d 719, 731 (1981) (footnote and citations omitted). Here, the State followed the articulated "true and safe rule" by substantially employing the terminology of N.C.G.S. § 14-288.4 in the delinquency petition that initiated the disorderly conduct action. Because the petition averred the offense of disorderly conduct with sufficient specificity to clearly apprise the juvenile here of the offense with which he was charged, the district court was properly cloaked with subject-matter jurisdiction over this alleged offense.

[2] With the jurisdictional issue having been addressed, we turn to the substantive issue regarding the sufficiency of the evidence presented by the State at trial to withstand the juvenile's motion to dismiss.

This Court performs de novo review of the denial of a motion to dismiss for insufficiency of the evidence in order to determine "*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) (emphasis added) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)); *see also*, *e.g.*, *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Turnage*, 362 N.C. at 493, 666 S.E.2d at 755 (quoting *Crawford*, 344 N.C. at 73, 472 S.E.2d at 925). In undertaking this determination, "[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. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citations omitted). "[S]o 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.' " *Id.* at 99, 678 S.E.2d at 594 (quoting *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 140 (2002)).

"Disorderly conduct is a public disturbance intentionally caused by any person who" perpetrates one or more acts listed in the General Statutes. N.C.G.S. § 14-288.4(a) (2017). In the case at bar, the disorderly conduct petition averred that the juvenile was delinquent for a violation of section 14-288.4(a)(1). Although the juvenile petitions did not specifically cite subdivision (a)(1) of that statute, we note that the juvenile's alleged act of "throwing a chair toward another student in the school's cafeteria" placed him in the category of "any person who . . . [e]ngages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence." *Id.* § 14-288.4(a)(1). A "public disturbance" is defined as:

> Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, *schools*, prisons, apartment houses, places of business or amusement, or any neighborhood.

Id. § 14-288.1(8) (2017) (emphasis added). Accordingly, this Court must determine whether, as we view the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference, *see Miller*, 363 N.C. at 98, 678 S.E.2d at 594, substantial evidence was presented at the adjudication hearing that the juvenile perpetrated an "annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place" by means of "[e]ngag[ing] in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence." N.C.G.S. §§ 14-288.1(8), -288.4(a)(1).

The juvenile contends that the evidence presented by the State could support an inference that he was simply engaged in horseplay with his brother, that he did not intend to harm any person or property, and that he did not actually cause harm to any person or property. While we do not disagree that such inferences could be drawn from the evidence, *any* contradictions or conflicts in the evidence are resolved in favor of the State on a motion to dismiss for insufficiency of the evidence. The

juvenile's misconstruction of the law is likewise exhibited in the erroneous conclusion of the Court of Appeals majority that "[t]hrowing a single chair with no other person nearby and without attempting to hit another person and without hitting even any other item in the cafeteria is not disorderly conduct as defined by North Carolina General Statute § 14-288.4(a)(1)." *In re T.T.E.*, 818 S.E.2d at 328 (majority opinion). Based on its own review of the evidence presented at the adjudication hearing, the majority of the lower appellate court erroneously decided to ultimately determine whether the juvenile committed the offense of disorderly conduct. But the proper question before the district court, the Court of Appeals, and now this Court, when considering the juvenile's motion to dismiss based on all of the evidence presented at the adjudication hearing, which must be viewed in the light most favorable to the State, is whether the evidence merely could support an inference that the juvenile committed the offense of disorderly conduct. *See Miller*, 363 N.C. at 98, 678 S.E.2d at 594.

In the light most favorable to the State, the evidence presented at the adjudication hearing tended to show that the juvenile threw a chair at his brother across the EHS cafeteria where other students were present. The juvenile then ran out of the cafeteria and through the school's hallways. The juvenile's behavior occurred during a part of the school day when students were not in class and were allowed to move relatively freely about the campus in order to receive tutoring and to relax. As a result, a number of EHS students were able to observe the interaction between the juvenile and Deputy Ray after the school resource officer saw the juvenile throw the chair and after the deputy was able to successfully pursue the juvenile. While the school resource officer executed his responsibilities which included a search of the juvenile, the juvenile cursed at the deputy. After the school resource officer opted to place the juvenile in handcuffs, other students also directed profane words toward the deputy in raised voices and became actively involved in the interaction between the two, resulting in the officer handcuffing and arresting another EHS student. The deputy considered the juvenile's act of throwing the chair as constituting conduct that disrupted or disturbed the process of school, including the efforts of students to attend their classes in a timely fashion. EHS faculty member McQueen described the circumstances as constituting "a significant safety issue with students gravitating towards that situation" to the extent that the teacher and coach "turned as a buffer for Officer Ray."

Upon viewing this evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference as required

by *Miller*, we conclude that substantial evidence was presented at the adjudication hearing that the juvenile perpetrated an "annoying, disturbing, or alarming act . . . exceeding the bounds of social toleration normal for" Clyde A. Erwin High School during the course of the instructional day through a public disturbance as defined by N.C.G.S. § 14-288.1(8) by "engaging in violent conduct" by "throwing a chair toward another student in the school's cafeteria." As a result, the juvenile petition alleged a violation of N.C.G.S. § 14-288.4, which defines the public disturbance of disorderly conduct. The evidence presented by the State was sufficient to warrant the denial of the juvenile's motion to dismiss the petition that alleged his commission of the delinquent act of disorderly conduct. In applying the *Miller* standard to the current case, the district court properly denied the juvenile's motion to dismiss.

Based on the foregoing considerations, as to the issue before this Court on appeal, namely, whether the Court of Appeals majority erred in holding that the State's evidence was insufficient to support the adjudication for disorderly conduct, the decision of the Court of Appeals is reversed. Accordingly, we reverse the decision of the Court of Appeals vacating the adjudication and disposition orders relating to that offense. The Court of Appeals decision to vacate the adjudication and disposition orders entered in regard to the charge of resisting a public officer remains undisturbed.

REVERSED.

Justice EARLS, dissenting.

Here the State presented evidence that a high school student threw a chair in his school cafeteria. Beyond the basic fact that a chair was thrown, the State's sole witness to this event, the school's resource officer, provided few details regarding the specifics of this chair-throwing, save that the chair did not hit anyone, that the officer did not see anyone moving to avoid being hit by the chair, and that the officer could not say, despite being very close to the student, whether there was any risk of the chair striking any other person or object in the cafeteria. The officer testified that the student later told him that the student had thrown the chair "at his brother because they were playing or something." The majority considers this testimony to be substantial evidence from which a rational juror could find—beyond a reasonable doubt—that the student, T.T.E., is guilty of the Class 2 misdemeanor offense of disorderly conduct on the basis that he *intentionally* caused a public disturbance by engaging in *violent conduct*. Either the majority is adopting

an uncommonly broad view of what constitutes violent conduct, or, in applying what it deems a "relatively low threshold" for sufficiency of the evidence,[1] the majority is mistaking evidence that raises a mere suspicion of guilt for substantial evidence. In any event, because I conclude that the State presented insufficient evidence that T.T.E. committed the offense of disorderly conduct by intentionally causing a public disturbance by engaging in violent conduct, I respectfully dissent.

"Disorderly conduct" is a criminal offense defined as "a public disturbance[2] intentionally caused by any person who" commits any of the acts set forth in N.C.G.S. § 14-288.4(a)(1)-(8), including, *inter alia*, any person who:

> (1) Engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence.
>
> . . . .
>
> (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

N.C.G.S. § 14-288.4(a)(1), (6) (2017). Here, Deputy Mickey Ray of the Buncombe County Sheriff's Office filed a petition in district court on 8 November 2016 alleging that T.T.E. was a delinquent juvenile because he had committed the Class 2 misdemeanor offense of disorderly conduct by "intentionally caus[ing] a public disturbance at Clyde A. Erwin High School, Buncombe County NC, by engaging in violent conduct. This conduct consisted of throwing a chair toward another student in the school's cafeteria."

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1. The majority cites no precedent for the assertion that the sufficiency of evidence standard requires only a "relatively low threshold" of evidence.

2. As the majority notes, a "public disturbance" is defined as:

> Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

N.C.G.S. § 14-288.1 (2017).

The majority concludes that although the disorderly conduct petition did not specify which of the various subsections of N.C.G.S. § 14-288.4(a) was at issue, the petition gave sufficient notice to T.T.E. of the specific conduct and offense for which he was being charged because it closely tracked the language of N.C.G.S. § 14-288.4(a)(1) ("Engages in . . . violent conduct"). Assuming *arguendo* that T.T.E. did have sufficient notice that he was being charged under (a)(1),[3] the State was, as a result, necessarily limited to proceeding on what was alleged in the petition—namely, that T.T.E. intentionally committed the offense of disorderly conduct under (a)(1) by "engaging in violent conduct," specifically "by throwing a chair toward another student in the cafeteria."

Accordingly, the State was required to present *substantial evidence* that T.T.E. intentionally caused a public disturbance by engaging in violent conduct by throwing a chair toward another student in the cafeteria. *See State v. Barnes*, 345 N.C. 146, 148, 478 S.E.2d 188, 189 (1996) (stating that a "motion to dismiss must be allowed unless the State presents substantial evidence of each element of the crime charged" (quoting *State v. Davis*, 340 N.C. 1, 11, 455 S.E.2d 627, 632, *cert. denied*, 516 U.S. 846 (1995))). "Evidence is not substantial if it arouses only a suspicion about the fact to be proved, even if the suspicion is strong." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986) (citing *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983)); *see also State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) ("A motion to dismiss should be granted, however, '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.' " (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988))). While the majority, in its discussion of the applicable de novo standard of review, correctly notes that "[s]ubstantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion," *Turnage*, 362 N.C. at 493, 666 S.E.2d at 755 (citation omitted), it is helpful to bear in mind the nature of this "conclusion" that must be adequately supported. Specifically, "[s]ubstantial evidence is evidence from which any rational trier of fact could find the fact to be proved *beyond a reasonable doubt*." *Sumpter*, 318 N.C. at 108, 347 S.E.2d at 399 (emphasis added) (citing *State v. Pridgen*, 313 N.C. 80, 94–95, 326 S.E.2d

3. It is worth noting, however, that the State attempted to prove T.T.E.'s guilt at the adjudicatory hearing under both (a)(1) and (a)(6) ("Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.").

618, 627 (1985)); *see also State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998) ("A defendant's motion to dismiss must be denied if the evidence considered in the light most favorable to the State permits a rational jury to find beyond a reasonable doubt the existence of each element of the charged crime and that defendant was the perpetrator." (citation omitted)). After all, the evidentiary standard in a juvenile delinquency proceeding is the same as that in adult criminal proceedings. *See* N.C.G.S. § 7B-2409 (2017) ("The allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt."); *see also*, *e.g.*, *In re A.N.C.*, *Jr.*, 225 N.C. App. 315, 324, 750 S.E.2d 835, 841 (2013) ("A 'juvenile is therefore entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults.' " (quoting *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001))).

The only evidence presented here by the State concerning T.T.E's actions in the cafeteria was the testimony of Deputy Ray, who was the school resource officer for Clyde A. Erwin High School at the time of the incident. Although Ray was an eyewitness to the chair-throwing, as discussed further below, the most salient part of his testimony with respect to the offense charged was his second-hand relation of what T.T.E. told him after the incident:

> Q. And did [T.T.E.] ever tell you why he threw the chair?
>
> A. He said he was -- him and his brother -- he said he threw it at his brother because they were playing or something.
>
> . . . .
>
> THE WITNESS: [T.T.E.] told me that him and his brother was having some issues, or were playing or something. And he threw the chair at his brother.
>
> . . . .
>
> Q. So students would not have been disrupted, in that they weren't in that area to begin with, correct?
>
> A. Yes, there was students there. At one particular time, there were students. They were not -- at the time that he threw the chair, I don't know if there was students at that particular time or not, because they were running from him, each other. They were playing -- horse playing with each other.
>
> Q. Okay. So let's go back. Now we have students horse playing. So who was horse playing with whom?

> A. Well, according to his statement, after I talked to him and asked him what happened, he said that him and his brother was horse playing or he was doing something with his brother. And they were going at it.

Viewing it in the light most favorable to the State, Ray's testimony in this respect can fairly be said to raise a suspicion that T.T.E. engaged in violent conduct, but no more than a suspicion. For instance, any inference from this testimony alone that T.T.E. was attempting to *strike* or *injure* his brother with the chair, would not be one from which a rational jury could find such facts beyond a reasonable doubt. I cannot conclude that on the basis of this second-hand relation of T.T.E.'s out of court statements—to the effect that T.T.E. threw a chair at his brother because they were playing or something—any rational trier of fact could find beyond a reasonable doubt that T.T.E. intentionally threw a chair in a manner that constituted *violent conduct* in order to cause a public disturbance.

Certainly, there are ways in which throwing a chair would conceivably constitute violent conduct. Yet, unless the majority intends to hold that throwing a chair in a school cafeteria is *per se* violent conduct,[4] the

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4. This notion was rejected by the Court of Appeals majority below. Misconstruing that part of the opinion, the majority here asserts that the majority below "erroneously decided to ultimately determine whether the juvenile committed the offense of disorderly conduct." A fair reading of the Court of Appeals majority's decision, however, clearly shows that the court was not purporting to adjudicate an ultimate issue of fact, but rather concluded that the State's evidence only gave rise to a reasonable inference that a chair was thrown, which, without more, is not violent conduct as a matter of law and is therefore insufficient evidence to be presented to the jury:

> The State contends the evidence shows "arguably violent conduct" because *if* the juvenile had thrown the chair at another student and *if* it hit them, "it presumably would have hurt them."
>
> Although we view the evidence in the light most favorable to the State, we do not go so far as to come up with hypothetical events that could have happened if juvenile actually did something in addition to what the actual evidence shows. . . . The State simply asks we infer too much from the evidence it presented.
>
> The evidence was not sufficient to show that the juvenile fought, engaged in violent conduct, or created an imminent risk of fighting or other violence. Although there were other students in the cafeteria—a very large room—when the juvenile threw a chair, no other person was nearby, nor did the chair hit a table or another chair or anything else. Juvenile then ran out of the cafeteria. This is not "violent conduct or . . . conduct creating the threat of imminent fighting or other violence." No one was hurt or threatened during the event and juvenile did not escalate the situation by yelling, throwing other things, raising fists, or other such conduct that along with the throwing of the chair could be construed to indicate escalating violent behavior. Throwing a single chair with no other person

specifics would seem necessary: How far and high did the chair travel? Was the chair thrown overhand or underhand? Was the chair moving fast or slow? Was the chair thrown with great force? How big was the chair? Did the chair make a loud crash? Was T.T.E. trying to hit his brother, or anyone or anything else? Was his brother waiting to catch the chair? Did the chair come close to hitting anything? The sole eyewitness to testify at the hearing on this issue, Deputy Ray, did provide the answers to a few of these questions. Of course, viewing his testimony in the light most favorable to the State, Ray's description of the event itself must largely be ignored as it tends to contradict the State's suggestion that that this chair-throwing amounted to violent conduct. *See State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (stating that "evidence unfavorable to the State is not considered" (citing *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001), *cert. denied*, 535 U.S. 1114 (2002))).

According to Ray, the incident happened during "Warrior period . . . where all the students get to just come out and relax a little bit, maybe hang out in the cafeteria." Ray was at the cafeteria wall, "just standing there observing" the 50 or 60 students in the cafeteria at that time. Near the end of Warrior period, Ray saw T.T.E. pick up a chair and throw it "in an underhanded motion." According to Ray, "I noticed [T.T.E.] pick up a chair and throw it across the cafeteria, kind of like, throw it across. . . . I saw him pick up the chair, I thought he was just going to move it, but he kind of picked it up and chucked it." Ray testified:

> Q. And you testified that this is in a cafeteria full of students -- about 50 or 60 students, correct?
>
> A. Yes.
>
> Q. And none of these students were touched with the chair?
>
> A. No. Because --
>
> Q. Did you see any students ducking from the chair being thrown across the cafeteria?
>
> A. No. I didn't see any of that.

> nearby and without attempting to hit another person and without hitting even any other item in the cafeteria is not disorderly conduct as defined by North Carolina General Statute § 14-288.4(a)(1). We vacate juvenile's adjudication and disposition for disorderly conduct.

In re T.T.E., 818 S.E.2d at 327–28 (citations omitted) (second alteration in original).

After throwing the chair, T.T.E. "ran out of the cafeteria, and ran down to the foreign language halls." Ray testified that when T.T.E. threw the chair, he was "very close by" to T.T.E. and that T.T.E. was "pretty much, within [his] full range of sight." Despite his close proximity to T.T.E., Ray had few other details to offer:

> Q. And did he throw it at anybody in particular, that you know of?
>
> A. I can't remember, to be honest.
>
> . . . .
>
> Q. Did it appear to you that, based on what you saw with the chair throwing incident, that [T.T.E.] was playing, or did it seem like something that was a little more violent?
>
> A. I couldn't really tell[.]
>
> . . . .
>
> Q. . . . Were any of the tables hit, whenever this chair was moved?
>
> A. I can't recall.
>
> Q. Do you know if any of the chairs were hit, due to the chair being moved or thrown?
>
> A. I can't recall. Once he threw the chair, I turned around and went out, after he ran.
>
> . . . .
>
> Q. Okay. So let's stop right there. Can you remember, if you recall, what was [T.T.E.] looking at when the chair was thrown?
>
> A. Well, he looked down to pick up the chair, and he picked it up and threw it.
>
> Q. And there were no children in his general vicinity, correct?
>
> A. I can't really -- I can't tell.

Thus, Ray's description of the event does little to bolster what is missing from T.T.E.'s out of court statement—that is explain what, exactly, about this chair-throwing made it violent conduct done intentionally to cause a public disturbance.

The majority, perhaps recognizing the paucity of evidence concerning the actual throwing of the chair, devotes considerable attention to the evidence regarding what occurred *after* the chair was thrown in the cafeteria, when the "6'3-and-a-half" Deputy Ray chased down the "5 foot" tall T.T.E. in the foreign language hallway, "snuck up on him" and grabbed him by the sweatshirt, then "brought him back up to the main lobby where [Ray] put him on the wall, just to search him, and then put cuffs on him." It was at that point that T.T.E. "started cussing, calling [Ray] all kind of names" and was "when all the other kids started trying to get involved."[5] According to Ray, "Another guy, I had to handcuff him also, because he was trying to keep me from, you know, getting -- just, you know, detaining him. So, he came up behind me, and I grabbed him and put him on the wall also." This evidence was relevant to defendant's adjudication for the charge of resisting a public officer, which the Court of Appeals unanimously vacated for insufficient evidence, *In re T.T.E.*, 818 S.E.2d 324, 328–29 (2018), and which, because the State did not seek further review of that decision, is not before this Court. This evidence presumably would have been relevant had the State elected to adjudicate T.T.E. for disorderly conduct under a different section of N.C.G.S. § 14-288.4 and for conduct separate from that listed in the petition. This evidence, however, is irrelevant as to whether T.T.E. intentionally caused a public disturbance by engaging in violent conduct "by throwing a chair toward another student in the cafeteria."

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5. The majority states that "[t]he deputy considered the juvenile's act of throwing the chair as constituting conduct that disrupted or disturbed the process of school, including the efforts of students to attend their classes in a timely fashion." This portion of the hearing was, in part, an attempt by the prosecutor to elicit testimony regarding N.C.G.S. § 14-288.4(a)(6), which was not alleged in the petition. More importantly, however, this statement was referring, not to the throwing of the chair in the cafeteria, of which there was no evidence concerning any disruption, but rather to T.T.E.'s conduct in the hallway when being detained by Ray:

> Q. Now, as [T.T.E.] was pulling away from you and yelling at you, what duty were you trying to perform?
>
> A. I was trying to detain him and bring him back to the office to sit down and have a discussion with the administrators and do what I needed to do. And at that point in time, he was resisting and didn't want to come.
>
> Q. Based on your view of how the other students reacted to all of this as it was going on, did it, in your opinion, in any way disrupt or disturb the process of the school --
>
> A. Absolutely.
>
> Q. -- by which I mean, going back to classes?
>
> A. Yes, sir. Absolutely.

Indeed, much of the issue in this case stems from the fact while the petition limited the State to adjudicating T.T.E. for disorderly conduct based on his actions in the cafeteria, the State sought in earnest to adjudicate T.T.E. for his conduct after he threw the chair and left the cafeteria. For instance, at the hearing, the State argued in closing:

> When that one student throws a chair, and then 50 or 60 students see the deputy standing up against the wall with his arms crossed, and doesn't do anything, now chair throwing is okay in the school cafeteria. So he goes down there to address that situation, make sure it doesn't happen again. And then it blew way out of proportion. It did not have to do that. Cuffs did not have to get involved. This did not -- this whole thing did not have to happen. It could've just been a quick, "Hey, what's going on? You horsing around? Well, don't do that anymore." But it was [T.T.E.] that elevated that situation.
>
> . . . .
>
> Violent conduct is not just picking up a chair and removing it from the floor entirely, but also when you are standing in a hallway, surrounded by a bunch of students, a crowd, and telling an officer, "Fuck you. You ain't shit," and physically fighting with him. Now, that's absolutely disorderly conduct.

Certainly, "chair throwing . . . in the school cafeteria" is normally not acceptable conduct, and schools have disciplinary measures to address it. There are, however, countless situations in which such behavior falls short of "fighting or other violent conduct." When the State seeks to invoke criminal processes on the basis of such conduct, it must present substantial evidence that the conduct amounts to a criminal offense. Here the State failed to do so. Accordingly, I dissent.

IN RE Z.L.W.

[372 N.C. 432 (2019)]

IN THE MATTER OF Z.L.W., Z.M.W.

No. 116A19

Filed 16 August 2019

Termination of Parental Rights—disposition—not an abuse of discretion

The trial court did not abuse its discretion by concluding that termination of respondent's parental rights was in the best interests of two children. The trial court appropriately considered the factors stated in N.C.G.S. § 78-1110(a) when determining their best interests, and the determination that respondent's strong bond with the children was outweighed by other factors was not manifestly unsupported by reason.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 12 December 2018 by Judge Doretta L. Walker in District Court, Durham County. This matter was calendared in the Supreme Court on 1 August 2019 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

The Law Office of Derrick J. Hensley, PLLC, by Derrick J. Hensley, Esq., and Senior Assistant County Attorney Bettyna Belly Abney, for petitioner-appellee Durham County Department of Social Services.

Daniel Heyman for appellee Guardian ad Litem.

Mary McCullers Reece for respondent-appellant father.

NEWBY, Justice.

Respondent appeals from the trial court's order terminating his parental rights to Z.L.W. and Z.M.W. (Zena and Zadie).[1] We affirm.

On 19 March 2015, the Durham County Department of Social Services (DSS) filed a petition alleging that Zena and Zadie were neglected juveniles. DSS had received a Child Protective Services report on 9 June 2014

1. Pseudonyms are used to protect the identities of the juveniles and for ease of reading. *See* N.C. R. App. P. 42(b)(1).

claiming that respondent, the father of the juveniles, was "extremely violent" with the juveniles' mother in their presence and had given her a black eye. The person who filed the report expressed concern that respondent might kill the juveniles and their mother. The person further reported an incident during which respondent drove off recklessly with the juveniles in the car while they were not safely secured and that respondent had threatened to fire multiple gun shots at the mother's residence.

DSS began providing services in July 2014. Respondent was required to complete a mental health and substance abuse assessment, engage in domestic violence counseling, and participate in a parent education program. In August 2014, respondent tested positive for marijuana. In September 2014, he completed a substance abuse assessment, but declined a drug screen. Respondent was referred to Carolina Outreach for mental health services, but could not be reached at the contact numbers he provided to social workers. Respondent also failed to attend a parenting education program. At the time the neglect petition was filed, respondent was in the Durham County Detention Center facing criminal charges of assault on a female, driving while license revoked, larceny, and second-degree trespassing.

On 5 May 2015, the trial court adjudicated Zena and Zadie neglected based on findings of fact as stipulated by the parties. The trial court ordered that custody remain with their mother and required both the mother and respondent to comply with a case plan to correct the conditions that led to the adjudication of neglect.

On 4 November 2015, the trial court entered a review order in which it found that respondent failed to participate in mental health or substance abuse services and used profanity when speaking with a DSS social worker. During a hearing on 3 February 2016, the juveniles' mother tested positive for cocaine. On 3 March 2016, the trial court entered a review order noting the mother's continued use of illegal substances and granting custody of Zena and Zadie to their maternal grandmother.

In a review order entered on 27 April 2016, the trial court found that respondent had not complied with recommended services. In June 2016, the maternal grandmother could no longer provide housing for Zena and Zadie, and she made arrangements for the paternal grandmother to provide care for the juveniles. In a review order entered on 12 September 2016, the trial court granted DSS legal custody, but ordered that Zena and Zadie continue to reside with the paternal grandmother. The placement ended, however, after respondent took Zena and Zadie out of the paternal grandmother's home during an unauthorized visit. In

a permanency planning review order entered on 20 October 2017, the trial court ceased reunification efforts and ordered DSS to file a petition to terminate respondent's and the mother's parental rights.

On 29 June 2017, DSS filed a motion and petition to terminate respondent's and the mother's parental rights on the grounds of neglect, willful failure to make reasonable progress, and failure to pay support. *See* N.C.G.S. § 7B-1111(a)(1)–(3) (2017). DSS additionally alleged that respondent had failed to legitimize Zena. *See id.* § 7B-1111(a)(5) (2017). On 10 April 2018, the mother relinquished her parental rights. On 12 December 2018, the trial court entered an order in which it determined grounds existed to terminate respondent's parental rights regarding Zena pursuant N.C.G.S. § 7B-1111(a)(1), (2), and (5), and regarding Zadie pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). The trial court further concluded it was in Zena's and Zadie's best interests that respondent's parental rights be terminated. Accordingly, the trial court terminated respondent's parental rights. Respondent gave timely notice of appeal pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1), but improperly designated the Court of Appeals as the court to which appeal was being taken. On 3 May 2019, respondent filed a petition for writ of certiorari, and this Court allowed the petition on 22 May 2019.

Respondent's sole argument on appeal is that the trial court abused its discretion when it determined termination of his parental rights was in Zena's and Zadie's best interests. We disagree.

Our Juvenile Code provides for a two-stage process for the termination of parental rights: the adjudicatory stage and the dispositional stage. *Id.* §§ 7B-1109, -1110 (2017). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under section 7B-1111(a) of the North Carolina General Statutes. *Id.* § 7B-1109(e), (f) (2017). During the adjudicatory stage in this case, the trial court found that statutory grounds to terminate respondent's paternal rights existed, and that finding is not being challenged on appeal.

When the trial court finds grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

Id. § 7B-1110(a) (2017). The trial court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion. *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984)). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Here, at disposition, the trial court incorporated its adjudicatory findings by reference and made a finding of fact regarding Zena's and Zadie's ages. Additionally, the trial court found as fact:

> 4. **As to the likelihood of adoption:** [Zena and Zadie] have been in the custody of [DSS] since June 28, 2016. They have been in a total of two placements: a kinship placement with their paternal grandmother, and, currently, a DSS foster home. The girls' current foster parents have expressed their desire to adopt [Zena and Zadie] and provide them with a 'forever home'. They have been providing care for [Zena and Zadie] since March 2017. There is a high probability of adoption.
>
> 5. [Zena and Zadie] express a desire to be loved. They love their parents. [Zena] is old enough to understand that there are concerns with her parents' ability to care for her and her sister. Both girls desire to be nurtured. They have bonded with their foster parents and extended foster family. [Zena and Zadie] deserve to be placed with a family who will supply all their basic, emotional, educational, and medical needs.

6. **Achieving the permanent plan:** The primary plan for permanence is Adoption, with a concurrent plan of Guardianship. Termination of the rights of [respondent] would help achieve the primary permanent plan of adoption.

7. **Bond with [respondent]:** [Respondent] has not provided day to day care for [Zena and Zadie] in several years. He attended many of the visits available to him. [Zena and Zadie] have a bond with [respondent]. They have expressed that they love [respondent]. However, [respondent's] bond with [Zena and Zadie] has diminished over the long time they have spent in foster care.

. . . .

9. **Quality of relationship with prospective adoptive parent:** There is a strong bond between [Zena and Zadie] and their prospective adoptive parents. [Zena and Zadie] are very affectionate towards their foster parents, and that affection is sincerely reciprocated. The foster parents refer to the girls as "their girls." Both foster parents are teachers and have provided love, support, and met the basic, educational, and medical needs of the girls. They have incorporated the girls into their family, taking them on family trips to Iowa to meet their family. The girls have bonded well with the foster parents' families.

10. The foster parents have expressed their desire to adopt them and to have them permanently become a part of their family.

11. **Other relevant factors:** The Court remains deeply concerned about [respondent's] lack of progress to address [the] core issues of this case. At the time of this hearing, [respondent] reported [that he] continued to search for a mental health provider. [Respondent] offered no satisfactory explanation to this court for not complying with mental health services and not complying with substance abuse treatment, or his failure to attend parenting classes or domestic violence counseling. The Court finds it is paramount that [Zena and Zadie] have a permanent and safe home, and if [Zena and Zadie] were returned to the care of [respondent], [Zena and Zadie] would suffer

> irreparable harm and the progress [Zena and Zadie] have obtained while in their current placements would be dismantled if returned to [respondent]. The court is also concerned about the safety of [Zena and Zadie] in [respondent's] care, in lieu [sic] of the continued incident[s] of domestic violence and unstable housing. Furthermore, [respondent] describes his childhood while residing with his biological [parents] as being traumatic. [Respondent] expressed that he was beaten, slapped and kicked by his mother and that his mother drank a lot. [Respondent] also expressed that his mother has changed, and he wants his mother to have [Zena and Zadie]. This Court is not recommending removing the children from their current plan.

Respondent does not challenge any of the trial court's dispositional findings; thus, they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)).

Respondent argues that, though the trial court made findings regarding the enumerated factors, it should have given stronger consideration to the bond between himself and the children and considered options that would have allowed them to maintain their parent-child relationship. Respondent cites testimony from the social worker assigned to the case that Zena and Zadie "love their dad" and "always ask about him, want to see him." Respondent also testified that Zena and Zadie loved him and his family very much "because they know we're going to be there." Respondent thus argued, given the mother's relinquishment of her parental rights and the strong bond between him and his children, the decision to terminate his parental rights constituted an abuse of discretion. We are not persuaded.

In this case, the trial court made extensive findings regarding the strong bond between respondent and Zena and Zadie. The trial court also found, however, that the bond had diminished over the long time that Zena and Zadie had spent in foster care. Furthermore, the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors. *Cf.*, *e.g.*, *In re C.L.C.*, 171 N.C. App. 438, 448, 615 S.E.2d 704, 709–10 (2005) (holding that, while the mother emphasized she had a strong bond with her child, the trial court was "entitled to give greater weight to other facts that it found"), *aff'd per curiam in part*, *disc. review improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006). Here the trial court also made uncontested findings that Zena

and Zadie had a strong bond with their foster parents; there was a strong likelihood of adoption; and termination of respondent's parental rights would aid in the permanent plan of adoption. Additionally, the trial court, when considering other relevant factors, expressed its concern regarding respondent's lack of progress in addressing the core issues of the case. Specifically, respondent "offered no satisfactory explanation to [the trial] court for not complying with mental health services and not complying with substance abuse treatment, or his failure to attend parenting classes or domestic violence counseling." The trial court believed that Zena and Zadie would suffer irreparable harm and the progress they had made since their removal from home would be "dismantled" if they were returned to his care due to his failure to address his many issues. Consequently, we conclude the trial court appropriately considered the factors stated in N.C.G.S. § 7B-1110(a) when determining Zena's and Zadie's best interests and that the trial court's determination that other factors outweighed respondent's strong bond with Zena and Zadie was not manifestly unsupported by reason.

Respondent further argues that, given the strong bond between him and Zena and Zadie, the trial court should have considered other dispositional alternatives, such as granting guardianship or custody to the foster family, thereby leaving a legal avenue by which Zena and Zadie could maintain a relationship with their father. We disagree. While the stated policy of the Juvenile Code is to prevent "the unnecessary or inappropriate separation of juveniles from their parents," N.C.G.S. § 7B-100(4) (2017), we note that "the best interests of the juvenile are of paramount consideration by the court and . . . when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a *safe, permanent home within a reasonable amount of time*," *id.* § 7B-100(5) (2017) (emphasis added); *see also In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 251 (emphasizing that "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star").

We therefore hold the trial court's conclusion that termination of respondent's parental rights was in Zena's and Zadie's best interests did not constitute an abuse of discretion. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

STATE v. BOWMAN

[372 N.C. 439 (2019)]

STATE OF NORTH CAROLINA
v.
DUVAL LAMONT BOWMAN

No. 274A18

Filed 16 August 2019

Constitutional Law—Confrontation Clause—cross-examination of State's principal witness—plea negotiations for pending charges—potential bias

The trial court violated the Confrontation Clause in a murder trial by significantly limiting defendant's cross-examination of the State's principal witness concerning plea negotiations for pending charges against her and her possible bias for the State. Because this witness was crucial to the State's case—she was the only witness to provide direct evidence of defendant's presence at the crime scene, and no physical evidence linked defendant to the crime—the error was not harmless beyond a reasonable doubt.

Justice ERVIN dissenting.

Justice NEWBY 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, 818 S.E.2d 718 (N.C. Ct. App. 2018), vacating a judgment entered on 27 July 2016 by Judge Richard S. Gottlieb in Superior Court, Forsyth County, and remanding for a new trial. On 24 October 2018, the Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court on 14 May 2019 in session in the Pitt County Courthouse in the City of Greenville pursuant to section 18B.8 of Chapter 57 of the 2017 Session Laws of the State of North Carolina.

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

Richard Croutharmel for defendant-appellee.

EARLS, Justice.

At defendant Duval Bowman's trial for the 2014 murder of Anthony Johnson, Lakenda Malachi was the only witness to provide direct evidence of Bowman's presence at the scene. Bowman sought to impeach Malachi's testimony by introducing evidence that Malachi was in plea negotiations over pending charges against her and that she would receive favorable treatment for her testimony against Bowman, but the trial court sustained objections to defense counsel's questions. Bowman was found guilty of attempted robbery with a dangerous weapon, possession of a firearm by a felon, and the first-degree murder of Anthony Johnson. He was sentenced to life imprisonment without parole.

Defendant argued at the Court of Appeals that the trial court committed reversible error by preventing his counsel from adequately cross-examining Malachi regarding the pending charges. The Court of Appeals' majority agreed with defendant, holding that the trial court committed constitutional error by restricting defendant's cross-examination of Malachi and that the error was not harmless beyond a reasonable doubt. *State v. Bowman*, 818 S.E.2d 718, 719 (N.C. Ct. App. 2018). Judge Dillon agreed that the trial court erred by limiting the cross-examination of Malachi but concluded the error was harmless beyond a reasonable doubt. *Id.* at 722 (Dillon, J., dissenting). The State filed its appeal of right based on Judge Dillon's dissenting opinion. We must now determine whether the trial court violated defendant's Sixth Amendment right to confront witnesses against him by limiting defendant's cross-examination of the State's principal witness and whether that error was harmless beyond a reasonable doubt. Because we agree that the trial court committed prejudicial error, we affirm the Court of Appeals' holding and its order that defendant receive a new trial.

Factual and Procedural Background

A. Facts

Defendant, Johnson, and Malachi were all involved in the illicit drug business. Around the time of his murder, Johnson was engaged to Malachi and they lived together with their four-year-old son. At trial, the State presented no physical evidence linking defendant to the shooting but argued that Malachi's testimony established defendant's guilt. Defendant also testified at trial, denying his involvement in the murder, and raising the suggestion that Malachi may have murdered Johnson. Necessarily either defendant or Malachi must have been misrepresenting essential facts about Johnson's death.

According to Malachi's trial testimony, around 3:00 a.m. on 23 February 2014, defendant went to Malachi's house to confront Johnson about

money he owed defendant. Once in the living room where Johnson and Malachi were on the couch, defendant asked Malachi, "Where your gun at?" Defendant was referring to Malachi's 9-millimeter, semiautomatic pistol. Malachi told defendant she had her gun on her, but she was lying to him. Malachi then looked on the shelf in the living room where she normally kept her weapon, but did not see it there. Malachi testified that she left the living room to look for the gun but turned around and saw defendant wearing white latex gloves and holding a gun in each hand. Defendant was standing over Johnson and stated, "Ya'll did me dirty." Malachi turned and ran to her bedroom and heard shots being fired as she ran away. She also heard defendant rattling things in the living room. Malachi then ran to the couple's son's room, locked the door, and hid in the closet. The couple's son was asleep in his bedroom when defendant kicked in the door then walked towards the son's bed. Upon seeing this, Malachi came out of the closet and told defendant that she would find the money for him. The couple's son continued to sleep throughout the encounter.

Malachi asked Johnson where the money was before defendant began stomping on Johnson as he lay motionless on the floor. As Malachi looked for the money, defendant hit her with the two handguns and threatened to shoot her in the feet. Defendant said he was going to kill Johnson and walked into the kitchen. Seeing her chance to escape, Malachi ran out of the house and hid near her neighbor's house until she saw what appeared to be a green station wagon drive away from her house. Malachi then rang her neighbor's doorbell until they responded. Once inside, Malachi asked to use their telephone and made calls to two different male friends whom she hoped would come pick up her son before police arrived. The neighbors called the police after Malachi finished her calls.

Johnson was pronounced dead when police arrived. He had been shot once in the leg and twice in the back. A revolver was used in the killing, as well as a 9-millimeter, semiautomatic pistol, but the police found no guns. They did find a box for a 9-millimeter Glock handgun in a shoe box on the top shelf of the closet in the master bedroom, along with various rounds of ammunition, a handgun magazine, and a receipt for the purchase of the gun. A gunshot residue test on Malachi's hands showed some amounts of lead, antimony, and barium but overall was an inconclusive result. However, Malachi had washed her hands while at the neighbor's house. Bowman was apprehended three weeks later in New York and denied any involvement in Johnson's death.

At trial, defendant denied murdering Johnson. Defendant also testified that Malachi and Johnson had a violent relationship and that Malachi carried a gun. Malachi was jealous of Johnson because he cheated on her and she would become physically violent with Johnson. She was particularly violent when she drank alcohol. Malachi admitted that she drank alcohol the night of Johnson's murder. A few weeks before the murder, Malachi was upset with Johnson over another woman who was at a liquor house with him.

On the night in question, defendant went to a liquor house around 11:00 p.m. Defendant then met a friend named Lorenzo Peace around 11:30 p.m. Peace had defendant drop him off at a friend's house before defendant drove back to the liquor house in Peace's vehicle. Around midnight, defendant left the liquor house to conduct a drug transaction with a man named Jay. Afterwards, defendant returned to the liquor house. Defendant met Peace at Bill's Truck Stop at about 5:00 a.m. before returning home. Sometime after arriving home, defendant received a phone call alerting him that Johnson was dead. Defendant fled to New York after receiving threatening messages and learning he was accused of Johnson's murder.

B. Pretrial Proceedings

The State filed a motion in limine to preclude the defense from questioning Malachi about her pending drug trafficking charges in Guilford County. Defendant objected to the State's request, arguing that there was an e-mail exchange between the Guilford County prosecutor handling Malachi's drug charges and the Forsyth County prosecutor involved in defendant's murder trial. Based on the e-mail exchange concerning a possible plea deal, the trial court ruled that defendant could question Malachi about the pending drug charges, as well as what she knew about any potential deals or favorable treatment as a result of her testimony at trial.

C. Trial

During cross-examination, defense counsel questioned Malachi regarding several drug charges pending against her including: one count of trafficking in methamphetamine, one count of conspiracy to traffic in methamphetamine, one count of trafficking in marijuana, and one count of conspiracy to traffic in marijuana. Malachi admitted that these charges were pending against her in Guilford County and admitted that she was aware that each of the charges involving methamphetamine carried a sentence of 90 months to 120 months in prison. Similarly, Malachi acknowledged that each of the charges involving marijuana carried a

mandatory sentence of 25 to 30 months in prison. Defense counsel then questioned Malachi about a possible plea deal.

> Q. What, if anything, have you been offered from the State at this point regarding those pending charges?
>
> A. I don't know nothing about that.
>
> Q. So nothing has been finalized in Guilford County?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

[ ]

> Q. You're not aware of any current plea offer at this point. Correct?
>
> A. Yes, sir.
>
> Q. Have you – – are you aware that there are such things as plea offers?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: I'll allow that one question.

[ ]

> Q. Ma'am?
>
> A. Yes, sir.
>
> Q. What, if anything, do you hope to gain out of testifying here for the State with regard to those five pending charges?
>
> A. Justice for Anthony Johnson.
>
> Q. So you don't think you're going to get anything out of it for the charges you got?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

[ ]

> Q. Are you aware of any other considerations you might have for those pending charges right now?

[PROSECUTOR]: Objection.

THE COURT: Sustained.

The jury found defendant guilty of first-degree murder, attempted robbery with a dangerous weapon, and possession of a firearm by a felon. The trial court arrested judgment on the conviction for attempted armed robbery and consolidated the other two convictions. Defendant was sentenced to life in prison without parole.

Analysis

In general, we review a trial court's limitation on cross-examination for abuse of discretion. *See State v. McNeil*, 350 N.C. 657, 678, 518 S.E.2d 486, 499 (1999). If the trial court errs in excluding witness testimony showing possible bias, thus violating the Confrontation Clause, the error is reviewed to determine whether it was harmless beyond a reasonable doubt. *Id.* at 678, 518 S.E.2d at 499. "The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' " *Davis v. Alaska*, 415 U.S. 308, 315 (1974). An accused confronts the witnesses against him through cross-examination, which tests "the believability of a witness and the truth of his testimony." *Id.* at 316. By way of the Confrontation Clause, the accused is guaranteed effective cross-examination, but "[t]rial judges retain broad discretion to preclude cross-examination that is repetitive or that is intended to merely harass, annoy or humiliate a witness." *State v. Mason*, 315 N.C. 724, 730, 340 S.E.2d 430, 434 (1986) (citations omitted). Here, we must first determine whether the trial court violated defendant's Sixth Amendment right by limiting his cross-examination of Malachi and if so, whether that error was harmless beyond a reasonable doubt.

Generally, a defendant may not cross-examine a witness regarding pending charges. *See State v. Abraham*, 338 N.C. 315, 353, 451 S.E.2d 131, 151 (1994) (error to allow cross-examination of prior bad acts, plea deal, and pending warrant). *See also State v. Jones*, 329 N.C. 254, 259, 404 S.E.2d 835, 837 (1991) (cross-examination of a pending charge could not be used to impeach a witness). An exception to this rule is compelled by the Sixth Amendment Confrontation Clause when defendant seeks to show bias or undue influence by the state because of the pending charges. *See Davis*, 415 U.S. at 315. Such potential bias or influence is present when a witness faces pending charges in the same jurisdiction he testifies in, allowing a defendant to cross-examine the witness concerning the charges. *See State v. Murrell*, 362 N.C. 375, 404, 665 S.E.2d 61, 80 (2008). However, where a witness faces pending charges in a separate

jurisdiction than the one he testifies in, a defendant must "provide[ ] [ ] supporting documentation of a[ ] discussion between the two district attorneys' offices to demonstrate that [the witness]'s testimony [i]s biased." *Murrell* at 404, 665 S.E.2d at 80.

This issue was addressed by this Court in *State v. Prevatte*, 346 N.C. 162, 484 S.E.2d 377 (1997). In *Prevatte*, the defendant was on trial for first-degree murder where the state's principal witness was an eyewitness to the murder. 346 N.C. at 162, 484 S.E.2d at 378. The eyewitness had been indicted on nine charges of forgery and uttering forged checks in another county at the time he testified. *Id.* at 163, 484 S.E.2d at 378. Even though it was a different county, the same district attorney was in charge of both cases. *Id.* at 163, 484 S.E.2d at 378. During trial, the court prohibited the defendant from questioning the witness regarding the pending criminal charges and whether he had been promised anything in exchange for his testimony. *Id.* at 163–64, 484 S.E.2d at 378. Instead, the court held a voir dire hearing outside the presence of the jury in which the defendant was allowed to cross-examine the witness about the charges. *Id.* at 164, 484 S.E.2d at 378. Because the questioning took place outside their presence, jurors were prevented from hearing the testimony that could have shown the witness's bias. *Id.* at 164, 484 S.E.2d at 378. This Court stated, "[t]he fact that the trial of [the witness] on the forgery and uttering charges had been continued for eighteen months might have led the jury to believe the State was holding those charges in abeyance pending the witness' testimony in this case." *Id.* at 164, 484 S.E.2d at 378. As a result, this Court issued the defendant a new trial, holding that the trial court committed constitutional error in limiting the cross-examination of the witness and "that the error was not harmless." *Id.* at 164, 484 S.E.2d at 378–79. The State argued that during the voir dire hearing, the defendant testified that there was no agreement for his pending charges in exchange for his testimony. *Id.* at 164, 484 S.E.2d at 378. In response, the Court reasoned that even if the witness's "testimony show[ed] that [the witness] expected nothing from the State for his testimony against the defendant[,] [t]he effect of the handling of the pending forgery and uttering charges on the witness was for the jury to determine" and "[n]ot letting the jury do so was error." *Id.* at 164, 484 S.E.2d at 378–79. The Court based its reasoning on *Davis v. Alaska* in holding that the error was not harmless beyond a reasonable doubt. *Id.* at 163–64, 484 S.E.2d at 378.

Davis involved a witness who was on probation for burglarizing two residences when he testified as an eyewitness against the defendant. 415 U.S. at 310–11. Since the witness was a juvenile at the time, the State

made a motion for a protective order regarding the witness's juvenile record, which the trial court granted. *Id.* at 311. The protective order barred the defendant from inquiring about the witness's probationary status or criminal record. *Id.* at 312. As a result, it was impossible for the defendant to show the witness's possible bias during cross-examination. *Id.* at 312. On appeal, the Supreme Court determined:

> Since defense counsel was prohibited from making inquiry as to the witness' being on probation under a juvenile court adjudication, [the witness]'s protestations of unconcern over possible police suspicion that he might have had a part in the [crime] and his categorical denial of ever having been the subject of any similar law enforcement interrogation went unchallenged.

Id. at 313–14. The Court emphasized that "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness]'s testimony which provided 'a crucial link in the proof . . . of [the defendant's] act.' " *Id.* at 317 (second alteration in original) (quoting *Douglas v. Alabama*, 380 U.S. 415, 419 (1965)). Because the jury was prohibited from learning about the witness's probationary status and whether the witness's criminal record motivated his testimony, the defendant was "denied the right of effective cross-examination . . . 'and no amount of showing of want of prejudice would cure it.' " *Id.* at 318 (citation omitted) (quoting *Smith v. Illinois*, 390 U.S. 129, 131 (1968)).

Here, the trial judge allowed defendant to cross-examine Malachi in the presence of the jury concerning the pending charges against her. Although the court did not completely deny defendant the right to cross-examine Malachi, it did place "a *significant limitation* on [ ] defendant's cross-examination of the State's principal witness." *State v. Hoffman*, 349 N.C. 167, 180, 505 S.E.2d 80, 88 (1998) (emphasis added). Thus, defendant was "denied the right of *effective* cross-examination." *Davis*, 415 U.S. at 318 (emphasis added). Malachi, like the witnesses in *Prevatte* and *Davis*, was the State's principal witness and was present when Johnson was murdered. At the time of the trial, Malachi was facing criminal charges that, if convicted, could result in her imprisonment for more than nineteen years.

In a voir dire hearing that was held outside the presence of the jury, defendant's evidence demonstrated that the prosecutor responsible for Malachi's drug charges was in communication with the prosecutor responsible for defendant's murder trial. The two prosecutors had exchanged e-mails concerning a possible plea deal for Malachi based

on her testimony at defendant's trial. Recognizing that Malachi was the only witness to the crime and that she was facing more than a decade in prison because of her pending drug charges, the State "had a strong[ ] weapon to control [Malachi]." *Prevatte*, 346 N.C. at 164, 484 S.E.2d at 378.

During trial, the court limited defendant's cross-examination of Malachi several times. When defendant asked Malachi whether a deal had been finalized in Guilford County concerning her pending charges, the prosecutor objected and the court sustained the objection. Likewise, when defendant asked Malachi whether she thought she was "going to get anything out of it" for the charges pending against her based on her testimony, the court again sustained the prosecutor's objection. Finally, defendant asked Malachi whether she was aware of any current considerations she might have for her pending charges. Before Malachi could answer, the prosecutor again objected and the court sustained the motion. Here, the concern with the court's limitations on cross-examination lies not with whether Malachi received a plea deal, but with the jury's inability to consider her testimony. By limiting Malachi's testimony, the court prohibited the jury from considering evidence that could have shown bias on Malachi's part. To reiterate, "[t]he effect of the handling of the pending . . . charges on [Malachi] was for the jury to determine" and "[n]ot letting the jury do so was error." *Prevatte* at 164, 484 S.E.2d at 378–79. Accordingly, the trial court abused its discretion in limiting defendant's cross-examination of Malachi, thereby violating the Confrontation Clause.

This Court in *State v. Hoffman* held that although the trial court erred in prohibiting the defendant's cross-examination of a witness about charges pending against him, the error was harmless. 349 N.C. at 181, 505 S.E.2d at 89. Unlike here, the witness in *Hoffman* was not a principal witness but only a corroborating witness. *Id.* at 180, 505 S.E.2d at 88. As such, the State's case did not rest solely on the witness's testimony. *Id.* at 180, 505 S.E.2d at 88 ("[The witness's] minimal importance [wa]s evidenced by the fact that the prosecutor scarcely mentioned him in his closing argument."). In addition to the witness's lack of significance to the State's case, the defendant was able to "thoroughly impeach[ ]" the witness regarding prior inconsistent statements and a lengthy history of past convictions. *Id.* at 180–81, 505 S.E.2d at 88–89. Finally, there was substantial evidence showing the defendant's guilt aside from the witness's testimony. *Id.* at 181, 505 S.E.2d at 89. The defendant was charged with robbery with a dangerous weapon and first-degree murder. *Id.* at 173, 505 S.E.2d at 84. The State presented evidence at the defendant's trial showing that the defendant was seen outside of the victim's store before the robbery and murder occurred. *Id.* at 181, 505 S.E.2d at 89.

Another witness testified that the defendant had asked him to rob the store with the defendant. *Id.* at 181, 505 S.E.2d at 89. Other witnesses testified that the defendant admitted to murdering the victim. *Id.* at 181, 505 S.E.2d at 89. Finally, physical evidence found at the scene of the crime was consistent with a witness's testimony regarding what the defendant had told the witness about the crime. *Id.* at 181, 505 S.E.2d at 89. Because there was substantial evidence against the defendant along with the impeachment evidence against the State's corroborating witness, the trial court's error "was harmless beyond a reasonable doubt." *Id.* at 181, 505 S.E.2d at 89.

In this case, the State argues that any error committed by the trial court was harmless beyond a reasonable doubt based on the thoroughness of defendant's cross-examination of Malachi and her impeachment over prior inconsistent statements. *See McNeil*, 350 N.C. at 680, 518 S.E.2d at 500 (evidence of the thorough impeachment of a witness regarding inconsistent statements may result in harmless error). In *McNeil* this Court reasoned that "as in *Hoffman*, [the] defendant here thoroughly impeached [the witness] regarding her prior inconsistent statements and prior convictions." 350 N.C. at 680, 518 S.E.2d at 500. The Court found no error in *McNeil* and pointed out that the defendant had pleaded guilty to both counts of first-degree murder and only challenged errors in his sentencing phase. 350 N.C. at 680, 518 S.E.2d at 500. *See also State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998) (finding no error where the defendant argued the trial court denied him the right to confront a witness testifying against him in his sentencing phase after pleading guilty to first-degree murder).

However, as in *Prevatte*, here Malachi was the key witness against defendant and was vital to the State's case due to the lack of other evidence against defendant. There was no physical evidence linking defendant to the crime and no other witnesses who placed him at the scene. While the State presented circumstantial evidence at trial, its case relied heavily on Malachi's testimony. Therefore, it was crucial for defendant to demonstrate Malachi's possible bias to the jury. The trial court erred by limiting the cross-examination of the State's principal witness when there was a lack of substantial evidence linking defendant to the crime and the error was not harmless beyond a reasonable doubt.

Conclusion

Because the trial court erred in limiting defendant's cross-examination of the State's principal witness and because that error was not harmless beyond a reasonable doubt, defendant is entitled to a new trial.

Accordingly, we affirm the decision of the Court of Appeals vacating the verdict and judgment of the superior court. The cause is remanded to the Court of Appeals for further remand to the Superior Court in Forsyth County for a new trial.

AFFIRMED AND REMANDED.

Justice ERVIN dissenting.

I do not believe, for the reasons set forth in more detail below, that the trial court impermissibly limited defendant's ability to cross-examine Ms. Malachi. On the contrary, while the trial court did sustain the State's objections to certain questions that defendant attempted to pose to Ms. Malachi on cross-examination, the record clearly reflects that defendant "was . . . able to get his contentions before the jury," *State v. Ray*, 336 N.C. 463, 473, 444 S.E.2d 918, 925 (1994), and the Court has not identified any information necessary to support his bias-related challenge to Ms. Malachi's credibility that the jury did not hear. As a result, I respectfully dissent from the Court's decision to affirm the Court of Appeals' decision to award defendant a new trial.

As a general proposition, the scope of cross-examination is committed to the sound discretion of the trial court. In other words, "defendant's right to cross-examination is not absolute," *State v. Guthrie*, 110 N.C. App. 91, 93, 428 S.E.2d 853, 854 (1993), with "the scope of cross-examination [being] subject to appropriate control in the sound discretion of the court." *State v. Coffey*, 326 N.C. 268, 290, 389 S.E.2d 48, 61 (1990); *see also Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L.Ed.2d 347, 353 (1974) (stating that the right of cross-examination is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation"); *State v. Ward*, 354 N.C. 231, 261, 555 S.E.2d 251, 270 (2001) (holding that "the limits placed by the trial court on defendant's cross-examination of these witnesses [constituted] an appropriate exercise of its discretion" given that "the questions called for incompetent hearsay testimony, were unduly repetitive or argumentative, or were simply improper in form"); *State v. Mason*, 315 N.C. 724, 730, 340 S.E.2d 430, 434 (1986) (stating that "trial judges retain broad discretion to preclude cross-examination that is repetitive").

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI. In *Davis*, the United States Supreme

Court held that the defendant had a Sixth Amendment right to question a witness who was on probation about his probationary status in order to establish that the witness might be motivated to testify for the prosecution for the purpose of reducing or eliminating his own exposure to criminal prosecution or other adverse consequences. *Davis*, at 415 U.S. 316–319, 94 S. Ct. at 1110–11, 39 L. Ed.2d at 347. Even in that context, however, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant[, with] 'the Confrontation Clause [serving to] guarantee[ ] an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435, 89 L. Ed. 2d 674, 683 (1986) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 295, 86 L. Ed. 2d 15, 19 (1985) (per curiam) (emphasis in the original)).

A number of decisions of this Court have considered the appropriateness of various trial court rulings concerning the extent to which criminal defendants were entitled to cross-examine prosecution witnesses concerning pending criminal charges for the purpose of showing that those witnesses were biased in favor of the prosecution and against the defendant. For example, in *State v. Prevatte*, 346 N.C. 162, 162–64, 484 S.E. 2d 377, 377–79 (1997), the defendant was under indictment for nine counts of forgery and uttering. The trial court refused to allow the defendant to question or elicit testimony from a prosecution witness concerning that witness's pending charges for the purpose of establishing that the witness "had been promised or expected anything in regard to the charges in exchange for his testimony." *Id.* at 163, 484 S.E.2d at 378. In holding that the trial court's ruling was erroneous and awarding the defendant a new trial, this Court stated, in reliance upon *Davis*, that, when the State "had a strong[ ] weapon to control the witness," such as the ability to utilize the plea negotiation process to persuade the witness in question to testify on behalf of the State, the defendant must be allowed to question the witness concerning his or her pending criminal charges. *Id.* at 164, 484 S.E.2d at 378–79.

On the other hand, in *State v. Atkins*, 349 N.C. 62, 80–81, 505 S.E.2d 97, 109 (1998), the trial court, after refusing to allow the defendant to question the State's principal witness about whether she could receive the death penalty in the event that she declined to testify for the State, permitted the defendant to ask the witness "[w]hat kind of promises

. . . has the State made you in exchange for your testimony," to which the witness replied, simply, "None." *Atkins*, 349 N.C. at 81, 505 S.E.2d at 109. Although the defendant in *Atkins* challenged the trial court's decision to sustain the State's objection to the question asking, "[s]o you can't get the death penalty, can you," on appeal, this Court rejected defendant's contention that the trial court's ruling impermissibly interfered with his confrontation rights on the grounds that "[t]he trial court allowed exactly the type of questioning mandated by *Prevatte*" and that "[d]efendant was clearly allowed to inquire into any potential bias of [the witness] based upon any arrangement between the witness and the prosecution." *Id.* at 80–81, 505 S.E.2d at 109. As a result, this Court's confrontation-related jurisprudence focuses upon whether the defendant was allowed to engage in sufficient cross-examination to support an argument to the jury that the witness was biased in favor of the prosecution rather than upon whether the trial judge sustained an objection to any particular question.

As the majority notes, limitations upon the scope of cross-examination imposed by trial judges are reviewed on appeal using an abuse of discretion standard. *See State v. McNeil*, 350 N.C. 657, 678, 518 S.E. 2d 486, 499 (1999). "[A] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)). "Absent a showing of an abuse of discretion or that prejudicial error has resulted, the trial court's ruling will not be disturbed on review." *State v. Maynard*, 311 N.C. 1, 10, 316 S.E.2d 197, 202–03 (1984).

A careful examination of the record reveals that defendant was afforded ample opportunity to cross-examine Ms. Malachi concerning her pending Guilford County drug charges, which had been the subject of communications with those responsible for prosecuting defendant. In anticipation of trial, the State filed a motion in limine seeking the entry of an order that, among other things, precluded defendant from cross-examining Ms. Malachi about the criminal charges that were pending against her in Guilford County. Prior to the beginning of the trial, the trial court heard arguments concerning the State's motion in limine. At the conclusion of those arguments, the trial court determined that:

> [H]aving heard arguments of counsel, having reviewed the motion on the limited question of whether or not the charges and any potentially favorable treatment as a result

> – *that testimony will be allowed*, and the motion is overruled to that limited extent.
>
> *The defendant will be allowed to ask about the nature of the charges and what the defendant knew about any potential deals or favorable treatment as a result of her testimony here.*
>
> In reaching that decision, I have done a balancing test. And I find that it is relevant. I also find that it's – in order to actually get a context requires a little bit of background to it. But it's not going to be at this point an in-depth discussion of those facts.

(emphasis added). After the completion of Ms. Malachi's testimony on direct examination and prior to the beginning of her cross-examination, the trial court conducted additional proceedings out of the presence of the jury for the purpose of addressing a number of potential evidentiary issues, including the extent to which defendant would be allowed to question Ms. Malachi concerning her pending criminal charges. Following a recitation of the questions that defendant intended to ask Ms. Malachi concerning those pending charges, the trial court delineated the scope of the cross-examination questioning that it intended to permit:

> You may ask if she – you may ask about the charges. You may ask if she has been offered any incentive to testify. And you may ask if she is hoping to gain a benefit, either a reduction in sentence if she pleads guilty or otherwise, as a result of her testimony here. You may also ask her – and it may be a lead-up question – if she's aware of the potential sentences that she would be facing.

During her cross-examination in the presence of the jury by defendant's trial counsel, Ms. Malachi testified that

> Q. Isn't it true on [21 January 2015], you were charged by the High Point Police Department with one count of trafficking in methamphetamine, one count of conspiracy to traffic in methamphetamine, one count of trafficking in marijuana and one count of conspiracy to traffic in marijuana?
>
> . . . .
>
> A. Yes, sir.

Q. And those charges are still pending, are they not?

A. Yes, sir.

After establishing that Ms. Malachi knew that "the trafficking in methamphetamine and the conspiracy to traffic in methamphetamine carry a sentence of 90 months minimum to 120 months maximum," that "the trafficking in marijuana charges" "each . . . carr[y] a mandatory sentence of 25 months minimum to 30 months maximum active prison time," that these cases were pending in Guilford County, and that she was represented by counsel, the following additional proceedings occurred:

Q. What, if anything, have you been offered from the State at this point regarding those pending charges?

A. I don't know nothing about that.

Q. So nothing has been finalized in Guilford County?

MR. TAYLOR: Objection.

THE COURT: Sustained.

BY MR. JAMES:

Q. You're not aware of any current plea offer at this point. Correct?

A. Yes, sir.

Q. Have you – are you aware that there are such things as plea offers?

MR. TAYLOR: Objection.

THE COURT: I'll allow that one question.

BY MR. JAMES:

Q. Ma'am?

A. Yes, sir.

Q. What, if anything, do you hope to gain out of testifying here for the State with regard to those five pending charges?

A. Justice for Anthony Johnson.

> Q. So you don't think you're going to get anything out of it for the charges you got?
>
> MR. TAYLOR: Objection.
>
> THE COURT: Sustained.
>
> BY MR. JAMES:
>
> Q. Are you aware of any other considerations you might have for those pending charges right now?
>
> MR. TAYLOR: Objection.
>
> THE COURT: Sustained.

As a result, defendant's trial counsel was allowed to establish that, at the time of defendant's trial, Ms. Malachi had been charged in Guilford County with one count of trafficking in methamphetamine, one count of conspiracy to traffic in methamphetamine, one count of trafficking in marijuana, and one count of conspiracy to traffic in marijuana; that she faced sentences of 90 to 120 months imprisonment in each of the methamphetamine-related cases and sentences of 25 to 30 months imprisonment in each of the marijuana-related cases; that she was aware of the plea negotiation process; that she was not aware that any plea offer had been extended to her in these Guilford County cases; and that she "hoped to gain" "[j]ustice for Anthony Johnson" by testifying for the State against defendant. I am hard put to understand why this information, without more, does not suffice to support an argument to the jury that Ms. Malachi was biased in favor of the State and against defendant by virtue of the leverage given to the State by virtue of the existence of these pending Guilford County charges.

In holding that the trial court placed impermissible limitations upon defendant's ability to cross-examine Ms. Malachi about the potentially biasing effect of her pending Guilford County drug charges, the Court focuses solely upon the fact that the trial court sustained the State's objections to questions inquiring whether anything "had been finalized in Guilford County," whether she thought that she was "going to get anything out of [testifying] for the charges you got," and whether she was "aware of any other considerations you might have for her pending charges right here." Although the Court states that, "[b]y limiting [Ms.] Malachi's testimony, the court prohibited the jury from considering evidence that could have shown bias on [Ms.] Malachi's part," the record contains no support for the Court's apparent assumption that Ms. Malachi's answers to the questions to which the State's objections were sustained would have benefitted defendant. On the contrary, Ms.

Malachi testified on voir dire that she was not expecting to receive any benefit for testifying on the State's behalf at defendant's trial and that the only goal that she sought to achieve by testifying for the State against defendant was to obtain justice for Anthony Johnson.

In addition, the record reflects that the trial court had ample justification for sustaining the State's objections to each of the three questions upon which the Court's decision rests and certainly did not act in an arbitrary and capricious manner in making the challenged rulings, particularly given the extensive cross-examination of Ms. Malachi that the trial court otherwise allowed.[1] After the trial court sustained the State's objection to defendant's question inquiring whether anything had "been finalized in Guilford County," the trial court allowed defendant to ask Ms. Malachi whether she was "aware of any current plea offer at this point" and received what amounted, in substance, to a negative answer. Thus, the record establishes that Ms. Malachi actually provided the information that defendant sought to obtain by posing the first question to which the trial court sustained the State's objection. Furthermore, the questions to which the second and third of the State's successful objections were directed inquired if Ms. Malachi thought that she was "going to get anything out of [testifying] for the charges you got" and if she was "aware of any other considerations she might have for those pending charges right now." Immediately prior to the posing of these questions, defendant had asked Ms. Malachi what she "hope[d] to gain out of testifying here for the State with regard to those five pending charges" and was told, consistently with the answer that she had given to essentially the same question on voir dire, "[j]ustice for Anthony Johnson." Aside from the fact that Ms. Malachi had already effectively answered the second of these two questions when she testified that she did not have a plea offer at the time that she testified for the State at defendant's trial, the second and third of the three questions to which the trial court sustained the State's objections essentially repeated a question that the trial court had already allowed defendant to pose and that Ms. Malachi had already answered.[2] As a result, rather than impermissibly

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1. Although the Court acknowledges that defendant's claim is subject to abuse of discretion, rather than *de novo*, review in stating the applicable standard of review, the Court does not, as best I can tell, ever take the applicable standard of review into consideration at any point in its analysis and never makes reference to the applicable standard of review in analyzing the validity of defendant's claim.

2. In the event that defendant believes that Ms. Malachi's statement that she hoped to achieve "[j]ustice for Anthony Johnson" was not responsive to the question that defendant posed, he could have moved to strike Ms. Malachi's statement as unresponsive.

constraining defendant's ability to question Ms. Malachi concerning bias-related issues arising from the existence of the charges that were pending against her in Guilford County, the trial court rulings to which the Court's holding is directed represent nothing more than the appropriate exercise of the trial court's discretion to control the scope and extent of cross-examination for the purpose of preventing confusion and eliminating undue repetition. *Ward*, 354 N.C. at 261, 555 S.E.2d at 270 (holding that "the questions [that defendant sought to pose concerning the events that took place on the day of a murder and the witness's plea agreements] called for incompetent hearsay testimony, were unduly repetitive or argumentative, or were simply improper in form"); *McNeill*, 350 N.C. at 678, 518 S.E.2d 499 (holding that "further cross-examination relating to [the witness's] unserved warrants . . . would be repetitive and cumulative of the evidence already presented") (citing *State v. Howie*, 310 N.C. 613, 616, 313 S.E.2d 554, 556 (1984)).

The Court's decision in this case cannot, at least in my opinion, be squared with our existing decisional law concerning the nature and extent of the trial court's authority to control the scope and extent of a defendant's ability to question a prosecution witness concerning bias-related issues arising from the existence of pending criminal charges. For example, this case does not involve the total preclusion of cross-examination concerning a witness's pending charges of the type that this Court determined to have been erroneous in *Prevatte*, 346 N.C. at 164, 484 S.E.2d at 378–79, and *State v. Hoffman*, 349 N.C. 167, 181, 505 S.E.2d 80, 89 (1998) (holding that "the trial court erred by not allowing defendant to cross-examine [a prosecution witness] regarding his pending charges for breaking and entering"). On the contrary, the cross-examination that the trial court allowed concerning Ms. Malachi's pending charges in this case was much more extensive than that deemed to be sufficient in *McNeill*, 350 N.C. at 676–78, 518 S.E.2d. at 498–99 (holding that the trial court permitted a sufficient inquiry into a prosecution witness's pending charges by allowing "defendant wide latitude to expose [the witness's] alleged bias and motive by allowing cross-examination regarding all of [her] prior convictions" and instructing the jury that the witness was testifying pursuant to a plea agreement that provided her with a charge reduction and a sentence concession in return for her testimony, that the witness was an accomplice deemed to have an interest in the outcome of the proceeding, and that defendant contended that the witness had made false, contradictory, and conflicting statements), and *Atkins*, 349 N.C. at 81, 505 S.E.2d at 109 (holding that the trial court had allowed a sufficient inquiry into a prosecution's pending charges by permitting defendant to inquire "[w]hat kind of promises . . . has the

State made you in exchange for your testimony"). Simply put, the result reached by the Court in this case is fundamentally inconsistent with our prior decisions concerning the nature and extent of a defendant's right to cross-examine prosecution witnesses concerning any pending charges that they might be facing at the time of their testimony, at least two of which have held that much more limited questioning than that which the trial court allowed in this case satisfied the requirements of the Confrontation Clause.

In summary, a careful review of the record reveals that the trial court allowed an extensive exploration of the criminal charges that Ms. Malachi was facing at the time that she testified on behalf of the State and against defendant. The evidence that defendant's trial counsel elicited during his thorough cross-examination of Ms. Malachi supplied sufficient information to support a concentrated attack upon her credibility given that Ms. Malachi admitted that she was facing serious criminal charges in Guilford County, that she was familiar with the plea negotiation process, and that no proposed plea agreement had been extended to her at the time of defendant's trial. The trial court had legitimate justification for sustaining each of the successful objections that the State asserted during the relevant portion of Ms. Malachi's cross-examination, and the Court has failed to point to any additional evidence or any additional bias-related argument that defendant would have been able to elicit in the absence of the trial court's ruling. Finally, the Court's decision conflicts with our existing jurisprudence concerning the nature and extent of a criminal defendant's right to cross-examine prosecution witnesses concerning pending criminal charges. As a result, for all of these reasons, I respectfully dissent from the Court's decision to affirm the Court of Appeals' decision that defendant should be awarded a new trial.

Justice NEWBY joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
JAMES HAROLD COURTNEY, III

No. 160PA18

Filed 16 August 2019

Constitutional Law—double jeopardy—hung journey—dismissal by State

Defendant's second prosecution for second-degree murder violated his Double Jeopardy rights where a first trial ended in a hung jury, the State took a voluntary dismissal, and defendant was retried and convicted after new DNA evidence emerged. Jeopardy continued after the mistrial, and the State could have retried defendant again without violating his double jeopardy rights; however, the State made a binding decision not to retry the case when it made the unilateral choice to enter a final dismissal. That decision was tantamount to an acquittal.

Justice NEWBY dissenting.

Justice ERVIN joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 817 S.E.2d 412 (N.C. Ct. App. 2018), vacating a judgment entered on 9 November 2016 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Supreme Court on 15 May 2019 in session in the New Bern City Hall in the City of New Bern pursuant to section 18B.8 of Chapter 57 of the 2017 Session Laws of the State of North Carolina.

Joshua H. Stein, Attorney General, by Jess D. Mekeel, Special Deputy Attorney General, and Benjamin O. Zellinger, Assistant Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Amanda S. Zimmer, Assistant Appellate Defender, for defendant-appellee.

Tin Fulton Walker & Owen, PLLC, by Matthew G. Pruden; and Devereux & Banzhoff, PLLC, by Andrew B. Banzhoff, for North Carolina Advocates for Justice, amicus curiae.

HUDSON, Justice

This case comes to us by way of the State's appeal from a unanimous decision of the Court of Appeals holding that defendant's right to be free from double jeopardy was violated when the State voluntarily dismissed defendant's charge after his first trial ended in a hung jury mistrial. Defendant was retried nearly six years later, after new evidence emerged. The State argues that jeopardy is deemed never to have attached because of the mistrial, so that defendant was not in jeopardy at the time that his second trial began. In the alternative, the State argues that, even if defendant remained in jeopardy following the mistrial, the State's voluntary dismissal without leave did not terminate that jeopardy and that the State was not barred from trying the defendant a second time. We are not persuaded by either of the State's arguments and, thus, affirm the Court of Appeals.

Today we recognize, in accordance with double jeopardy principles set out by this Court and the United States Supreme Court, that jeopardy attaches when the jury is empaneled and continues following a mistrial until a terminating event occurs. We hold that when the State enters a voluntary dismissal under N.C.G.S. § 15A-931 after jeopardy has attached, jeopardy is terminated in the defendant's favor, regardless of the reason the State gives for entering the dismissal. The State cannot then retry the case without violating a defendant's right to be free from double jeopardy. When the State dismisses a charge under section 15A-931 after jeopardy has attached, jeopardy terminates. Thus, we affirm the decision of the Court of Appeals vacating defendant's conviction on double jeopardy grounds and remand to the trial court for further proceedings consistent with this opinion.

Background

Defendant was arrested on 2 November 2009 for the murder of James Carol Deberry, which was committed three days earlier on 31 October 2009; he was indicted on 30 November 2009. Defendant's trial began on 6 December 2010, at which point a jury was empaneled and evidence presented. On 9 December 2010, the trial court declared a mistrial after the jury foreperson reported that the jury was hopelessly deadlocked. Defendant was released the same day. Following the hung jury mistrial declaration, the trial court continued the case so the State could decide whether it would re-try defendant on the murder charge. The trial court held status hearings on 16 December 2010 and on 10 February 2011. The trial court's orders from both hearings noted that the case had ended in mistrial and that it would be continued to another status hearing for the

State to decide whether it intended to re-try defendant. Ultimately, the State entered a dismissal of the murder charge against defendant on 14 April 2011[1], by filing form AOC-CR-307 with the trial court. Like many similar forms, form AOC-CR-307 includes multiple options; the State may use the form to enter a dismissal, a dismissal with leave, or a notice of reinstatement for a case that had previously been dismissed with leave. The State left blank the sections for dismissal with leave and reinstatement but checked the box in the "dismissal" section next to the statement "[t]he undersigned prosecutor enters a dismissal to the above charge(s) and assigns the following reasons." The State checked the box marked "other" in the list of reasons for dismissal and wrote underneath: "hung jury, state has elected not to re-try case." In addition, the State modified a statement on the form to reflect the circumstances so that it reads: "A jury has ~~not~~ been impaneled ~~nor~~ and has evidence [sic] been introduced." The State's voluntary dismissal of the charge was signed by the prosecutor.

Several years passed, and the State discovered additional evidence related to the case. In 2013 and 2014, fingerprints and DNA from a cigarette found at the scene of the murder were found to belong to an individual named Ivan McFarland. A review of the cell phone activity for McFarland and defendant revealed that defendant had McFarland's cell phone number in his phone, that five calls had been made between the two phones on the night of the murder, and that cell phone tower data placed both men in the vicinity near where the murder occurred.

A second warrant for defendant's arrest for murder was issued on 16 June 2015,[2] and defendant was re-indicted on 6 July 2015. On 7 October 2016, defendant filed a motion to dismiss the indictment based on N.C.G.S. § 15A-931, the voluntary dismissal statute, on estoppel and double jeopardy grounds, as well as a second motion to dismiss the murder charge for violating defendant's rights to a speedy trial under the state and federal constitutions. On 10 October 2016, the trial court in open court denied defendant's motion to dismiss based

1. The parties' filings disagree on which day in April 2011 the State entered its dismissal. However, the copy of the form included in the record appears to be dated 14 April 2011, which is also the date referenced in the Court of Appeals opinion. Any disagreement over the date does not impact the result of the case.

2. McFarland was also indicted for the murder, and, as noted by the Court of Appeals, his trial was apparently scheduled to take place after defendant's trial. However, the record is silent as to the outcome of McFarland's trial.

on double jeopardy.[3] Defendant was tried for the second time 31 October 2016 through 9 November 2016 in the Superior Court in Wake County. At that trial, the jury found defendant guilty of second-degree murder, and the trial court sentenced defendant to between 220 and 273 months in prison.

Defendant appealed to the Court of Appeals, where he argued that his right to be free from double jeopardy was violated when the State re-tried him on the same charge following its voluntary dismissal of the charge after defendant's first trial ended in a hung jury mistrial. In a unanimous opinion filed on 15 May 2018, the Court of Appeals agreed with defendant that his second prosecution violated the Double Jeopardy Clause of the United States Constitution. *State v. Courtney*, 817 S.E.2d 412, 422 (N.C. Ct. App. 2018) The Court of Appeals noted that the Double Jeopardy Clause does not prevent the State from retrying a defendant following a hung jury mistrial, but it listed three categories of jeopardy-terminating events that do bar a subsequent prosecution—jury acquittals, judicial acquittals, and "certain non-defense-requested terminations of criminal proceedings, such as non-procedural dismissals or improperly declared mistrials, that for double jeopardy purposes are functionally equivalent to acquittals." *Id.* at 418 (citing *Lee v. United States*, 432 U.S. 23, 30, 97 S. Ct. 2141, 2145, 53 L. Ed. 2d 80, 87 (1977); *United States v. Scott*, 437 U.S. 82, 99–100, 98 S. Ct. 2187, 2198, 57 L. Ed. 2d 65, 79–80 (1978)). The panel concluded that the dismissal entered by the State in this case fell within this third category, "interpret[ing] section 15A-931 as according that dismissal the same constitutional finality and conclusiveness as an acquittal for double jeopardy purposes." *Id.* at 419. Thus, the Court of Appeals concluded that the trial court had erred in denying defendant's motion to dismiss his 2015 indictment, and it vacated defendant's conviction.[4] On 20 September 2018, we allowed the State's petition for discretionary review of the decision of the Court of Appeals.

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3. Defendant's motion to dismiss based on speedy trial grounds was denied in open court on 31 October 2016, and an order with findings of fact and conclusions of law was filed on 3 November 2016.

4. Defendant raised three other issues before the Court of Appeals. Defendant argued, in the alternative, that the trial court erred in denying his motion to dismiss based on a violation of his right to a speedy trial. In addition, defendant argued that certain evidence was erroneously admitted at trial and that his statutory right not to be tried within a week of his arraignment was violated. Because the Court of Appeals found defendant's double jeopardy issue to be dispositive, it did not address his remaining three arguments, none of which are the subject of this appeal. *Courtney*, 817 S.E.2d at 416.

Analysis

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution states that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. The U.S. Constitution's guaranty against double jeopardy applies to the states through the Fourteenth Amendment, *see Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062, 23 L. Ed. 2d 707, 716 (1969), and we have long recognized that the Law of the Land Clause found in our state's constitution also contains a prohibition against double jeopardy, N.C. Const. art. I, § 19; *State v. Sanderson*, 346 N.C. 669, 676, 488 S.E.2d 133, 136 (1997); *see also State v. Crocker*, 239 N.C. 446, 80 S.E.2d 243 (1954). "The underlying idea [of this constitutional protection] is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187–88, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199, 204 (1957). In situations where jeopardy has not attached or where, having attached, jeopardy has not yet been terminated, the State retains the power to proceed with a prosecution. But under the Double Jeopardy Clause, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 123 S. Ct. 732, 736, 154 L. Ed. 2d 588, 595 (2003) (citation omitted).

When the Double Jeopardy Clause is implicated, an individual's right to be free from a second prosecution is not up for debate based upon countervailing policy considerations. *See Burks v. United States*, 437 U.S. 1, 11 n.6, 98 S. Ct. 2141, 2147 n.6, 57 L. Ed. 2d 1, 9 n.6 (1978) ("[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination.").

We review *de novo* a defendant's claim that a prosecution violated the defendant's right to be free from double jeopardy. *State v. Sparks*, 362 N.C. 181, 186, 657 S.E.2d 655, 658 (2008). The United States Supreme Court has recognized a two-pronged analysis to determine whether a violation of the Double Jeopardy Clause has occurred: "First, did jeopardy attach to [the defendant]? Second, if so, did the proceeding end in such a manner that the Double Jeopardy Clause bars his retrial?"

Martinez v. Illinois, 572 U.S. 833, 838, 134 S. Ct. 2070, 2074, 188 L. Ed. 2d 1112, 1117 (2014).

The State asks this Court to hold that neither of these two preconditions for a double jeopardy violation were present here and that, therefore, the re-trial in this case did not offend double jeopardy principles. First, the State argues that, notwithstanding the fact that the defendant was tried once for this murder charge, jeopardy never attached under these circumstances, meaning that jeopardy attached for the first time when the jury was empaneled in the second trial. Second, the State contends that, even if jeopardy did attach when the jury was empaneled and sworn in the first trial, the prosecution's voluntary dismissal of the indictment under N.C.G.S. § 15A-931 was not an event that terminated jeopardy. We are not persuaded by either argument and conclude that the unanimous panel below correctly held that the second trial of defendant violated his rights under the Double Jeopardy Clause.

I. Attachment and Continuation of Jeopardy

"There are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.' " *Martinez*, 572 U.S. at 839, 134 S. Ct. at 2074, 188 L. Ed. 2d at 1117 (citations omitted). *See also State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977) ("Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn.").

Though retrials may proceed in certain circumstances without violating the Due Process Clause, such as when a trial ends in mistrial or when a defendant secures the relief of a new trial after an original conviction is vacated on appeal,[5] *see Richardson v. United States*, 468 U.S. 317, 326, 104 S. Ct. 3081, 3086, 82 L. Ed. 2d 242, 251 (1984), "it became firmly established by the end of the 19th century that a defendant could be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal, and this concept has been long established as an integral part of double jeopardy jurisprudence." *Crist v. Bretz*, 437 U.S. 28, 34, 98 S. Ct. 2156, 2160, 57 L. Ed. 2d 24, 30 (1978).

In *Richardson v. United States*, the United States Supreme Court, recognizing that jeopardy attaches when a jury is sworn, held that a

5. Because we recognize that the State may proceed with a retrial when a defendant secures the relief of a new trial after an original conviction is vacated on appeal, the dissent's assertion that our holding "would also apply to cases reversed on appeal" is incorrect. Our holding is limited to the facts presented here.

hung jury mistrial does not terminate that jeopardy in the defendant's favor. 468 U.S. at 326, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251. Specifically, the Court stated

> we reaffirm the proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected. The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree.

Id. The *Richardson* Court rejected the defendant's implicit argument that his hung jury mistrial was a jeopardy-terminating event but, importantly, recognized the fact that jeopardy had attached and remained attached following the mistrial. *Id.* at 325, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251 ("Since jeopardy attached here when the jury was sworn, petitioner's argument necessarily assumes that the judicial declaration of a mistrial was an event which terminated jeopardy in his case and which allowed him to assert a valid claim of double jeopardy. But this proposition is irreconcilable with [the Court's prior cases], and we hold on the authority of these cases that the failure of the jury to reach a verdict is not an event which terminates jeopardy.") (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S. Ct. 1349, 1353, 51 L. Ed.2d 642 (1977)).

The principle affirmed in *Richardson* that the original jeopardy continues, rather than terminates, following a hung jury mistrial, has been reaffirmed in more recent statements from the Court. *See Yeager v. United States*, 557 U.S. 110, 118, 129 S. Ct. 2360, 2366, 174 L. Ed. 2d 78, 87 (2009) ("[W]e have held that the second trial does not place the defendant in jeopardy 'twice.' Instead, a jury's inability to reach a decision is the kind of 'manifest necessity' that permits the declaration of a mistrial and the *continuation of the initial jeopardy* that commenced when the jury was first impaneled.") (emphasis added) (citations omitted).

The State concedes that jeopardy attaches when a jury is empaneled; however, it argues that the occurrence of a hung jury mistrial sets in motion a legal fiction in which the clock is wound back, placing the case back in pre-trial status such that jeopardy is deemed never to have attached.[6] The State's argument posits two necessary conditions.

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6. At oral argument, counsel for the State instead argued that jeopardy "unattaches," a phenomenon that the State specifically disclaims in its brief. *Compare* New Brief for the State at 8, *State v. Courtney*, No. 160PA18 (N.C. November 21, 2018) ("Although the

First, the State argues that the United States Supreme Court has never held that jeopardy continues following a mistrial, notwithstanding the clear language to the contrary found in *Richardson* and *Yeager*. The State contends that the multiple statements by the Court appearing to embrace the doctrine of continuing jeopardy are *dicta* because a number of those cases did not squarely address the Double Jeopardy Clause's limits on prosecutors' ability to bring a second prosecution on the same charge following a declaration of a hung-jury mistrial that was not sought by the defendant. The State argues that even *Richardson*'s continuing jeopardy discussion is "[a]rguably . . . dictum because by finding a mistrial was not a terminating event, it was immaterial whether or not jeopardy had continued, as opposed to the case being placed back in the pre-trial posture[.]"

The second element of the State's argument that jeopardy did not attach appears to be as follows: because the U.S. Supreme Court, in the State's view, has not formally adopted the continuing jeopardy doctrine, this Court is free to follow its own precedent on the matter. The State further argues that this Court has explicitly held that upon the declaration of a hung jury mistrial, a legal fiction goes into effect under which jeopardy is deemed never to have attached at the first trial, meaning that no jeopardy exists to continue and eventually terminate. Thus, the State contends that, following his 2010 trial, defendant was placed in precisely the same position in which he stood before trial, and it was only when the jury was empaneled at defendant's second trial in 2016 that jeopardy first attached. We find both components of the State's proffered theory that defendant was not in jeopardy at the time of the mistrial to be wholly without merit.

In *Richardson*, the Supreme Court stated multiple times that jeopardy, which existed prior to a mistrial, does not terminate following the

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court below believed the State was contending jeopardy 'unattached' with the mistrial, the State's actual argument is that, based on case law from this Court, the mistrial created the legal fiction that jeopardy *never attached* in the first place.") (citation and footnote omitted) (emphasis in original) *with* Oral Argument at 55:08–55:18, 57:36–57:51, *State v. Courtney*, No. 160PA18 (N.C. May 15, 2019) ("I would ask this Court to look at this Court's holding in *State v. Lachat*, which found that when there is a mistrial, jeopardy unattaches."; "After a hung jury, the jeopardy in that situation unattaches and then when the State made this dismissal, the State was in a pretrial procedure at that point, and therefore the State could bring back these charges and retry the defendant.") (emphases added). While we primarily focus here on the State's contention in its brief that jeopardy never attached, we also find no legal support for its alternative formulation that jeopardy "unattaches" following a hung jury mistrial. Both arguments—that jeopardy never attached and that jeopardy unattached—are foreclosed by the continuing jeopardy principle embraced by the United States Supreme Court in *Richardson*.

mistrial. The Court in *Richardson* "reaffirm[ed] the proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates *the original jeopardy to which petitioner was subjected*," and reiterated that "*jeopardy does not terminate when the jury is discharged* because it is unable to agree." *Richardson*, 468 U.S. at 326, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251 (emphases added). The State argues, however, that merely because the *Richardson* Court held that "jeopardy does not terminate" following a hung jury mistrial "does not necessarily mean that jeopardy had continued" because, under the State's theory, jeopardy would not terminate because jeopardy would no longer be deemed in effect. While this is a creative argument, it is foreclosed by a commonsense reading of *Richardson*.

First, the *Richardson* Court clearly contemplates the continuation of jeopardy at the time of the mistrial. If the Court had intended to say that jeopardy, which attaches when the jury is empaneled, can—only in the singular context of a hung jury mistrial—be retroactively deemed never to have attached, it could have done so. Instead, the Court stated that the *original jeopardy* did not terminate, thus signaling that jeopardy continued. We see no logical interpretation of the Court's declaration in *Richardson* that the original jeopardy did not terminate other than to acknowledge that the original jeopardy *continued*.[7]

Second, the outcome and legal significance of *Richardson* cannot be separated from its text. The continuing jeopardy doctrine reaffirmed by *Richardson* provided a rationale for the longstanding practice of permitting retrial following a hung jury mistrial that was consistent with the guarantee of the Double Jeopardy Clause. *See Richardson*, 468 U.S. at 324, 104 S. Ct. at 3085, 82 L. Ed. 2d at 250 (citing *Logan v. United States*, 144 U.S. 263, 297–98, 12 S. Ct. 617, 627–28, 36 L. Ed. 429, 441 (1892); *Arizona v. Washington*, 434 U.S. 497, 509, 98 S. Ct. 824, 832, 54 L. Ed. 2d 717, 730 (1978)).

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7. The dissenting justice in *Richardson* also acknowledged the Court's adoption of the continuing jeopardy principle. Writing in dissent in *Richardson*, Justice Brennan argued that the majority's approach "improperly ignores the realities of the defendant's situation and *relies instead on a formalistic concept of 'continuing jeopardy.'* " *Richardson*, 468 U.S. at 327, 104 S. Ct. at 3087, 82 L. Ed. 2d at 252 (Brennan, J., concurring in part and dissenting in part) (emphasis added). *See also Yeager v. United States*, 557 U.S. 110, 129, 129 S. Ct. 2360, 2372, 174 L. Ed. 2d 78, 94 (2009) (Scalia, J., dissenting) ("This Court has extended the protections of the Double Jeopardy Clause by holding that jeopardy attaches earlier: at the time a jury is empanelled and sworn.. . . . [D]ischarge of a deadlocked jury does not 'terminat[e] the original jeopardy.' *Under this continuing-jeopardy principle*, retrial after a jury has failed to reach a verdict is not a new trial but part of the same proceeding.") (emphasis added) (footnote omitted) (citations omitted).

The State here argues against the existence of a legal principle that secures the government's right to retry a defendant following mistrial in the face of legal opposition to those retrials on double jeopardy grounds. The State rejects the principle that permitted the Government to prevail in *Richardson*—that jeopardy continues, rather than terminates, following a mistrial—in favor of an argument that, following a mistrial, jeopardy neither continues nor terminates but rather is deemed never to have attached in the first place. Thus, the State's argument that the Supreme Court has not embraced the principle of continuing jeopardy following a mistrial is unsupported by either the text or context of *Richardson*.

The State also points to *United States v. Sanford*, 429 U.S. 14, 97 S. Ct. 20, 50 L. Ed. 2d 17 (1976) (per curiam) to support its argument that, following a hung jury mistrial, a defendant is placed back in a pre-trial posture and jeopardy is deemed not to have attached. In *Sanford*, defendants were indicted for illegal game hunting, and their trial resulted in a hung jury mistrial. *Id.* at 14, 97 S. Ct. at 20, 50 L. Ed. 2d at 19. Four months later, as the Government was preparing to retry the case, the trial court granted the defendants' motion to dismiss the indictment, concluding that the Government had consented to the activities described in the indictment. *Id.* The Government appealed. *Id.* The Supreme Court reversed a decision of the circuit court dismissing the Government's appeal on double jeopardy grounds, concluding that "[t]he dismissal in this case, like that in [*Serfass v. United States*, 420 U.S. 377, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975)], was prior to a trial that the Government had a right to prosecute and that the defendant was required to defend," *id.* at 16, 97 S. Ct. at 21–22, 50 L. Ed. 2d at 20, and that "in such cases a trial following the Government's successful appeal of a dismissal is not barred by double jeopardy," *id.* at 16, 97 S. Ct. at 22, 50 L. Ed. 2d at 20.

Though the State is correct that *Sanford* includes language analogizing the dismissal in that case to the pretrial dismissal considered in *Serfass*, *see id.* at 16, 97 S. Ct. at 21, 50 L. Ed. 2d at 20, there are two reasons why *Sanford* does not control here. First, *Richardson* was decided eight years *after Sanford*, meaning that if the two opinions were in conflict, *Richardson* would control. The Court in *Sanford* issued only a brief *per curiam* opinion without oral argument, *see id.* at 16, 97 S. Ct. at 22, 50 L. Ed. 2d at 20 (Brennan & Marshall, JJ., dissenting from summary reversal and indicating that they would have set the case for oral argument); however, the Court included a more robust analysis of double jeopardy principles in its later opinion in *Richardson*.

Second, the result in *Sanford* is consistent with the principle discussed two years later in *United States v. Scott*. In *Scott*, the Court held

that the State was permitted to appeal a defendant-requested dismissal of charges after jeopardy had attached. 437 U.S. at 101, 98 S. Ct. at 2198–99, 57 L. Ed. 2d at 80–81. The Court explained that

> the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. . . . [T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.

Id. at 98–99, 98 S. Ct. at 2198, 57 L. Ed. 2d at 79. Unlike in *Sanford* and *Scott*, the dismissal here was entered unilaterally by the State rather than by a trial court granting defendant's request. Thus, this line of cases is not applicable to the facts before us.

We now move to the second element of the State's theory that jeopardy attached for the first time at defendant's second trial. As the sole support for its theory that this Court has adopted the principle that jeopardy is deemed never to have previously attached at the point that the trial court declares a mistrial, the State points to a single statement from this Court's decision in *State v. Lachat*, 317 N.C. 73, 343 S.E.2d 872 (1986). The State notes that we stated in *Lachat* that "[w]hen a mistrial is declared properly for such reasons [as a deadlocked jury], 'in legal contemplation there has been no trial.' " 317 N.C. at 82, 343 S.E.2d at 877 (quoting *State v. Tyson*, 138 N.C. 627, 629, 50 S.E. 456, 456 (1905)).

The *Lachat* Court quoted this phrase from our 1905 decision in *State v. Tyson*, 138 N.C. at 629, 50 S.E. at 456. In *Tyson*, we held that a defendant's double jeopardy right was not violated when the jury was empaneled, the trial court declared a mistrial due to the intoxication of one of the jurors, and the defendant was re-tried and convicted. *Id.* We stated in *Tyson* that

> [w]here a jury has been impaneled and charged with a capital felony, and the prisoner's life put in jeopardy, the court has no power to discharge the jury, and hold the prisoner for a second trial, except in cases of absolute necessity. Where such absolute necessity appears from the findings of the court, and in consequence thereof the jury has been discharged, then in legal contemplation there has been no trial.

Id. (citation omitted). Significantly, though we stated that there had been "no trial" in this situation, such that the defendant was not subject to double jeopardy, we did not state that, due to the mistrial, there had been "no jeopardy." To the contrary, by noting that a jury may be discharged only "in cases of absolute necessity" after "the prisoner's life [has been] put in jeopardy," we implicitly acknowledged—from the post-mistrial perspective—that the defendant in *Tyson* had been in jeopardy during his first trial.

Eight decades later in *Lachat*, this Court quoted the phrase from *Tyson* in a somewhat different context. In *Lachat*, we held that a defendant's second trial should have been barred due to former jeopardy[8] based on the particular findings of fact and conclusions made by the trial court. *Lachat*, 317 N.C. at 74, 83–84, 343 S.E.2d at 872, 877. Our ruling in *Lachat* was a fact-specific determination that the trial court had erred in declaring a mistrial before making a proper determination on whether the jury was, in fact, hopelessly deadlocked. *Id.* at 84–85, 343 S.E.2d at 878. In setting out the applicable law in that case, we stated that the double jeopardy principle

> is not violated where a defendant's first trial ends with a mistrial which is declared for a manifest necessity or to serve the ends of public justice. "It is axiomatic that a jury's failure to reach a verdict due to a deadlock is a 'manifest necessity' justifying the declaration of a mistrial." When a mistrial is declared properly for such reasons, "in legal contemplation there has been no trial."

State v. Lachat, 317 N.C. at 82, 343 S.E.2d at 877 (first citing and quoting *State v. Simpson*, 303 N.C. 439, 447, 279 S.E.2d 542, 547 (1981), then quoting *Tyson*, 138 N.C. at 629, 50 S.E. at 456). Thus, the Court opined that following a properly declared mistrial, including a mistrial declared due to a hopelessly deadlocked jury, "in legal contemplation there has been no trial." Because *Lachat* explicitly involved an *improperly* declared mistrial, any discussion of the consequences stemming from a *properly* declared mistrial is not conclusive on this point. More importantly, the "no trial" language quoted in *Lachat* again falls far short of declaring that a defendant in such a situation has not been placed in jeopardy. Nor could this Court have made such a statement, given that, just two years

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8. *Lachat* was not decided under the Double Jeopardy Clause of the United States Constitution but rather "on adequate and independent grounds of North Carolina law." 317 N.C. at 77, 343 S.E.2d at 874.

earlier, the Supreme Court in *Richardson* had embraced the doctrine that jeopardy continues following a hung jury mistrial.[9]

This Court's prior statements that "in legal contemplation there has been no trial" were made in the context of explaining why the State is permitted to retry a defendant following a properly declared mistrial, which was also the context for the U.S. Supreme Court's embrace of the continuing jeopardy doctrine in *Richardson*. The State contends that "[i]f a hung jury creates the legal fiction that 'there has been no trial,' then by definition a jury was never empaneled and defendant was never placed in jeopardy." But in our view the State reads this explanatory phrase from our prior opinions too expansively. Contrary to the State's view, this Court did not with those eight words adopt an exception to the longstanding rule recognized by this Court and the United States Supreme Court that jeopardy attaches when a jury is empaneled, nor did we hold that a legal fiction acts to invalidate the jeopardy that a defendant, even one who is later retried, did in fact experience at a first trial.[10]

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9. In its brief, the State also references *State v. Sanders*, 347 N.C. 587, 496 S.E.2d 568 (1998), the most recent case from this Court to quote *Tyson*'s "no trial" language, though as with *Lachat*, it provides no analysis of the case. In *Sanders*, we upheld the propriety of a trial court's declaration of a mistrial due to the "manifest necessity" of jury misconduct in a sentencing proceeding, such that the defendant's double jeopardy rights would not be violated by a subsequent sentencing proceeding. *Id.* at 599–601, 496 S.E.2d at 576–77. In setting forth the reasoning for our conclusion, we discussed the right of a defendant to be free from double jeopardy and noted that this right is not violated when a mistrial is declared due to manifest necessity. *Id.* at 599, 496 S.E.2d at 576. Then we stated that "[w]hen a mistrial has been declared properly, 'in legal contemplation there has been no trial.' " *Id.* (quoting *Tyson*, 138 N.C. at 629, 50 S.E. at 456). As is the case with *Tyson* and *Lachat*, *Sanders* includes no statement that jeopardy is deemed, following the mistrial, never to have attached in the first place. Like *Lachat*, *Sanders* also post-dated *Richardson*, which would have foreclosed any holding that jeopardy did not remain attached following a mistrial.

10. Although the State contends this Court already adopted its proffered legal fiction as a holding in *Lachat*, it also seeks to highlight the usefulness of legal fictions by analogizing this situation before us to other situations where legal fictions have been employed. In a footnote on legal fictions in its brief, the State contends that "[h]ere, resetting the proceedings after a hung jury mistrial to pre-trial status is not all that different than other legal fictions such as *nunc pro tunc* orders and the relation-back doctrine." One of the cases the State cites in this discussion is *Costello v. Immigration & Naturalization Serv.*, 376 U.S. 120, 130, 84 S. Ct. 580, 586, 11 L. Ed. 2d 559, 565 (1964). But *Costello* declined to apply the relation-back doctrine in the manner urged by the government in that case and disparaged the legal fiction concept in the process. *Id.* at 130, 84 S. Ct. at 586, 11 L. Ed. 2d 559, 565–66 ("The relation-back concept is a legal fiction at best, and even the respondent concedes that it cannot be 'mechanically applied.' . . . This Court declined to apply the fiction in a deportation context in [a prior] case, and we decline to do so now."). The Court further stated that, "[i]n this area of the law, involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities." *Id.* at 131, 84 S. Ct. at 587, 11 L. Ed. 2d at 566.

The State argues that "the continuing jeopardy doctrine . . . is a slender reed upon which to base a determination that defendant's double jeopardy rights were violated." On the contrary, we conclude that this century-old statement from this Court is a "slender reed" intended only to explain the State's ability to re-try a defendant following a mistrial. This Court has not adopted an elaborate legal fiction under which jeopardy attaches when a jury is empaneled and then simply ceases to apply when the trial court declares a mistrial. This Court has not embraced the proposition proffered by the State and does not do so today. Instead, relying upon the commonsense meaning of binding Supreme Court precedents, we reaffirm that jeopardy continues following a mistrial until the occurrence of a jeopardy-terminating event.

Because we conclude that the original jeopardy continued following defendant's mistrial, we turn to the second part of our analysis and consider whether the State's subsequent dismissal of defendant's murder indictment terminated the original jeopardy, such that defendant's second trial placed him in jeopardy a second time in violation of both the federal and state constitutions.

II. Voluntary Dismissal Terminating Jeopardy

Defendant concedes that the State, under the doctrine of continuing jeopardy, could have retried him following the mistrial without violating the Double Jeopardy Clause. He argues, however, that the State's unilateral decision to enter a voluntary dismissal of the murder indictment under N.C.G.S. § 15A-931 after jeopardy had attached was an event that terminated defendant's original jeopardy, thus preventing the State from subsequently retrying him. We hold that where, as here, the State dismisses a charge under section 15A-931 after jeopardy has attached, a defendant's right to be free from double jeopardy under the federal and state constitutions is violated if the State initiates a subsequent prosecution on the same charge. Thus, we affirm the holding of the Court of Appeals that the State's dismissal of a charge under section 15A-931 is binding on the state and is tantamount to an acquittal, making it a jeopardy-terminating event for double jeopardy purposes.

North Carolina has two statutes governing the State's ability to voluntarily dismiss charges, either with or without leave to reinstate those charges. Section 15A-931 of the General Statutes ("Voluntary dismissal of criminal charges by the State.") reads as follows:

> Except as provided in G.S. 20-138.4,[11] the prosecutor may dismiss any charges stated in a criminal pleading including those deferred for prosecution by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time. The clerk must record the dismissal entered by the prosecutor and note in the case file whether a jury has been impaneled or evidence has been introduced.

N.C.G.S. § 15A-931(a) (2017).

By contrast, N.C.G.S. § 15A-932 ("Dismissal with leave when defendant fails to appear and cannot be readily found or pursuant to a deferred prosecution agreement.") allows a prosecutor to dismiss charges with leave to reinstate them under specific circumstances. Under section 15A-932,

> The prosecutor may enter a dismissal with leave for nonappearance when a defendant:
>
> > (1) Cannot be readily found to be served with an order for arrest after the grand jury had indicted him; or
> >
> > (2) Fails to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot be readily found.

N.C.G.S. § 15A-932(a) (2017) and

> The prosecutor may enter a dismissal with leave pursuant to a deferred prosecution agreement entered into in accordance with the provisions of Article 82 of this Chapter.

Id. § 15A-932(a1). A prosecutor may reinstate charges dismissed with leave under these provisions upon apprehension of a defendant who previously could not be found or if a defendant fails to comply with the terms of a deferred prosecution agreement. *Id.* § 15A-932(d), (e).

Section 15A-932 establishes a few specifically enumerated circumstances in which the State may dismiss a charge with leave to refile, such that a dismissal under this statute does not necessarily contemplate the

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11. The statute referenced herein applies only to implied-consent and impaired driving with license revoked offenses and requires that a voluntary dismissal by the State be accompanied by detailed reasons and other information related to the case. N.C.G.S. § 20-138.4(a)(1), (b) (2017).

end of the prosecution. All other voluntary dismissals entered by the State are governed by section 15A-931. In *State v. Lamb*, 321 N.C. 633, 641, 365 S.E.2d 600, 604 (1988) we contrasted the effect of these two provisions, nothing that section 15A-931 provides "a simple and final dismissal which terminates the criminal proceedings under that indictment" (citing N.C.G.S. § 15A-931 official cmt.) while a dismissal under section 15A-932 "results in removal of the case from the court's docket, but the criminal proceeding under the indictment is *not* terminated." (emphasis in original). Before a defendant has been tried, "[s]ection 15A-931 does not bar the bringing of the same charges upon a new indictment," *id.* but, even in a pre-attachment context, the key characteristic of a dismissal entered under 15A-931 is its finality. In the context of an analysis of the now-repealed Speedy Trial Act in *Lamb*, we noted that the finality provided by the statute precluded consideration of any time that accrued between the time when a first indictment was dismissed under section 15A-931 and a new indictment was secured for purposes of a statutory speedy trial claim; by contrast, no such consequence resulted from a section 15A-932 dismissal.[12]

It appears that the legislature contemplated the possibility that a dismissal under section 15A-931 might have double jeopardy implications and, further, that the State might enter a voluntary dismissal sometime other than during the middle of a trial. Section 15A-931(a) dictates that "[t]he clerk must record the dismissal entered by the prosecutor *and note in the case file whether a jury has been impaneled or evidence has been introduced*" and directs that the State may dismiss a charge "by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk *at any time*." (Emphases added). The State suggested at oral argument that the statutory language contemplating the attachment of jeopardy was intended only to ward against the double jeopardy implications of a voluntary dismissal entered by the State *mid-trial*. But this contention is undermined by the specific language in the statute authorizing entry of a dismissal before a trial, during a trial, or *at any time*.

While the text of section 15A-931 fully supports the conclusion that the legislature intended a dismissal under this section to have such a

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12. In *Lamb*, the State entered a pretrial dismissal of the indictment "[w]ith [l]eave [p]ending the completion of the investigation." 321 N.C. at 635, 365 S.E.2d at 601. However, because none of the circumstances described in section 15A-932 actually occurred, we concluded that the "with leave" language was merely surplusage and that the dismissal in fact was entered under section 15A-931. *Id.* at 642, 365 S.E.2d at 604–05.

degree of finality that double jeopardy protections would come into play, this reading finds further support in the official commentary to the statute. *See State v. Jones*, 819 S.E.2d 340, 344 (N.C. 2018) ("The commentary to a statutory provision can be helpful in some cases in discerning legislative intent." (quoting *Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 425, 426 S.E.2d 685, 689 (1993)); *State v. Williams*, 315 N.C. 310, 327, 338 S.E.2d 75, 85 (1986) ("Although the official commentary was not drafted by the General Assembly, we believe its inclusion in The Criminal Procedure Act is some indication that the legislature expected and intended for the courts to turn to it for guidance when construing the Act.").

The Criminal Code Commission provided the following commentary to section 15A-931:

> The case of *Klopfer v. North Carolina*, 386 U.S. 213, held in 1967, that our system of "nol pros" was unconstitutional when it left charges pending against a defendant and he was denied a speedy trial. Thus the Commission here provides for a simple and final dismissal by the solicitor. No approval by the court is required, on the basis that it is the responsibility of the solicitor, as an elected official, to determine how to proceed with regard to pending charges. This section does not itself bar the bringing of new charges. That would be prevented if there were a statute of limitations which had run, *or if jeopardy had attached when the first charges were dismissed.*

N.C.G.S. § 15A-931 (2017) (official cmt.) (emphasis added). The explicit statement in the commentary that the bringing of new charges "would be prevented . . . if jeopardy had attached when the first charges were dismissed," *id.*, provides further insight into the legislature's intent for a 15A-931 dismissal. This commentary suggests that such a dismissal would be viewed as a jeopardy-terminating event for purposes of the Double Jeopardy Clause.

In reaching its conclusion that the State's dismissal of defendant's murder charge was a terminating event that prevented him from being retried, the Court of Appeals "f[ou]nd further guidance from [this] Court's explanation and application of the 'State's election' rule." *State v. Courtney*, 817 S.E.2d 412, 420 (N.C. Ct. App. 2018) (citing *State v. Jones*, 317 N.C. 487, 346 S.E.2d 657 (1986)). Like the panel below, we also find the rule discussed in *Jones* to be instructive here. In *Jones*, this Court

reviewed the case of a defendant whose indictment arguably[13] was sufficient to charge him with first-degree rape but who was arraigned only on the charge of second-degree rape. *Jones*, 317 N.C. at 491–92, 346 S.E.2d at 659–60. No discussion at all of a first-degree rape charge occurred until after the close of all evidence, when the prosecutor proposed an instruction on first-degree rape. *Jones*, 317 N.C. at 491, 346 S.E.2d at 659. Jones was ultimately convicted of first-degree rape, *id.*, and appealed his conviction to this Court. In our decision vacating defendant's conviction for first-degree rape, we held that

> by unequivocally arraigning the defendant on second-degree rape and by failing thereafter to give *any notice whatsoever*, prior to the jury being impaneled and jeopardy attaching, of an intent instead to pursue a conviction for first-degree rape arguably supported by the short-form indictment, the State made a binding election not to pursue the greater degree of the offense, and such election was tantamount to an acquittal of first-degree rape.

Id. at 494, 346 S.E.2d at 661 (emphasis in original).[14]

While the State correctly notes that this case presents a different circumstance from that detailed in *Jones*, it does not adequately explain why a prosecutor's unilateral, post-attachment decision to terminate the entire prosecution should be *less* binding on the State than its post-attachment decision to pursue a lesser charge. By making the unilateral choice to enter a final dismissal of defendant's murder charge after jeopardy had attached, the State made a binding decision not to retry the case. Thus, we conclude that the State's post-attachment dismissal of defendant's indictment was tantamount to, or the functional equivalent of, an acquittal, which terminated the original jeopardy that had continued following the declaration of a hung jury mistrial in defendant's case.

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13. The *Jones* Court did not reach the issue of whether or not the indictment, which contained a sufficient description of first-degree rape in the body of the indictment but also contained a caption and statutory citation that both referenced second-degree rape, would have been sufficient to charge first-degree rape absent the State's post-jeopardy election. 317 N.C. at 493, 346 S.E.2d at 660–61.

14. In reaching our conclusion in *Jones* that the State had made a binding election to pursue only the charge of second-degree rape, we also noted that the State had "that charge [for second-degree rape] entered of record in the clerk's minutes of arraignment." *Id.* at 493, 346 S.E.2d at 660-61.

Conclusion

At his first trial, defendant was unquestionably placed in jeopardy, which continued after his first trial ended with a hung jury mistrial. As explained by the continuing jeopardy doctrine, the mistrial was not a terminating event that deprived the State of the opportunity to retry defendant. Rather, as defendant acknowledges, the State at that time could have tried defendant again on the existing charge without violating his double jeopardy rights. Instead of exercising that opportunity to retry defendant, the State entered a final dismissal of the charge, unilaterally and irrevocably terminating the prosecution and, with it, defendant's original jeopardy. Under the Double Jeopardy Clause, the State was then barred from retrying defendant for the same crime.[15]

Because defendant's jeopardy remained attached following the mistrial declaration in his first trial and was terminated when the State subsequently entered a dismissal of the charge under N.C.G.S. § 15A-931, we conclude that defendant's second prosecution was barred by the Double Jeopardy Clause and that the trial court erred in denying defendant's motion to dismiss his 2015 murder indictment on double jeopardy grounds. Thus, we affirm the Court of Appeals' decision vacating defendant's murder conviction.

AFFIRMED.

Justice NEWBY dissenting.

The general principles governing double jeopardy provide that when a trial ends in a mistrial the State can retry that defendant on the same charges. Procedurally, the subsequent new trial has all the same stages as the original one, including a pretrial stage. A dismissal during the pretrial stage does not prevent a subsequent re-indictment and retrial. The majority ignores these general principles and, by its holding, makes North Carolina an outlier in the country. Guided by a misapplication of the concept of continuing jeopardy, the majority effectively eliminates a complete, new trial after a mistrial (or reversal on appeal), removing any pretrial proceedings. Under its theory, once jeopardy attaches with the first trial, it continues, affecting everything that occurs thereafter. The majority's interpretation of continuing jeopardy means any motion

15. Of course there may have been crimes other than lesser included offenses of murder with which defendant could have been charged arising from the same incident. *See State v. Wilson*, 338 N.C. 244, 261, 449 S.E.2d 391, 401 (1994).

or dismissal after a mistrial is treated as if made midtrial. Thus, after a mistrial, a pretrial dismissal is deemed an acquittal. Because of the majority's hyper-technical application of its view of the continuing jeopardy theory, defendant's murder conviction is vacated, and he goes free. The fundamental right against being tried twice for the same crime does not require this outcome.

The State's dismissal here does not address defendant's guilt or innocence and therefore is not the functional equivalent of a jury verdict of acquittal. Regardless of which abstract legal theory of jeopardy informs this Court, it should not stray from the fundamental concepts governing mistrials and double jeopardy. The mistrial here returned the criminal proceedings to a pretrial status and allowed for a dismissal of the charge without prejudice. This approach is consistent with the long-established precedent of the Supreme Court of the United States and this Court that, after a mistrial, the trial process "proceed[s] anew," *United States v. Scott*, 437 U.S. 82, 92, 98 S. Ct. 2187, 2194, 57 L. Ed. 2d 65, 75 (1978), as if "there has been no trial," *State v. Tyson*, 138 N.C. 627, 629, 50 S.E. 456, 456 (1905). Thereafter, defendant was properly re-indicted and retried, resulting in the jury convicting defendant of murder; that conviction is now judicially erased. Allowing the State to take a pretrial dismissal after a mistrial and subsequently to retry defendant does not offend the safeguard against double jeopardy. I respectfully dissent.

I. Facts and Procedural History

In 2009 the State charged defendant with the first-degree murder of James Deberry based in part on Deberry's dying statement after being shot. On 6 December 2010, defendant's trial began. Three days later, the trial court declared a mistrial after the jury was unable to reach a verdict. On 16 December 2010, the trial court issued a judgment form noting "Mistrial Con't to next Status Hearing for State to decide if case to be retried."

On 14 April 2011, the State dismissed the murder charge against defendant by filing the standard Form AOC-CR-307 in accordance with N.C.G.S. § 15A-931, circling "Dismissal" in handwriting, rather than "Notice of Reinstatement," on the form. The form has no checkbox to indicate a mistrial, and the State selected the fourth checkbox option "Other: *(specify)*," and specified below "hung jury, State has elected not to re-try case." The State noted that, in the mistrial, "A jury has ~~not~~ been impaneled ~~nor~~ and has [sic] evidence been introduced." Notably, the State did not check any box on the form that could signify a finding of defendant's guilt or innocence despite having these checkbox options:

"No crime is charged"; "insufficient evidence to warrant prosecution"; and defendant "agreed to plead guilty."

The State obtained more evidence linking defendant to Deberry's death and, on 6 July 2015, a grand jury issued a new indictment against defendant for first-degree murder. Before his second trial, defendant unsuccessfully moved to dismiss the new indictment on double jeopardy grounds. On 7 November 2018, the jury convicted defendant of second-degree murder.

On appeal defendant conceded, and the majority agrees, that the State could retry him on the mistried murder charge without transgressing double jeopardy protections. The Court of Appeals held, and now a majority of this Court holds, that the prosecutor's post-mistrial voluntary dismissal of the original murder indictment possessed "the same constitutional finality and conclusiveness as an acquittal." *State v. Courtney*, 817 S.E.2d 412, 414 (N.C. Ct. App. 2018). Thus, defendant's second trial put him in jeopardy twice for the same charge in violation of the principles of double jeopardy.

In affirming the Court of Appeals, the majority holds

> that when the State enters a voluntary dismissal under N.C.G.S. § 15A-931 after jeopardy has attached, jeopardy is terminated in the defendant's favor, regardless of the reason the State gives for entering the dismissal. The State cannot then retry the case without violating a defendant's right to be free from double jeopardy. When the State dismisses a charge under section 15A-931 after jeopardy has attached, jeopardy terminates.

In its view, once jeopardy attaches with the empaneling of the first jury, jeopardy infects each aspect of the proceeding thereafter, even after a mistrial. Thus, the majority "hold[s] that where, as here, the State dismisses a charge under section 15A-931 after jeopardy has attached, a defendant's right to be free from double jeopardy under the federal and state constitutions is violated if the State initiates a subsequent prosecution on the same charge." Of note, its analysis would also apply to cases reversed on appeal. The majority attempts to support this position by misapplying precedent from the Supreme Court of the United States and this Court.

The majority's hyper-technical application of the "continuing jeopardy" theory is flawed because it does not ask the correct fundamental question: After a mistrial, are the parties returned to the same position

procedurally as before the original trial? If so, there is a procedural pretrial period during which the State can take a voluntary dismissal. At this stage, no jury is currently empaneled; various pretrial proceedings must occur. Precedent from the Supreme Court of the United States and this Court indicates that, after a mistrial, the proceeding returns to a pretrial status. Thus, a dismissal following a mistrial and before a new jury is empaneled is a pretrial dismissal which is not akin to an acquittal.

The majority's approach confuses defendant with "an *acquitted* defendant [who] may not be retried" regardless of the reason for the acquittal. *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 829, 54 L. Ed. 2d 717, 726 (1978) (emphasis added). Defendant's first trial ended with a hung jury, resulting in a mistrial. A hung jury is not an acquittal, *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L. Ed. 165, 165 (1824), nor is a pretrial dismissal an acquittal. Retrying defendant on a new indictment does not violate the prohibition against double jeopardy.

II. Governing Principles of Double Jeopardy

The Fifth Amendment of the United States Constitution contains a guarantee that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V; *see also Benton v. Maryland*, 395 U.S. 784, 794–96, 89 S. Ct. 2056, 2062–63, 23 L. Ed. 2d 707, 716–17 (1969) (incorporating the Double Jeopardy Clause to the States by the Fourteenth Amendment and noting its "fundamental nature" rooted in the English common law and dating back to the Greeks and Romans); *State v. Brunson*, 327 N.C. 244, 247, 393 S.E.2d 860, 863 (1990) (recognizing the law of the land clause of the North Carolina Constitution as affording the same protections as the Double Jeopardy Clause of the federal constitution).

"Our double jeopardy case law is complex, but at its core, the Clause means that those acquitted or convicted of a particular 'offence' cannot be tried a second time for the same 'offence.' " *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (quoting U.S. Const. amend. V); *see id.* at 1966–67 (discussing the "abstract principle" that double jeopardy allows two punishments for "[a] single act" under the political theory of dual sovereignty); *see also Green v. United States*, 355 U.S. 184, 186–87, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199, 204 (1957) (recognizing "former" or "double jeopardy" as "designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense" (citing 4 William Blackstone, *Commentaries* *335)).

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187–88, 78 S. Ct. at 223, 2 L. Ed. 2d at 204. Further, double jeopardy principles work "to preserve the finality of judgments." *Crist v. Bretz*, 437 U.S. 28, 33, 98 S. Ct. 2156, 2159, 57 L. Ed. 2d 24, 30 (1978).

"[A] defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge." *United States v. Jorn*, 400 U.S. 470, 479, 91 S. Ct. 547, 554, 27 L. Ed. 2d 543, 553 (1971). Thus, jeopardy generally attaches "when the jury is empaneled and sworn." *Crist*, 437 U.S. at 35, 98 S. Ct. at 2161, 57 L. Ed. 2d at 553. "Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Serfass v. United States*, 420 U.S. 377, 391–92, 95 S. Ct. 1055, 1064, 43 L. Ed. 2d 265, 276 (1975). Thus, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 123 S. Ct. 732, 736, 154 L. Ed. 2d 588, 595 (2003).

Hence, an acquittal is final even if obtained erroneously. *See Green*, 355 U.S. at 188, 192, 78 S. Ct. at 223–24, 226, 2 L. Ed. 2d at 204, 207. Even so, "an 'acquittal' cannot be divorced from the procedural context"; it has "no significance . . . unless jeopardy has once attached and an accused has been subjected to the risk of conviction." *Serfass*, 420 U.S. at 392, 95 S. Ct. at 1065, 43 L. Ed. 2d at 276. An acquittal, by its very definition, requires some finding of innocence and "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 1355, 51 L. Ed. 2d 642, 651 (1977). Therefore, jeopardy will always terminate following a defendant's acquittal, regardless of whether the acquittal originated from a jury or judge. *See Evans v. Michigan*, 568 U.S. 313, 328–29, 133 S. Ct. 1069, 1080–81, 185 L. Ed. 2d 124, 140 (2013).

Generally, a conviction or guilty plea likewise brings finality if it represents the final judgment "with respect to the guilt or innocence of the defendant." *Burks v. United States*, 437 U.S. 1, 15, 98 S. Ct. 2141, 2149,

57 L. Ed. 2d 1, 12 (1978). The State cannot retry a convicted defendant in pursuit of harsher punishment. *See Green*, 355 U.S. at 190–91, 78 S. Ct. at 225–226, 2 L. Ed. 2d at 205–06 (discussing when the State is precluded from retrying on a greater offense). For the same reason, double jeopardy principles operate to defeat prosecutorial efforts to dismiss a case midtrial in hope of procuring a more favorable jury. Once jeopardy attaches in a trial, if the jury is wrongfully discharged without defendant's consent, he cannot be tried again with a different jury on the same charges. *Id.* at 188, 78 S. Ct. at 224, 2 L. Ed. 2d at 204 ("This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict."); *see also Gori v. United States*, 367 U.S. 364, 369, 81 S. Ct. 1523, 1526–27, 6 L. Ed. 2d 901, 905 (1961).

Nonetheless, the law provides certain exceptions to the strict application of the bare text of the Fifth Amendment. For example, the protection against double jeopardy "does not bar reprosecution of a defendant whose conviction is overturned on appeal." *Justices of Bos. Mun. Court v. Lydon*, 466 U.S. 294, 308, 104 S. Ct. 1805, 1813, 80 L. Ed. 2d 311, 324 (1984). Some cases discussing this principle rely on the theory of "continuing jeopardy" to justify imposing a new trial following a defendant's successful appeal. *See, e.g.*, *id.* at 309, 312, 104 S. Ct. at 1814, 1815, 80 L. Ed. 2d at 325, 327 (opining that jeopardy stays on a single and continuous course throughout the judicial proceedings and thus a new trial offers more protection to the defendant because he has two opportunities to secure an acquittal); *Green*, 355 U.S. at 189–193, 78 S. Ct. at 224–27, 2 L. Ed. 2d at 205–08 (offering continuing jeopardy as one "rationalization" to justify a new trial following a successful appeal).

Similarly, "[w]hen a trial court declares a mistrial, it all but invariably contemplates that the prosecutor will be permitted to proceed anew notwithstanding the defendant's plea of double jeopardy." *Scott*, 437 U.S. at 92, 98 S. Ct. at 2194, 57 L. Ed. 2d at 75. To "proceed anew" after a properly declared mistrial means a fresh start with a complete, new trial, having all the procedural stages as the original one. Thus, whether after an appeal or a mistrial, double jeopardy protection is not implicated by a complete, new trial.

III. Unique Nature of Mistrials

"[W]ithout exception, the courts [in this country] have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to

society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona*, 434 U.S. at 509, 98 S. Ct. at 832, 54 L. Ed. 2d at 730.

> The double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. *In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.* . . . It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial.

Wade v. Hunter, 336 U.S. 684, 688–89, 69 S. Ct. 834, 837, 93 L. Ed. 974, 978 (emphasis added), *reh'g denied*, 337 U.S. 921, 69 S. Ct. 1152, 93 L. Ed. 1730 (1949). Seemingly contrary to the general rules governing double jeopardy, the jeopardy from the first trial is not regarded to have attached, continued, or ended in a way that can preclude a second trial. *See id.* at 688–89, 69 S. Ct. at 837, 93 L. Ed. at 978. A mistried defendant's "valued right to have his trial completed by a particular tribunal must . . . be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* at 689, 69 S. Ct. at 837, 93 L. Ed. at 978. Defendant is entitled to a fair trial, and the State is entitled to a fair opportunity to prosecute the crime; both defendant and the State are entitled to a jury verdict on the charges. *See Arizona*, 434 U.S. at 509, 98 S. Ct. at 832, 54 L. Ed. 2d at 730.

The Supreme Court of the United States first set out the general rule regarding mistrials in *United States v. Perez* by considering "whether the discharge of the jury by the Court from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offence." *Perez*, 22 U.S. at 579, 6 L. Ed. at 578. The Court concluded that "the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of

public justice would otherwise be defeated." *Id.* at 580, 6 L. Ed. at 578 (contemplating the sound discretion by the trial court in declaring a mistrial). Under circumstances of manifest necessity, "a discharge [of the jury] constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial." *Id.* at 580, 6 L. Ed. at 579–80.

In *United States v. Sanford*, the Court confirmed that "[t]he Government's right to retry the defendant, after a mistrial, in the face of his claim of double jeopardy is generally governed by the test laid down in *Perez* . . . ." 429 U.S. 14, 16, 97 S. Ct. 20, 21, 50 L. Ed. 2d 17, 20 (1976) (footnote omitted). In that case the respondents successfully moved to dismiss the indictment post-mistrial but before the new trial had begun. *Id.* at 14–15, 97 S. Ct. at 20–21, 50 L. Ed. 2d at 19. On appeal the Court agreed "that jeopardy attached at the time of the empaneling of the jury for the first trial," but disagreed that the procedural "sequence of events in the District Court" presented a bar from retrying respondents under the Double Jeopardy Clause. *Id.* at 15, 97 S. Ct. at 21, 50 L. Ed. 2d at 19.

The Court determined that "the indictment terminated, not in [respondent's] favor, but in a mistrial declared, *sua sponte*, by the District Court." *Id.* at 15, 97 S. Ct. at 21, 50 L. Ed. 2d at 19. "Where the trial is terminated in this manner," *Perez* provides "the classical test for determining whether the defendants may be retried without violating the Double Jeopardy Clause." *Id.* at 15, 97 S. Ct. at 21, 50 L. Ed. 2d at 19–20. Reviewing respondent's post-mistrial motion to dismiss, the Court concluded: "The situation of a hung jury presented here is precisely the situation that was presented in *Perez*, and therefore the Double Jeopardy Clause does not bar retrial of these respondents on the indictment which had been returned against them." *Id.* at 16, 97 S. Ct. at 21, 50 L. Ed. 2d at 20 (citation omitted).

The Court compared the procedural posture of *Sanford* to its then recent case *Serfass v. United States*. *Sanford*, 429 U.S. at 16, 97 S. Ct. at 21–22, 50 L. Ed. 2d at 20. *Serfass* involved a *pretrial* motion to dismiss an indictment *outside* the context of a mistrial; thus, the Court indicated the procedure after a mistrial was to begin afresh, including a pretrial period. *Serfass*, 420 U.S. at 379–81, 387–93, 95 S. Ct. at 1058–59, 1062–65, 43 L. Ed. 2d at 268–70, 273–77. In *Serfass* the Court held that a pretrial order dismissing an indictment did not affect the government's right to reprosecute the petitioner because there was no determination of guilt or innocence by the fact-finder. *Id.* at 389, 95 S. Ct. at 1063, 43 L. Ed. 2d at 274. Because the motion was pretrial, "[a]t no time during or following the hearing on petitioner's motion to dismiss the indictment

did the District Court have jurisdiction to do more than grant or deny that motion, and neither before nor after the ruling did jeopardy attach." *Id.* at 389, 95 S. Ct. at 1063, 43 L. Ed. 2d at 275. The Court also rejected the petitioner's assertion that dismissing the indictment, even if the trial court based its decision on facts that would constitute a defense at trial, was the functional equivalent of an acquittal. *Id.* at 390, 95 S. Ct. at 1063–64, 43 L. Ed. 2d at 275.

By analogizing the *post-mistrial* motion to dismiss an indictment in *Sanford* to the *pretrial* motion to dismiss the indictment in *Serfass*, the Court signifies the procedural similarities between those cases; both involved a dismissal during a pretrial stage. Retrial does not offend the protections afforded by the Double Jeopardy Clause. Thus, applying *Sanford* and *Serfass*, if a mistrial terminates the criminal proceeding, intervening motions between mistrial and the beginning of a defendant's second trial do not trigger double jeopardy protections. This principle is illustrated by this Court's long-stated view that "[w]hen a mistrial has been declared properly, 'in legal contemplation there has been no trial.' " *State v. Sanders*, 347 N.C. 587, 599, 496 S.E.2d 568, 576 (1998) (quoting *Tyson*, 138 N.C. at 629, 50 S.E. at 456).[1]

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1. Federal circuit courts have reached the same conclusion. *See, e.g.*, *Chatfield v. Ricketts*, 673 F.2d 330, 332 (10th Cir.) ("The *Sanford* court obviously concluded that since the government has a right to retry the defendant following a mistrial because of a hung jury, the period following the mistrial is a pretrial period. During the pretrial period, a prosecutor may dismiss charges, and the Double Jeopardy Clause does not prohibit the prosecutor from reasserting the same charges at a later date."), *cert. denied*, 459 U.S. 843, 103 S. Ct. 96, 74 L. Ed. 2d 88 (1982); *Arnold v. McCarthy*, 566 F.2d 1377, 1388 (9th Cir. 1978) ("Once a mistrial had been fairly ordered the situation became analogous to the pretrial period in which the prosecutor has undisputed authority to dismiss charges without fear of being prohibited from reasserting them by the Fifth Amendment. Subsequent to the declaration of a mistrial for reasons which satisfy the 'manifest necessity' standards of the Double Jeopardy Clause, the state can dismiss criminal charges without forfeiting the right to retry them."); *Dortch v. United States*, 203 F.2d 709, 710 (6th Cir.) (per curiam) (The sequence of a mistrial, "a *nolle prosequi*[,] and a dismissal without prejudice do[es] not bar a second prosecution for the same offense, inasmuch as such terminations are not tantamount to acquittal."), *cert. denied*, 346 U.S. 814, 74 S. Ct. 25, 98 L. Ed. 342 (1953); *Lynch v. United States*, 189 F.2d 476, 478–79 (5th Cir.) ("When the mistrial was declared, the Government was at liberty to try the appellants again on the same indictment or to obtain a new indictment. A mistrial in a case is no bar to a subsequent trial of defendants."), *cert. denied*, 342 U.S. 831, 72 S. Ct. 50, 96 L. Ed. 629 (1951).

State courts have reached the same conclusion. *See, e.g.*, *Duncan v. State*, 939 So. 2d 772, 774–77 (Miss. 2006) (allowing re-indictment following mistrial due to hung jury on original indictment and the prosecutor's nolle prosequi of original indictment despite double jeopardy claim); *Casillas v. State*, 267 Ga. 541, 542, 480 S.E.2d 571, 572 (1997) ("[A] properly granted mistrial removes the case from the jury and a nolle prosequi entered thereafter, even without the consent of the defendant, does not have the effect of an acquittal. Since the nolle prosequi of the original indictment of Casillas was entered only

Like the trial court in *Sanford*, the majority here confuses the theory of jeopardy with the procedural "sequence of events." *See Sanford*, 429 U.S. at 15, 97 S. Ct. at 21, 50 L. Ed. 2d at 19. The procedural posture of *Sanford* determined the effect of the dismissal. Because the case after mistrial was in its pretrial stage, the dismissal was not a terminating event.

The majority seeks to minimize the holding of *Sanford*, saying that *Richardson v. United States*, 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984), somehow limits *Sanford* and, without analysis, that a motion to dismiss by a defendant is qualitatively different than a dismissal by the State. Under its misapplication of the "continuing jeopardy" theory, however, jeopardy would infect all aspects of the proceeding. Regardless of which party makes the motion, the granting of a motion to dismiss after jeopardy attached in the first trial would be a terminating event. The correct question asks at what trial stage was the motion made or the dismissal was taken, not the identity of the party that initiated it.

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after the mistrial was declared, he was not acquitted of any crimes charged in that original indictment and there is no bar to his retrial for the crimes charged in the new indictment." (citations omitted)); *State v. Gaskins*, 263 S.C. 343, 347, 210 S.E.2d 590, 592 (1974) ("If, after a mistrial has been duly ordered, the prosecuting officer enters a *nolle prosequi*, such will not be a bar to a subsequent prosecution for the same offense. . . . [as it] would not adjudicate either the innocence or the guilt of the respondent and would be no bar to his future prosecution for the same offense."(citations omitted)); *id.* (recognizing the differing effects of a pretrial dismissal following a mistrial and a midtrial dismissal that may occur during the second trial); *In re Weir*, 342 Mich. 96, 99, 69 N.W.2d 206, 208 (1955) ("The dismissal of the former prosecution . . . following disagreement of the jury is not to be considered as an acquittal either on the facts or on the merits." (citing, *inter alia*, *People v. Pline*, 61 Mich. 247, 28 N.W. 83 (1886))); *Smith v. State*, 135 Fla. 835, 839, 186 So. 203, 205 (1939) ("It is well settled in this state that a mistrial by reason of the inability of the jury to agree does not constitute former jeopardy. Nor is the entry of a *nolle prosequi* a bar to another information for the same offense. After the mistrial the case stood as if it had never been tried, and a *nolle prosequi* entered then had no different effect in favor of the defendant than if it had been entered prior to the trial." (citations omitted)); *Pline*, 61 Mich. at 251, 28 N.W. at 84 (concluding that the sequence of a mistrial, a subsequent nolle prosequi, followed by a new trial does not offend the defendant's right against double jeopardy).

Courts have applied the same principle following a reversal on appeal. *See*, *e.g.*, *C.K. v. State*, 145 Ohio St. 3d 322, 325, 49 N.E.3d 1218, 1221–22 (2015) ("[T]he dismissal of an indictment without prejudice on remand from a reversal does not bar future prosecution of the accused."); *United States v. Davis*, 873 F.2d 900, 903 (6th Cir.) ("In the leading case of *United States v. Ball*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896), the Supreme Court held that a defendant who succeeded in having his murder conviction set aside because of a legal defect in the indictment was not 'twice put in jeopardy,' in violation of the Constitution, when retried on a new and legally sufficient indictment."), *cert. denied*, 493 U.S. 923, 110 S. Ct. 292, 107 L. Ed. 2d 271 (1989).

IV. Continuing Jeopardy

While the majority's misapplication of the "continuing jeopardy theory" causes it to miss the fundamental question regarding the procedural posture of this case, a discussion of the development of the theory is helpful. Similar to granting a new trial after appeal, courts have put forward different legal theories that justify a second trial following a mistrial, but the theories result in the same conclusion: The State may proceed with a complete, new trial following a mistrial.

The majority relies heavily on *Richardson* to justify its outcome here. In that case the jury acquitted Richardson of some but not all federal narcotics charges brought against him, resulting in a hung jury on those remaining charges and a declared mistrial. *Richardson*, 468 U.S. at 318–19, 104 S. Ct. at 3082–83, 82 L. Ed. 2d at 246–47. The trial court scheduled defendant's new trial. *Id.* at 318, 104 S. Ct. at 3082, 82 L. Ed. 2d at 246. Richardson moved to bar the retrial, arguing that "if the Government failed to introduce sufficient evidence to establish his guilt beyond a reasonable doubt at his first trial [on the acquitted charges], he may not be tried again following a declaration of a mistrial because of a hung jury." *Id.* at 322–23, 104 S. Ct. at 3084, 82 L. Ed. 2d at 249.

The Court in *Richardson* recognized that "[t]he case law dealing with the application of the prohibition against placing a defendant twice in jeopardy following a mistrial because of a hung jury has its own sources and logic." *Id.* at 323, 104 S. Ct. at 3085, 82 L. Ed. 2d at 249–50. Citing "this settled line of cases," it reaffirmed that "a failure of the jury to agree on a verdict was an instance of 'manifest necessity' which permitted a trial judge to terminate the first trial and retry the defendant, because 'the ends of public justice would otherwise be defeated.' " *Id.* at 323–24, 104 S. Ct. at 3085, 82 L. Ed. 2d at 250 (quoting *Perez*, 22 U.S. at 580, 6 L. Ed. at 165).

The Court emphasized Richardson's situation involved a mistrial and distinguished it from the outcome of *Burks v. United States*, a non-mistrial case. *Id.* at 325–26, 104 S. Ct. at 3086, 82 L. Ed. 2d at 250–51 (citing *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)). The Court introduced this discussion by refusing "to uproot this settled line of cases by extending the reasoning of *Burks*, which arose out of an appellate finding of insufficiency of evidence to convict following a jury verdict of guilty, to a situation where the jury is unable to agree on a verdict." *Id.* at 324, 104 S. Ct. at 3085, 82 L. Ed. 2d at 250. The Court then summarized its holding in *Burks* as equating "an appellate court's finding of insufficient evidence to convict on appeal from a judgment of

conviction" as an acquittal "for double jeopardy purposes." *Id.* at 325, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251. *Burks* "obviously did not establish, consistently with cases such as *Perez*, that a hung jury is the equivalent of an acquittal." *Id.* at 325, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251.

In distinguishing Richardson's situation from that of a defendant in a nonmistrial case, the Court recognized that mistrials present unique exceptions that terminate a criminal proceeding in a way that permits retrial without giving rise to a double jeopardy claim. *See id.* at 325, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251 ("[T]he failure of the jury to reach a verdict is not an event which terminates jeopardy."). The concurring opinion in *Richardson* calls this "continuing jeopardy" theory "a formalistic concept" unnecessary to justifying the general policy behind retrying mistrials. *Id.* at 327, 329, 104 S. Ct. at 3087, 3088, 82 L. Ed. 2d at 252, 254 (Brennan, J., concurring in part and dissenting in part) ("[S]trong policy reasons may justify subjecting a defendant to two trials in certain circumstances notwithstanding the literal language of the Double Jeopardy Clause" and without "seek[ing] to justify such a retrial by pretending that it was not really a new trial at all but was instead simply a 'continuation' of the original proceeding." (quoting *Lydon*, 466 U.S. at 321, 104 S. Ct. at 1820, 80 L. Ed. 2d at 333 (Brennan, J., concurring in part and concurring in judgment))).

As demonstrated by *Richardson*, mistrials presuppose a future prosecution. *See id.* at 326, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251 (majority opinion) ("The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree."). Tellingly, in *Richardson* both the majority opinion's theory and the concurring opinion's theory result in the same general rule that the State may retry a defendant following a mistrial.

The Supreme Court of the United States "ha[s] constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." *Id.* at 323–24, 104 S. Ct. at 3085, 82 L. Ed. 2d at 250 (A hung jury "permit[s] a trial judge to terminate the first trial and retry the defendant, because 'the ends of public justice would otherwise be defeated.' " (quoting *Perez*, 22 U.S. at 580, 6 L. Ed. at 165)). Here the majority now uses *Richardson*'s "continuing jeopardy" justification that *allows* a new trial following a mistrial to *prevent* a new trial, by holding that the prosecutor's pretrial dismissal was a "terminating event" to the jeopardy that had attached at the original trial. Regardless of the legal theory posited to *justify* a new trial following a mistrial, that same theory cannot then be used to *prohibit* the same.

In a case with facts similar to the instant case, the Supreme Court of Mississippi applied the general principles of double jeopardy under the continuing jeopardy theory in the context of two previous mistrials for the same defendant. *Beckwith v. State*, 615 So. 2d 1134, 1135–36 (Miss. 1992), *cert. denied*, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993). Beckwith was indicted and tried twice for the murder of civil rights activist Medgar Evers, resulting in hung juries and mistrials. *Id.* at 1135. In 1969, five years after his second mistrial, the prosecutor entered a *nolle prosequi*, noticing his intent not to prosecute further. *Id.* In 1990, twenty-six years after the last mistrial, the State again indicted Beckwith for murder. *Id.* On interlocutory appeal, Beckwith claimed another trial would violate his constitutional right against double jeopardy. *Id.* at 1136.

Applying federal precedent and Mississippi law, that court first recognized that "[d]efendants may be repeatedly retried . . . following mistrials granted because the jury was deadlocked and could not reach a unanimous verdict." *Id.* at 1147. The court further determined the *nolle prosequi* was akin to " 'retiring' or 'passing' an indictment to the files [and] [wa]s not an acquittal barring further prosecution, following which the case may be reopened upon motion of the State"; it "did not terminate the original jeopardy, and the State was not barred thereafter from seeking the re-indictment of and re-prosecuting the defendant from the same offense." *Id.* The court continued, "If, following a mistrial declared in such an instance, the State does what it considers manifestly fair, and moves to dismiss the case, it would be shockingly wrong to hold that it could never have the case re-opened upon discovery of additional evidence." *Id.* at 1148. Therefore, "the entry of the *nolle prosequi* in 1969 did not terminate Beckwith's original jeopardy or accrue unto him the right not to be re-indicted and re-prosecuted for the same offense." *Id.*

V. Effect of the Voluntary Dismissal

A voluntary dismissal during a pretrial phase following a mistrial is not the equivalent of an acquittal and cannot prevent a retrial. A prosecutor may take "a simple and final dismissal which terminates the criminal proceedings under that indictment" at any time. *State v. Lamb*, 321 N.C. 633, 641, 365 S.E.2d 600, 604 (1988) (citing N.C.G.S. § 15A-931 (1983)). A dismissal at a pretrial stage does not prevent re-indictment and retrial. Of note, there is no statute of limitations applicable to murder in North Carolina, nor does dismissal and re-indictment implicate speedy trial concerns. *See State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279 (1969).

The standard dismissal form used by the prosecutor here does not contemplate proceedings after a mistrial (or reversal on appeal). The form lists the sections of the General Statutes to which it corresponds, including, at issue here, section 15A-931 governing general dismissals,[2] which provides in pertinent part:

> (a) . . . [T]he prosecutor may dismiss any charges stated in a criminal pleading including those deferred for prosecution by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time. The clerk must record the dismissal entered by the prosecutor and note in the case file whether a jury has been impaneled or evidence has been introduced.
>
> (a1) Unless the defendant or the defendant's attorney has been notified otherwise by the prosecutor, a written dismissal of the charges against the defendant filed by the prosecutor shall be served in the same manner prescribed for motions under G.S. 15A-951. In addition, the written dismissal shall also be served on the chief officer of the custodial facility when the record reflects that the defendant is in custody.

N.C.G.S. § 15A-931(a) to (a1) (2017). A dismissal under N.C.G.S. § 15A-931 terminates the criminal proceedings under that indictment. *Id.* § 15A-931 official cmt. (2017). It does not prohibit indicting the same defendant later on the same charges, *see id.*, but a new indictment is necessary to do so, *see Lamb*, 321 N.C. at 635, 641, 365 S.E.2d at 601, 604 (reviewing a pretrial dismissal for an apparent lack of evidence under N.C.G.S. § 15A-931 that did not preclude later re-indictment on the same charges). In contrast, "[s]ection 15A-932 provides for a dismissal 'with leave' " that removes "the case from the court's docket, but the criminal

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2. The form includes additional statute cites. *See* N.C.G.S. § 15A-302(e) (2017) ("Dismissal by Prosecutor. — If the prosecutor finds that no crime or infraction is charged in the citation, or that there is insufficient evidence to warrant prosecution, he may dismiss the charge and so notify the person cited. An appropriate entry must be made in the records of the clerk. It is not necessary to enter the dismissal in open court or to obtain consent of the judge."); N.C.G.S. § 15A-932(b) (2017) (captioned "Dismissal with leave when defendant fails to appear and cannot be readily found or pursuant to a deferred prosecution agreement" that "results in removal of the case from the docket of the court, but all process outstanding retains its validity . . .").

A dismissal under sections 15A-931 and 15A-932 "results in termination or indeterminate suspension of the prosecution of a criminal charge." N.C.G.S. § 15A-1381(6) (2017).

proceeding under the indictment is *not* terminated. All outstanding process retains its validity and the prosecutor may reinstitute the proceedings by filing written notice with the clerk without the necessity of a new indictment." *Id.* at 641, 365 S.E.2d at 604 (citing N.C.G.S. § 15A-932 (1983)). A proper dismissal under N.C.G.S. § 15A-931 prevents a claim of a speedy trial violation, *id.*, whereas an indefinite continuance may give rise to one.

The dismissal statutes were enacted in response to an opinion issued by the Supreme Court of United States, *Klopfer v. North Carolina*, to provide "a simple and final dismissal." *See* N.C.G.S. § 15A-931 official cmt. (citing *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967)). In that case the Supreme Court of the United States invalidated a North Carolina procedure, referred to as the "*nolle prosequi* with leave," because it violated Klopfer's right to a speedy trial. *Klopfer*, 386 U.S. at 222, 87 S. Ct. at 993, 18 L. Ed. 2d at 7. Klopfer was indicted for misdemeanor criminal trespassing in January 1964, and his trial ended in a mistrial in March 1964. *Id.* at 217, 87 S. Ct. at 990, 18 L. Ed. 2d at 4–5. The trial court initially continued the case for another term in April 1965 before the State took a "*nolle prosequi* with leave" eighteen months after the indictment. *Id.* at 217–18, 87 S. Ct. at 990–91, 18 L. Ed. 2d at 5.

In effect the *nolle prosequi* with leave allowed the indictment to remain pending for an indeterminate time period, indefinitely postponing prosecution while at the same allowing the case to be docketed on the court's calendar at any time. *Id.* at 214, 87 S. Ct. at 984, 18 L. Ed. 2d at 3. In the meantime, Klopfer could not obtain a dismissal of the charge or demand the case be set for trial. *Id.* at 216, 87 S. Ct. at 990, 18 L. Ed. 2d at 4. The Court concluded:

> The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "anxiety and concern accompanying public accusation," the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

Id. at 222, 87 S. Ct. at 993, 18 L. Ed. 2d at 7 (footnote omitted) (quoting *United States v. Ewell*, 383 U.S. 116, 120, 86 S. Ct. 773, 776, 15 L. Ed. 2d

627, 630 (1966)). Notably, Klopfer's victory meant he "was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment" following his mistrial, rather than a substantive dismissal of the charges. *Id.* at 222, 87 S. Ct. at 993, 18 L. Ed. 2d at 7–8 (quoting *Pointer v. Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 1069, 13 L. Ed. 2d 923, 928 (1965)).

Nonetheless, the majority declares that the section 15A-931 dismissal here provides a newfound "terminating event" that now bars retrial following a mistrial. Under the majority's reasoning, because jeopardy attached in defendant's original mistrial, the State's dismissal following the mistrial occurred during "jeopardy" and thus is treated as a midtrial dismissal. The majority overlooks the mistrial principle that the "jeopardy" of the mistrial does not preclude a retrial. The initial jury was discharged, and a new trial must take place to put defendant at risk of conviction. Before the new trial began, during the new pretrial phase, the State could dismiss the pending indictment without being prohibited from re-indicting and retrying defendant.

The statute clearly governs voluntary dismissals at trials generally and does not, on its face, even address the unique circumstances involved in a mistrial. Moreover, the form associated with the statute does not specifically include nor contemplate the procedure following a mistrial. The State signified defendant's first trial terminated with a hung jury by handwriting and without suggesting any substantive or conclusive finding on defendant's guilt or innocence. The dismissal here is not substantive; it does not speak to defendant's guilt or innocence and cannot be equated to an acquittal.

By the statute's text and application, it is unlikely that the General Assembly intended it to place North Carolina outside the longstanding double jeopardy principles that govern mistrials. It is more likely that the General Assembly intended to abolish a specific procedure that threatened a defendant's right to a speedy trial when an indictment remained pending against him and to prevent prosecutorial efforts to dismiss a case midtrial in hope of procuring a more favorable jury. Double jeopardy concerns that may arise in a midtrial dismissal simply do not arise in the pretrial stages. Even under a continuing jeopardy theory of mistrials, a nonsubstantive voluntary dismissal by the State does not preclude a retrial following a mistrial. *See Beckwith*, 615 So. 2d at 1148. A prosecutor can dismiss an indictment following a mistrial under N.C.G.S. § 15A-931, in keeping with defendant's constitutional right to a speedy trial, without compromising the State's undeniable right to retry a mistried case should new evidence surface.

It is indisputable that the State can enter a pretrial section 15A-931 dismissal and later re-indict. The majority places the State in the impossible position of choosing to proceed to a new trial with what one jury deemed insufficient evidence or lose any opportunity to hold the defendant accountable for the crime. Instead of rushing to a retrial, the ends of justice may be best served by waiting. Over time, as with this case, new witnesses may come forward or improvements may be made in forensic evidence testing. The new evidence might exonerate the defendant or implicate him. A pretrial dismissal, whether during the initial stage or during the pretrial stage after mistrial, can serve the ends of justice. Thereafter, as with this defendant and with Beckwith, armed with new evidence the State can retry the defendant even years later.

The majority's reliance on the State's election rule, as described in *State v. Jones*, underscores the majority's mistaken view of the procedural posture of this case. 317 N.C. 487, 346 S.E.2d 657 (1986). In that case the trial proceeded on a charge of second-degree rape; however, at the close of evidence, the State proposed a jury instruction on first-degree rape, and the trial court gave that instruction. *Id.* at 491, 346 S.E.2d at 659–60. The jury ultimately convicted the defendant on first-degree rape. *Id.* In reversing the first-degree rape conviction, this Court "h[e]ld that the State made a binding election," after the jury was empaneled, "not to pursue a verdict of guilty of first-degree rape, thereby effectively assenting to an acquittal of the maximum offense arguably charged by the indictment." *Id.* at 493, 346 S.E.2d at 660. The majority says the State cannot adequately explain why

> a prosecutor's unilateral, post-attachment decision to terminate the entire prosecution should be less binding on the State than its post-attachment decision to pursue a lesser charge. By making the unilateral choice to enter a final dismissal of defendant's murder charge after jeopardy had attached, the State made a binding decision not to retry the case.

Clearly, the majority confuses the trial stages at which the actions were taken; the charge election occurred during trial whereas the post-mistrial dismissal here was taken during the pretrial stage.

VI. Conclusion

Does a mistrial result in a new proceeding with a pretrial period? The clear language from this Court says that, following a mistrial, "the jury has been discharged . . . [and] in legal contemplation there has been no trial." *Tyson*, 138 N.C. at 629, 50 S.E. at 456. Likewise, the Supreme

Court of the United States says the proceeding begins anew after a mistrial. *See Scott*, 437 U.S. at 92, 98 S. Ct. at 2194, 57 L. Ed. 2d at 75. Thus, the dismissal here was a pretrial dismissal, which is not an acquittal, and the State is not barred from proceeding with a new indictment and trial. The majority's hyper-technical misapplication of the "continuing jeopardy" theory is not supported by applicable law and results in a convicted murderer being freed. I respectfully dissent.

Justice ERVIN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
RAUL PACHICANO DIAZ

No. 412PA17

Filed 16 August 2019

1. Constitutional Law—surrender of Fifth Amendment right to assert Sixth Amendment right—admission to affidavit of indigency to prove defendant's age—element of charges

In defendant's trial for abduction of a child and statutory rape charges, the trial court erred by allowing defendant's affidavit of indigency to be admitted to prove his age, which was an element of the charges. The trial court's decision impermissibly required defendant to surrender one constitutional right—his Fifth Amendment right against compelled self-incrimination—to assert another—his Sixth Amendment right to the assistance of counsel as an indigent defendant.

2. Evidence—erroneously admitted in violation of defendant's constitutional rights—proof of age at trial—victim's opinion testimony

The Court of Appeals erred by concluding that the trial court's erroneous admission of defendant's affidavit of indigency to prove his age in his trial for abduction of a child and statutory rape was not harmless beyond a reasonable doubt and granting defendant a new trial. The State was not required to prove defendant's exact date of birth; the victim's opinion testimony was competent as to the issue of defendant's age; and other evidence admitted at trial—the testimony of the victim (who had attended high school

with defendant and had engaged in an intimate relationship with him for several months) that defendant was born in November 1995—left no reasonable possibility that the jury would have unduly relied on defendant's affidavit of indigency to convict him.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 808 S.E.2d 450 (N.C. Ct. App. 2017), granting defendant a new trial in part and finding no error in part upon appeal from judgments entered on 18 May 2016 by Judge Jeffrey B. Foster in Superior Court, Pitt County. Heard in the Supreme Court on 10 April 2019.

Joshua H. Stein, Attorney General, by Neil Dalton, Special Deputy Attorney General, for the State-appellant.

Marilyn G. Ozer for defendant-appellee.

HUDSON, Justice.

This case is before us pursuant to the State's petition in the alternative for discretionary review[1] of the Court of Appeals' opinion which granted defendant a new trial on his abduction of a child and statutory rape charges after determining that he was prejudiced by the trial court's decision to allow his affidavit of indigency to be admitted to prove his age—an element of the charges—in violation of his constitutional right against self-incrimination. *State v. Diaz*, 808 S.E.2d 450, 457 (N.C. Ct. App. 2017). Pursuant to the State's petition in the alternative for discretionary review, we now address whether:

> . . . the Court of Appeals err[ed] when it . . . held there was a self-incrimination clause violation where a form filled out by the defendant was admitted into evidence to show the defendant's age which was an element of his crimes, when the defendant's age was testified to without objection by uncontroverted testimony by the victim who lived in the same household.

We conclude that admission of the affidavit was in error; however, because the trial court's error in allowing the affidavit of indigency to be

1. The State's notice of appeal based upon a constitutional question was dismissed *ex mero motu* on 9 May 2018.

admitted was harmless beyond a reasonable doubt, we affirm the Court of Appeals' opinion in part and reverse it in part.[2]

I. Factual and Procedural Background

At trial, the State offered the only evidence. The factual background of this case was established mainly through the testimony of the juvenile victim, Julie.[3] Julie's testimony tended to show the following.

Defendant and Julie met and began dating in the "late fall, early winter" of 2014. At the time they met, Julie was a freshman in high school and defendant was a senior at the same high school. Julie was fourteen years old, and she would not turn fifteen until 21 July 2015. Defendant told Julie that he was eighteen, but Julie later found out that he was nineteen. Julie testified that defendant's birthdate was 26 November 1995. On cross-examination, Julie testified that she never saw defendant's driver's license, birth certificate, or passport.

After they met, Julie and defendant began "talking." However, at the end of January 2015, Julie and defendant began skipping school to have sex at defendant's house. The two continued having sex through April of 2015. Julie testified that she wanted to have sex with defendant all "but the first time."

At one point in March or April of 2015, defendant asked Julie if he could record them while they were having sex. Julie testified that defendant's request was unexpected and that although she initially did not object to it, she was later worried that defendant might "use[ ] [i]t to manipulate [her]." Defendant made four separate recordings and the trial court admitted all of them into evidence.

On 14 April 2015, Julie and defendant left North Carolina. Julie testified that although it was defendant's idea to leave North Carolina, she agreed to leave with him because: (1) she thought she was in love with him; (2) he told her that she would never see him again if she did not come with him; and (3) she was scared that he was going to use the recordings that he took of them having sex to manipulate her to go with him. Julie ultimately testified on cross-examination that although, in her view, defendant did not force her to leave with him, she "felt forced."

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2. We are not reviewing the Court of Appeals' conclusions as to: (1) the amount of defendant's bond on the affidavit of indigency, *Diaz*, 808 S.E.2d at 455–56; and (2) defendant's motion to dismiss the abduction of a child charge, *id.* at 457–58. Those issues are not before us.

3. The Court of Appeals used this pseudonym in order to protect the identity of the juvenile. *Diaz*, 808 S.E.2d at 452 n.1. We will also use that pseudonym in this opinion.

After leaving North Carolina, defendant and Julie first went to defendant's uncle's house in New Mexico. Defendant's uncle, however, "didn't help [them]." He told them that they needed to "go back and do things right." He also told Julie that she needed to call her mother. Julie did so, but she did not tell her mother where she and defendant were.

After leaving defendant's uncle's house, Julie and defendant went to Broken Arrow, Oklahoma. Julie testified that they "tried to get settled" there. They got an apartment together, and both she and defendant found jobs. Julie testified that at that point, the two were "[b]asically starting a new life" and "helping each other out." Julie testified that although she was "in favor of being out" in Oklahoma, she "kind of wanted to go back." Julie and defendant were away from North Carolina for about a month in total before U.S. Marshals found them in Oklahoma. Once they were found, U.S. Marshals arranged for Julie to return home to Greenville, N.C., on a flight from Oklahoma to Charlotte. Julie had no interaction with defendant after she returned home.

On 2 June 2015, Julie made a written statement to one of the U.S. Marshals who picked her up at the airport in Charlotte. Julie testified at trial that she still loved defendant and felt like she had to protect him at the time that she wrote the statement. The statement tended to: (1) contradict Julie's trial testimony that it was defendant who came up with the idea to record them having sex back in March or April; and (2) demonstrate that defendant was willing to take Julie back home if she wanted to go back.

On 14 September 2015, defendant was indicted for: (1) one count of abduction of a child under N.C.G.S. § 14-41; (2) three counts of statutory rape under then N.C.G.S. § 14-27.7A(b);[4] and (3) four counts of first-degree sexual exploitation of a minor under N.C.G.S. § 14-190.16.

On 6 October 2015, defendant completed and signed an affidavit of indigency so that a court-appointed attorney could be assigned to his case. Within the sworn affidavit, defendant listed his date of birth as 20 November 1995.

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4. Now amended and recodified as N.C.G.S. § 14-27.25. *See* An Act to Enact the Women and Children's Protection Act of 2015, S.L. 2015-62, § 1(a), 2015 N.C. Sess. Laws 135, 135–36 (amending N.C.G.S. § 14-27.7A); An Act to Reorganize, Rename, and Renumber Various Sexual Offenses to Make Them More Easily Distinguishable From One Another as Recommended by the North Carolina Court of Appeals in *State of North Carolina v. Slade Weston Hicks, Jr.*," and to Make Other Technical Changes, S.L. 2015-181, § 7(a)–(b), 2015 N.C. Sess. Laws 460, 461–62 (recodifying N.C.G.S. § 14-27.7A as N.C.G.S. § 14-27.25 and amending the recodified statute according to the changes made in "S.L. 2015-62").

Defendant's trial began on 16 May 2016. At trial, Julie testified to the facts stated herein.[5] At the end of Julie's testimony, the State offered as evidence a copy of defendant's affidavit of indigency. The State asserted that the affidavit was a self-authenticating document under Rule 902 of the North Carolina Rules of Evidence. Defendant objected to the admission of the affidavit on the grounds of "relevance, due process, hearsay, confrontation." The trial court ruled that the affidavit was admissible because under "Rule 902 Rules of Evidence, it is a self-authenticating document." The trial court then allowed the State to publish the affidavit to the jury. At the close of the State's evidence, defendant moved to dismiss all charges. The trial court denied defendant's motion to dismiss.

The jury found defendant guilty of the following: (1) one count of abduction of a child, (2) three counts of statutory rape; and (3) four counts of second-degree sexual exploitation. At sentencing, the trial court sentenced defendant as a prior record level I offender. The court consolidated sentencing for defendant's abduction of a child and statutory rape convictions and sentenced him to a term of 65 to 138 months in prison. The trial court also ordered defendant to pay $1,054.51 in restitution as a civil judgment. Further, the trial court sentenced defendant to consecutive, suspended terms of 25 to 90 months in prison for each second-degree sexual exploitation conviction. Lastly, the court ordered 36 months of supervised probation for each second-degree sexual exploitation conviction. Defendant entered his notice of appeal on 19 May 2016.

The Court of Appeals granted defendant a new trial on his abduction of a child and statutory rape charges. *Diaz*, 808 S.E.2d at 452, 457–58. In so doing, the court reached two conclusions that are pertinent here. First, the Court of Appeals concluded that "the trial court erred in admitting the affidavit of indigency, which showed Defendant's age—an element in the abduction of a child charge and the statutory rape charges—over Defendant's objection. The State cannot violate Defendant's right against self-incrimination to prove an element of charges against Defendant." *Id.* at 456. Specifically, the Court of Appeals reasoned that "Defendant cannot be required to complete an affidavit of indigency to receive his right to counsel, and the State then use the affidavit against Defendant, violating his constitutional right against self-incrimination." *Id.* As supporting authority, the Court of Appeals relied on our decision in *State v. White*, where we stated that "[a] defendant cannot be required to surrender one constitutional right in order to assert another." *Id.* (bracket

5. The State also offered testimony from Julie's mother.

in original) (citation omitted) (quoting *State v. White*, 340 N.C. 264, 274, 457 S.E.2d 841, 847 (1995); *see also Simmons v. United States*, 390 U.S. 377, 394, 88 S. Ct. 967, 976, 19 L. Ed. 2d 1247, 1259 (1968).

Second, the Court of Appeals concluded that the trial court's constitutional error in admitting the affidavit of indigency was not harmless beyond a reasonable doubt under N.C.G.S. § 15A-1443(b) because:

> Julie's testimony about Defendant's date of birth was incorrect. Julie testified Defendant was born on 26 November 1995, but the affidavit reflects that Defendant was born on 20 November 1995. Additionally, as evinced through cross-examination, Julie did not testify regarding a basis for her knowledge. Julie had never seen an official document showing Defendant's correct date of birth or age.

Diaz, 808 S.E.2d at 457.

We allowed the State's petition in the alternative for discretionary review on 9 May 2018 and now review whether the Court of Appeals erred in concluding that: (1) the trial court erred when it admitted defendant's affidavit of indigency into evidence, *id.* at 456; and (2) the trial court's error in admitting the affidavit of indigency was not harmless beyond a reasonable doubt, *id.* at 457.

II. Analysis

Because we conclude that the trial court's error in admitting the affidavit of indigency was harmless beyond a reasonable doubt, we affirm the decision of the Court of Appeals in part and reverse it in part.

"It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated." *Piedmont Triad Regional Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (citing *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 674–75 (2000); *Ornelas v. United States*, 517 U.S. 690, 696–97, 116 S. Ct. 1657, 1661–62, 134 L. Ed. 2d 911, 918–19 (1996)); *see also State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) ("An appellate court reviews conclusions of law pertaining to a constitutional matter de novo." (citing *State v. Williams*, 362 N.C. 628, 632, 669 S.E. 2d 290, 294 (2008))).

A. Whether the Court of Appeals erred in concluding that the trial court committed constitutional error when it admitted defendant's affidavit of indigency into evidence.

[1] Under the Sixth Amendment to the United States Constitution, an indigent defendant has a right to the assistance of counsel, and this right has been extended to indigent defendants in state courts by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342–45, 83 S. Ct. 792, 795–97, 9 L. Ed. 2d 799, 804–806 (1963).

Under the Fifth Amendment to the United States Constitution,[6] individuals "shall [not] be compelled in any criminal case to be witness[es] against [themselves]." *Pennsylvania v. Muniz*, 496 U.S. 582, 588, 110 S. Ct. 2638, 2643, 110 L. Ed. 2d. 528, 543 (1990) (quoting U.S. Const. amend. V). Further, although the privilege against self-incrimination "does not protect a suspect from being compelled by the State to produce 'real or physical evidence,' " *Id.* at 589, 110 S. Ct. at 2643, 110 L. Ed. 2d. at 543 (quoting *Schmerber v. California*, 384 U.S. 757, 764, 86 S. Ct. 1826, 1832, 16 L. Ed. 2d. 908, 916 (1966)), it does protect a suspect "from being compelled to testify against [one]self, or otherwise provide the State with evidence of a testimonial or communicative nature," *id.* at 589, 110 S. Ct. at 2643, 110 L. Ed. 2d. at 543–44 (quoting *Schmerber*, 384 U.S. at 761, 86 S. Ct. at 1830, 16 L. Ed. 2d. at 914). In order for a communication to be testimonial within the meaning of the Fifth Amendment, it "must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against [one]self." *Id.* at 589, 110 S. Ct. at 2643, 110 L. Ed. 2d. at 544 (quoting *Doe v. United States*, 487 U.S. 201, 210, 108 S. Ct. 2341, 2347, 101 L.Ed.2d 184, 197 (1988)). " '[T]he vast majority of verbal statements thus will be testimonial' because '[t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts.' " *Id.* at 597, 110 S. Ct. at 2648, 110 L. Ed. 2d at 549 (second alteration in original) (quoting *Doe*, 487 U.S. at 213, 108 S. Ct. at 2349, 101 L. Ed. 2d at 199).

In considering the "purposes of the [Fifth Amendment] privilege," *id.* at 595, 110 S. Ct. at 2647, 110 L. Ed. 2d at 547–48 (footnote omitted) (citing *Doe*, 487 U.S. at 212–13, 108 S. Ct. at 2348–49, 101 L.Ed.2d at 198–199), the Court has concluded that they are served when "the

6. The Fifth Amendment is applicable to the States through the Fourteenth Amendment under *Malloy v. Hogan*, 378 U.S. 1, 3, 84 S. Ct. 1489, 1491, 12 L. Ed. 2d 653, 656 (1964).

privilege is asserted to spare the accused from having to reveal, directly or indirectly, [ ] knowledge of facts relating [the accused] to the offense or from having to share [the accused's] thoughts and beliefs with the Government." *Id.* at 595, 110 S. Ct. at 2647, 110 L. Ed. 2d. at 548 (quoting *Doe*, 487 U.S. at 213, 108 S. Ct. at 2349, 101 L.Ed.2d at 199). "At its core, the privilege reflects our fierce 'unwillingness to subject those suspected of a crime to the cruel trilemma of self-accusation, perjury or contempt.' " *Id.* at 596, 110 S. Ct. at 2647, 110 L. Ed. 2d at 548 (quoting *Doe*, 247 U.S. at 212, 108 S. Ct. at 2348, 101 L. Ed. 2d at 198). "Whatever else it may include, therefore, the definition of 'testimonial' evidence articulated in *Doe* must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the 'cruel trilemma.' " *Id.* at 596–97, 110 S. Ct. at 2648, 110 L. Ed. 2d at 549. "The difficult question whether a compelled communication is testimonial for purposes of applying the Fifth Amendment often depends on the facts and circumstances of the particular case." *Doe*, 487 U.S. at 214–15, 108 S. Ct. at 2350, 101 L. Ed. 2d at 200 (citing *Fisher v. United States*, 425 U.S. 391, 410, 96 S. Ct. 1569, 1581, 48 L. Ed. 2d 39, 56 (1976)).

"It is consistent with the history of and the policies underlying the Self-Incrimination Clause to hold that the privilege may be asserted only to resist compelled explicit or implicit disclosures of incriminating information." *Id.* at 212, 108 S. Ct. at 2348, 101 L. Ed. 2d at 198. "A defendant cannot be required to surrender one constitutional right in order to assert another." *White*, 340 N.C. at 274, 457 S.E.2d at 847 (citing *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259). The United States Supreme Court's opinion in *Simmons* provides an instructive illustration of when a defendant is impermissibly compelled to testify by a circumstance in which "one constitutional right should have to be surrendered in order to assert another." *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d. at 1259. In *Simmons*, the trial court allowed testimony that the defendant gave to establish his Fourth Amendment standing during a hearing on a motion to suppress to be used against him in the guilt phase of his trial. *Id.* at 389, 88 S. Ct. 973–74, 19 L. Ed. 2d. at 1256. In concluding that "these circumstances" were "intolerable," *id.* at 394, 88 S. Ct. at 976, 19 L. Ed. 2d. at 1259, the Court reasoned that:

> "[a] defendant is 'compelled' to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forgo a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has

> a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case [defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination."

Id. at 393–94, 88 S. Ct. at 976, 19 L. Ed. 2d. at 1259 (footnotes omitted).

Here, we affirm the Court of Appeals' conclusion that the trial court committed constitutional error when it admitted defendant's affidavit of indigency into evidence. In doing so, the trial court required defendant "to surrender one constitutional right," his Fifth Amendment right against compelled self-incrimination, "in order to assert another," his right to the assistance of counsel as an indigent defendant under the Sixth Amendment. *White*, 340 N.C. at 274, 457 S.E.2d at 847 (citing *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d. at 1259).

Specifically, as an indigent person, defendant had a constitutional right to the assistance of counsel in state court. *Gideon*, 372 U.S. at 342–45, 83 S. Ct. at 795–97, 9 L. Ed. 2d at 804–06. In order to assert that right, North Carolina law requires an indigent person to complete an affidavit of indigency which is a sworn statement made before a court. N.C.G.S. § 7A-451(c1) (2015) (providing that the determination of indigency will be made "[u]pon application, supported by the defendant's affidavit"); *id.* § 7A-453(a) (providing that after the Office of Indigent Services makes a preliminary determination as to indigency, "[t]he court shall make the final determination"); *id.* § 7A-456(a) (recognizing that statements "in regard to the question of [a defendant's] indigency" are "made . . . under oath or affirmation."). Therefore, when defendant was completing his affidavit of indigency, he was asserting his Sixth Amendment right to assistance of counsel.

Additionally, by completing the affidavit of indigency, defendant also implicated his Fifth Amendment right to be free from compulsory self-incrimination. Specifically, "on the facts and circumstances of th[is] particular case," defendant's communication on his affidavit of indigency that his birthdate is "11/20/95," is testimonial. *Doe*, 487 U.S. at 214–15, 108 S. Ct. at 2350, 101 L. Ed. 2d at 200 (citing *Fisher*, 425 U.S. at 410, 96 S. Ct. at 1581, 48 L. Ed. 2d at 56). First, in providing his date of birth on the affidavit, defendant did "explicitly . . . relate a factual assertion or disclose information." *Muniz*, 496 U.S. at 589, 110 S. Ct. at 2643, 110 L.

Ed. 2d. at 544 (quoting *Doe*, 487 U.S. at 210, 108 S. Ct. at 2347, 101 L. Ed. 2d at 197).

Second, defendant's sworn statement, N.C.G.S. § 7A-456(a), as to his age on his affidavit of indigency, if asked of him as "a sworn suspect during a criminal trial, [w]ould place [him] in the 'cruel trilemma' " *Muniz*, 496 U.S. at 597, 110 S. Ct. at 2648, 110 L. Ed. 2d at 549, of "self-accusation, perjury or contempt.' " *Id.* at 596, 110 S. Ct. at 2647, 110 L. Ed. 2d at 548 (quoting *Doe*, 487 U.S. at 212, 108 S. Ct. at 2348, 101 L. Ed. 2d at 198). Specifically, defendant's charges relevant to this issue are his charges for abduction of a child and statutory rape. The crime of abduction of a child requires that the victim be "any minor child who is *at least four years younger* than the person" abducting the victim. N.C.G.S. § 14-41(a) (2015) (emphasis added). Further, the particular type of statutory rape that defendant was charged with required that "defendant engage[ ] in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is more than four but less than six years older than the person[.]" *Id.* § 14-27.7A(b) (2015). Therefore, had defendant been asked to state his date of birth by the prosecutor at trial, he would have faced the "cruel trilemma of self-accusation, perjury or contempt." *Id.* at 596, 110 S. Ct. at 2647, 110 L. Ed. 2d at 548 (quoting *Doe*, 247 U.S. at 212, 108 S. Ct. at 2348, 101 L. Ed. 2d at 198).

In addition to the above, defendant's statement of his date of birth on his affidavit of indigency was testimonial "on the facts and circumstances of th[is] particular case," *Doe*, 487 U.S. at 214–15, 108 S. Ct. at 2350, 101 L. Ed. 2d at 200 (citing *Fisher*, 425 U.S. at 410, 96 S. Ct. at 1581, 48 L. Ed. 2d at 56), because the General Statutes treat an affidavit of indigency as a sworn statement—made before a court under penalty for false statements—to establish defendant's entitlement to services. Specifically, the General Statutes required that defendant support his application with a sworn affidavit. N.C.G.S. § 7A-451(c1) ("Upon application, supported by the defendant's affidavit . . . ."); *see also id.* § 7A-456(a) (recognizing that the affidavit would be made "under oath or affirmation"). Defendant's own affidavit of indigency itself required that all of his statements be "Sworn/Affirmed" by him. Further, even though the Office of Indigent Defense Services has some authority to make a preliminary determination as to a defendant's indigency, "[t]he court shall make the final determination," of a defendant's indigency. *Id.* at § 7A-453(a). Moreover, defendant would have been subject to penalty had he made false statements on his affidavit of indigency. *See id.* § 7A-456(a)–(b) (stating that making a false statement "under oath or affirmation in regard to the question of [ ] indigency constitutes a Class I felony," and

requiring "[a] judicial official making the determination of indigency" to notify the applicant of the penalty); *see also State v. Denny*, 361 N.C. 662, 667–68, 652 S.E.2d 212, 215 (2007) (upholding defendant's perjury conviction for making a false statement on his affidavit of indigency concerning his real estate assets). Defendant's own affidavit even states that he is making statements concerning his indigency "[u]nder penalty of perjury." These facts and circumstances demonstrate that defendant's statement of his birthdate on his affidavit was testimonial.

That defendant's statement was testimonial is not the end of the analysis; in order to implicate his Fifth Amendment right, it must also have been compelled. *Doe*, 487 U.S. at 212, 108 S. Ct. at 2348, 101 L. Ed. 2d at 198 (". . . the privilege may be asserted only to resist *compelled* explicit or implicit disclosures of incriminating information." (emphasis added))). Here, like in *Simmons*, although defendant's decision to disclose his date of birth on his affidavit of indigency could be seen as voluntary "[a]s an abstract matter," *Simmons*, 390 U.S. at 393, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259, we cannot overlook the "undeniable tension [that] is created" by the fact that defendant needed to disclose his date of birth in order to exercise his right to the assistance of counsel, which is a " 'benefit' . . . afforded by another provision of the Bill of Rights," *id.* at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259. In such an instance, the "reasoning . . . that the defendant has a *choice*: he may refuse to testify and give up the benefit," is ultimately unpersuasive. *See id.* at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259 (emphasis added). Therefore, defendant's statement of his birthdate on his affidavit of indigency was a compelled, testimonial statement that triggered his Fifth Amendment privilege against compulsory self-incrimination.

Accordingly, by allowing defendant's affidavit of indigency to be admitted into evidence here, the trial court committed constitutional error by "requir[ing] [defendant] to surrender one constitutional right in order to assert another." *White*, 340 N.C. at 274, 457 S.E.2d at 847 (citing *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259). Like in *Simmons* where defendant "was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination," here defendant "was obliged either to give up" his right, as an indigent, to the assistance of counsel under the Sixth Amendment, "or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259.

The State's argument to the contrary that this case is governed by our prior decision in *State v. Banks*, 322 N.C. 753, 370 S.E.2d 398 (1988), is unpersuasive. In *Banks*, a police deputy was allowed to testify at trial that the defendant told the deputy that his birthdate was "8 May 1956" as the deputy was "booking" defendant. 322 N.C. at 758, 370 S.E.2d at 402. In that case, the defendant challenged the deputy's testimony on the ground that "evidence of his age was obtained in violation of his privilege against compulsory self-incrimination."[7] *Id.* at 758, 370 S.E.2d at 402. In reliance on our previous decision in *State v. Ladd*, we concluded that "the *Miranda* requirements are inapplicable to routine questions asked during the booking process unless such questions are designed to elicit incriminating information from a suspect." *Id.* at 760, 370 S.E.2d at 403; *see also id.* at 759, 370 S.E.2d at 402–403 (citing and quoting *State v. Ladd*, 308 N.C. 272, 286–87, 302 S.E.2d 164, 173 (1983)). We concluded that the deputy's questioning defendant as to his birthdate during the booking procedure was not "designed to elicit incriminating information from" defendant because the deputy was asking for "certain routine information" that was "regularly obtain[ed]," including "the suspect's name, date of birth, age, sex, race, social security number and address." *Id.* at 760, 370 S.E.2d at 403. Further, we concluded that the *Ladd* exception applied because the deputy "was not investigating any crime nor did he interrogate defendant for the purpose of eliciting incriminating information." *Id.* at 760, 370 S.E.2d at 403. As such, we ultimately concluded "that defendant's Fifth Amendment privilege against compulsory self-incrimination was not violated," notwithstanding defendant's argument that his "age [wa]s an essential element of the crimes for which he was being booked." *Id.* at 760, 370 S.E.2d at 403.

Our decision in *Banks* is inapplicable here because *Banks* dealt with a wholly separate basis for concluding that a defendant was compelled to give incriminating testimony. Here, we are not concerned with—and we make no conclusions in regard to—whether defendant was compelled to state his birthdate on his affidavit of indigency because he was being interrogated while under police custody as was the case in *Miranda v. Arizona*, 384 U.S. 436, 439, 86 S. Ct. 1602, 1609, 16 L. Ed. 2d 694, 704 (1966). Rather, defendant was compelled to state his birthdate on his affidavit of indigency because doing so was necessary to obtain a "benefit . . . afforded by another provision of the Bill of Rights." *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259. Therefore, the issue

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7. The defendant in *Banks* also challenged the admission of the deputy's testimony because the State failed to disclose the statement during voluntary discovery. *Banks*, 322 N.C. at 758, 370 S.E.2d at 402.

of whether the *Ladd* exception to *Miranda* would hypothetically apply here had defendant been subject to interrogation in police custody is irrelevant. *See Banks*, 322 N.C. at 760, 370 S.E.2d at 403 (disagreeing with defendant's argument "the testimony would not be admissible under the *Ladd* exception to *Miranda* requirements"). The compulsion that defendant encountered here, standing alone, is "intolerable." *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259.

B. Whether the Court of Appeals erred in concluding that the trial court's error was not harmless beyond a reasonable doubt.

[2] In his brief, defendant argues that forcing a defendant to choose between constitutional rights under *Simmons* and *White* constitutes reversible error.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b) (2017). A constitutional error is not harmless beyond a reasonable doubt if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *State v. Soyars*, 332 N.C. 47, 58, 418 S.E.2d 480, 487 (1992) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710 (1967)).

Here, the Court of Appeals concluded that the error in admitting defendant's affidavit of indigency was not harmless beyond a reasonable doubt because "Julie's testimony about Defendant's date of birth was incorrect," and "as evinced through cross-examination, Julie did not testify regarding a basis for her knowledge. Julie had never seen an official document showing Defendant's correct date of birth or age." *Diaz*, 808 S.E.2d at 457. The State now argues that the admission of defendant's affidavit of indigency was harmless beyond a reasonable doubt because: (1) "there is no requirement that a person see another's driver[']s license, birth certificate or passport to know the other person's age;" (2) the victim—whose testimony as to defendant's age received no objection at trial—"was intimately involved with the defendant for an extended period of time" and the jury was "highly likely" to believe such testimony; and (3) even though there was a six-day discrepancy between defendant's actual birthdate and the date that the victim testified to, the discrepancy was harmless because the victim's testimony still established that defendant was born in November 1995.

Here we conclude that there is no "reasonable possibility" that the admission of defendant's affidavit of indigency "might have contributed to the conviction." *Soyars*, 332 N.C. at 58, 418 S.E.2d at 487 (quoting *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed. 2d at 710).

Before analyzing the evidence of defendant's age offered at trial, we must clarify, under North Carolina law: (1) what it means for the State to be required to prove a defendant's age; and (2) what evidence is competent to prove a defendant's age. First, "when the fact that [a defendant] was at the time in question over a certain age is one of the essential elements to be proved by the State," the State "must prove only that [the defendant] was at the time of the offense charged over [that age]." *Banks*, 322 N.C. at 758, 370 S.E.2d at 402 (quoting *State v. Gray*, 292 N.C. 270, 287, 233 S.E.2d 905, 916 (1977)). Therefore, "the exact age of the defendant is not in issue, nor need the state prove it." *Id.* at 758, 370 S.E.2d at 402 (quoting *Gray*, 292 N.C. at 287, 233 S.E.2d at 916). This rule, however, should not be "extend[ed] to any case, criminal or civil, where the exact age of someone must be proved." *Id.* at 758, 370 S.E.2d at 402 (emphasis in the original) (quoting *Gray*, 292 N.C. at 287, 233 S.E.2d at 916).

Here, neither defendant's charge of abducting a child nor his charge of statutory rape required the State to prove his exact age. Specifically, with regard to the abduction of a child charge, the State only had to prove that defendant was at least four years older than Julie when she was a minor. *See* N.C.G.S. § 14-41(a). With regard to defendant's statutory rape charge, the State only had to prove that defendant was "more than four but less than six years older than" Julie when she was "13, 14, or 15 years old." *Id.* § 14-27.7A(b). As such, the State was never required to prove defendant's exact age. Therefore, the Court of Appeals' reasoning that the error in admitting defendant's affidavit of indigency was not harmless beyond a reasonable doubt because "Julie's testimony about Defendant's date of birth was incorrect," is a red-herring. *Diaz*, 808 S.E.2d at 457.

Having clarified what the State was required to prove at trial, we now turn to the issue of what evidence is competent to establish the age of a person. The Court of Appeals seems to have concluded that the admission of defendant's affidavit of indigency was not harmless beyond a reasonable doubt on account of the fact that Julie's testimony as to defendant's age could not have been competent because she never saw "an official document showing Defendant's correct date of birth or age." *See id.* at 457. The conclusion that Julie's testimony as to defendant's age was incompetent unless she saw official documentation showing

defendant's date of birth is without legal support. Specifically, under Rule 701 of the North Carolina Rules of Evidence, a lay witness may provide testimony as to that witness's "opinions or inferences" which are: (1) "rationally based on the perception of the witness"; and (2) "helpful to a clear understanding of [the witness's] testimony or the determination of a fact in issue." N.C. R. Evid. 701. In *Banks*, we determined that this rule allowed a police deputy to testify as to the defendant's age based upon the deputy's "ample opportunity to observe defendant both during the booking process and while they were together in the courtroom." *Banks*, 322 N.C. at 757, 370 S.E.2d at 401. We concluded that the deputy's opinion testimony as to the defendant's age comported with the requirements of Rule 701 of the North Carolina Rules of Evidence because it "was rationally based on his perception of defendant, and it was helpful to the jury in determining the age requirements of the crimes charged." *Banks*, 322 N.C. at 757, 370 S.E.2d at 401.

Here, there is an even stronger argument than in *Banks* that Julie's testimony "was rationally based on her perception[s]" of defendant. N.C. R. Evid. 701. Specifically, Julie attended the same high school as defendant where, at the time, she was a member of the freshman class, and he was a member of the senior class. They engaged in an intimate relationship that lasted for several months, including a few weeks during which they "basically start[ed] a new life" together in Oklahoma. As a result, Julie had even more of an opportunity to form a rational opinion as to defendant's age than the deputy in *Banks* who only observed the defendant in that case for the duration of the booking process and while the defendant was in the courtroom. *Banks*, 322 N.C. at 757, 370 S.E.2d at 401. Further, Julie's testimony was helpful to "the determination of a fact in issue" here, that fact being defendant's age. N.C. R. Evid. 701. Therefore, the Court of Appeals' apparent conclusion that Julie's opinion as to defendant's age was somehow incompetent is unfounded. *See Diaz*, 808 S.E.2d at 457.

Having clarified that the State was not required to prove defendant's date of birth at trial, and that Julie's opinion testimony was competent as to the issue of defendant's age, we now turn to analyzing the evidence admitted at trial as to defendant's age in order to determine whether the admission of his affidavit of indigency was harmless beyond a reasonable doubt. We conclude that there is no "reasonable possibility that [defendant's affidavit of indigency] might have contributed to [his] conviction[s]," *Soyars*, 332 N.C. at 58, 418 S.E.2d at 487 (quoting *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed. 2d at 710). Specifically, although Julie did incorrectly testify as to the day that defendant was

born, she did correctly testify that he was born in November of 1995. This evidence established that defendant was nineteen years old at all times relevant to the abduction of a child and statutory rape charges.[8] Julie's testimony that her birth date was 21 July 2000 established that she was fourteen years old at all times relevant to the charges against defendant. As such, Julie's testimony provided evidence that supported defendant's guilt. *See* N.C.G.S. § 14-41(a) (requiring that a defendant be at least four years older than the abducted minor); *id.* § 14-27.7A(b) (requiring that a defendant be "more than four but less than six years older than" a victim who is either "13, 14, or 15 years old"). Given that Julie's testimony resulted from her intimate relationship with defendant that lasted several months, and involved them "basically starting a new life" together, such testimony constituted strong and essentially uncontradicted evidence of defendant's age, and there is no "reasonable possibility" that the jury would have unduly relied on defendant's affidavit of indigency to convict defendant. *Soyars*, 332 N.C. at 58, 418 S.E.2d at 487 (quoting *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed. 2d at 710).

Accordingly, we reverse the conclusion of the Court of Appeals that the trial court's error in admitting defendant's affidavit of indigency was not harmless beyond a reasonable doubt. *Diaz*, 808 S.E.2d at 457.

III. Conclusion

Because we conclude that the trial court's constitutional error in admitting defendant's affidavit of indigency into evidence was harmless beyond a reasonable doubt, we affirm in part and reverse in part the ruling of the Court of Appeals.

AFFIRMED IN PART; REVERSED IN PART.

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8. Per defendant's indictments, the relevant date for the abduction of a child charge is "on or about" 14 April 2015. The relevant dates for the statutory rape charges are: (1) "on or about" 14 April 2015; (2) between 1 March 2015 and 15 March 2015; and (3) between 16 March 2015 and 31 March 2015.

STATE OF NORTH CAROLINA
v.
TORREY GRADY

No. 179A14-3

Filed 16 August 2019

Satellite-Based Monitoring—mandatory lifetime SBM monitoring—Fourth Amendment balancing test—bodily integrity and daily movements

North Carolina's satellite-based monitoring (SBM) program, N.C.G.S. § 14-208.40A(c) and 14-208.40B(c), was held unconstitutional as applied to individuals in defendant's category—those who were subject to mandatory lifetime SBM based solely on their statutorily defined status as a "recidivist" who also had completed their prison sentences and were no longer supervised by the State through probation, parole, or post-release supervision. Recidivists, as defined in the SBM statute, did not have a greatly diminished privacy interest in their bodily integrity or their daily movements; the SBM program constituted a substantial intrusion into those privacy interests; the State failed to demonstrate that the SBM program furthered its interest in solving crimes, preventing crimes, or protecting the public.

Justice NEWBY dissenting.

Justice MORGAN 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, 817 S.E.2d 18 (N.C. Ct. App. 2018), reversing an order for satellite-based monitoring entered on 26 August 2016 by Judge Phyllis M. Gorham in Superior Court, New Hanover County. Heard in the Supreme Court on 8 January 2019.

Joshua H. Stein, Attorney General, by Teresa M. Postell, Assistant Attorney General, and Joseph Finarelli, Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, and Lewis Everett for defendant-appellee.

Christopher Brook for American Civil Liberties Union of North Carolina Legal Foundation; and Nathan Freed Wessler, pro hac vice, and Brandon J. Buskey, pro hac vice, for American Civil Liberties Union Foundation, amici curiae.

EARLS, Justice.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. U.S. Const. amend. IV. The United States Supreme Court has determined that North Carolina's satellite-based monitoring (SBM) of sex offenders, which involves attaching an ankle monitor "to a person's body, without consent, for the purpose of tracking that individual's movements," constitutes a search within the meaning of the Fourth Amendment. *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015) (per curiam). The Supreme Court remanded the case for an examination of "whether the State's monitoring program is reasonable—when properly viewed as a search." *Id.* at 1371. In its per curiam opinion, the Supreme Court noted, among other things, the following:

> The State's program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search.
>
> That conclusion, however, does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. *See, e.g.*, *Samson v. California*, 547 U.S. 843 (2006) (suspicionless search of parolee was reasonable); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student athletes was reasonable). The North Carolina courts did not examine whether the State's monitoring program is reasonable—when properly viewed as a search—and we will not do so in the first instance.

Id. (citations omitted). In accordance with this decision, this case was ultimately remanded to the superior court, which entered an order determining the SBM program to be constitutional. The Court of Appeals reversed, but only as to Mr. Grady individually. We conclude that the

Court of Appeals erroneously limited its holding to the constitutionality of the program as applied only to Mr. Grady, when our analysis of the reasonableness of the search applies equally to anyone in Mr. Grady's circumstances. *Cf. Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that state statutes mandating a sentence of life imprisonment without the possibility of parole are unconstitutional as applied to a specific group, namely juveniles who did not commit homicide).

In North Carolina, "SBM's enrollment population consists of (1) offenders on parole or probation who are subject to State supervision, (2) unsupervised offenders who remain under SBM by court order for a designated number of months or years, and (3) unsupervised offenders subject to SBM for life, who are also known as 'lifetime trackers.' " *State v. Bowditch*, 364 N.C. 335, 338, 700 S.E.2d 1, 3 (2010). Mr. Grady is in the third of these categories in that he is subject to SBM for life and is unsupervised by the State through probation, parole, or post-release supervision. Additionally, Mr. Grady is a "recidivist," which makes lifetime SBM mandatory as to him without any individualized determination of the reasonableness of this search. Because we conclude that the relevant portions of N.C.G.S. §§ 14-208.40A(c) and 14-208.40B(c) are unconstitutional as applied to all individuals who, like Mr. Grady, are in the third *Bowditch* category and who are subject to mandatory lifetime SBM based solely on their status as a "recidivist," we modify and affirm the opinion of the Court of Appeals.

Background

Mr. Grady is required by North Carolina statute to enroll in the SBM program and to wear an ankle monitor at all times for the remainder of his life based on two sex crimes that he committed when he was seventeen and twenty-six years old and for which he has fully served his criminal sentences. *State v. Grady*, 817 S.E.2d 18 (N.C. Ct. App. 2018). On 13 September 2006, Grady pleaded guilty to indecent liberties with a child and was sentenced to a minimum of thirty-one and a maximum of thirty-eight months of imprisonment. For felony sentencing purposes, Grady stipulated to the aggravating factor that the fifteen-year-old victim was impregnated as a result of his crime, which occurred when he was twenty-six years old. He also stipulated to certain prior convictions, including a 16 January 1997 plea of no contest to a second-degree sex offense committed when he was seventeen years old and a 6 January 2004 plea of guilty to failure to register as a sex offender. Grady was unconditionally released from prison on 25 January 2009 and received certification that his rights of citizenship were "BY LAW AUTOMATICALLY RESTORED."

Over a year later, on 12 March 2010, the North Carolina Department of Correction (DOC) sent a letter to Grady informing him that it had made an initial determination that he met the statutory criteria of a "recidivist," which would require his enrollment in the SBM program, and giving him notice to appear at a hearing at which the court would determine his eligibility for SBM. Before a hearing was held, he pleaded guilty on 27 October 2010 to failure to maintain his address with the sex offender registry and was sentenced to twenty-four to twenty-nine months in prison. He served that term of imprisonment and was again unconditionally released on 24 August 2012. A new hearing was scheduled for 14 May 2013 in the Superior Court in New Hanover County to determine if Grady should be required to enroll in the State's SBM program.

North Carolina's SBM Program

North Carolina's SBM program for sex offenders[1] became effective on 1 January 2007 as a result of the ratification of "An Act To Protect North Carolina's Children/Sex Offender Law Changes," which directed the DOC to "establish a sex offender monitoring program that uses a continuous satellite-based monitoring system . . . . to monitor" the locations of certain categories of sex offenders. An Act To Protect North Carolina's Children/Sex Offender Law Changes, ch. 247, sec. 15, 2005 N.C. Sess. Laws (Reg. Sess. 2006) 1065, 1074–79 (codified as amended at N.C.G.S. §§ 14-208.40 to -208.45 (2017 & Supp. 1 2018)); *see also Bowditch*, 364 N.C. at 337, 700 S.E.2d at 3 ("As authorized by the legislation, DOC established and began administering the SBM program on 1 January 2007."). The General Assembly mandated that the "[SBM] program shall use a system that provides . . . [t]ime-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology." Ch. 247, sec. 15.(a), 2005 N.C. Sess. Laws (Reg. Sess. 2006) at 1075 (codified as amended at N.C.G.S. § 14-208.40(c)(1)).

In general terms, North Carolina's statutory framework for the satellite-based monitoring of convicted sex offenders establishes that an offender who is (a) classified as a sexually violent predator, (b) a recidivist, (c) convicted of an aggravated offense, or (d) an adult

1. North Carolina law also provides for the use of SBM with individuals sentenced to house arrest as a condition of probation, see N.C.G.S. § 15A-1343(a1) (2017), or post-release supervision, *see id.* § 15A-1368.4(e)(13) (2017). All references to "the SBM program" herein are only to the statutory framework for sex offenders that is codified as amended at N.C.G.S. §§ 14-208.40 to -208.45 (2017 & Supp. 1 2018).

convicted of statutory rape of a child or statutory sex offense with a victim under the age of thirteen must submit to SBM for life. *See* N.C.G.S. §§ 14-208.40A(c), -208.40B(c) (2017). The statutes provide for no individualized assessment of the offender; the court has no discretion over whether to impose SBM or for how long; and no court has the authority to terminate SBM for these individuals. *Id.* All other sex offenders may be ordered to submit to SBM if, based on a risk assessment, the offender "requires the highest possible level of supervision and monitoring." *Id.* §§ 14-208.40A(d)-(e), -208.40B(c) (2017). For these individuals the court specifies the period of time that the offender must be enrolled in the SBM program. *Id.* §§ 14-208.40A(e), -208.40B(c).

Section 14-208.6(2b) of the North Carolina General Statutes defines a "recidivist" as "[a] person who has a prior conviction for an offense that is described in G.S. 14-208.6(4)," which, in turn, defines a "reportable conviction." N.C.G.S. § 14-208.6(2b) (Supp. 1 2018). "Reportable convictions," which encompass a range of statutorily defined sex crimes, including "[a] final conviction for an offense against a minor," "a sexually violent offense," "or an attempt to commit any of those offenses," *id.* § 14-208.6(4)(a) (Supp. 1 2018), are final convictions that trigger the registration requirements of the "statewide sex offender registry." *See id.* § 14-208.7(a) (2017) (stating that "[a] person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides"). An individual who has a prior conviction for a reportable offense, and therefore meets the statutory definition of a "recidivist," must maintain registration with the sex offender registry for life. *Id.* § 14-208.23 (2017).

An individual who is subjected to lifetime SBM may file a request with the Post-Release Supervision and Parole Commission to terminate the SBM requirement. Such a request, however, cannot be filed until at least one year after the individual: "(i) has served his or her sentence for the offense for which the satellite-based monitoring requirement was imposed, and (ii) has also completed any period of probation, parole, or post-release supervision imposed as part of the sentence." *Id.* § 14-208.43(a) (2017). If the individual has not been convicted of any further reportable offenses and "has substantially complied with the provisions of this Article ["Sex Offender and Public Protection Registration Programs"], the Commission may terminate the monitoring requirement if the Commission finds that the person is not likely to pose a threat to the safety of others." *Id.* § 14-208.43(b) (2017). An individual enrolled in the SBM program "shall cooperate with the Division . . . and the requirements of the [SBM] program." *Id.* § 14-208.42 (2017). Moreover, the Division

> shall have the authority to have contact with the offender at the offender's residence or to require the offender to appear at a specific location as needed for the purpose of enrollment, to receive monitoring equipment, to have equipment examined or maintained, and for any other purpose necessary to complete the requirements of the [SBM] program.

Id. An individual who "fails to enroll" or "tampers with, removes, vandalizes, or otherwise interferes with the proper functioning of a [monitoring] device" is guilty of a felony, and it is a Class 1 misdemeanor for an individual to "fail[ ] to provide necessary information . . . or fail[ ] to cooperate with the . . . guidelines and regulations for the program." N.C.G.S. § 14-208.44(a)-(c) (2017); *see also id.* § 14-208.44(d) (2017) ("For purposes of this section, 'enroll' shall include appearing, as directed . . . to receive the necessary equipment.").

If an individual is convicted of a reportable conviction and a court has made no prior SBM determination, as was the case with Grady, the Division of Adult Correction and Juvenile Justice (the Division) is required to make an initial determination whether the individual is required to enroll in SBM, and, if so, to schedule a "bring back" hearing for a court to determine by using the same criteria described above whether the offender must enroll in SBM. *Id.* § 14-208.40B.

Today nearly every state uses SBM to some degree. *See* Avlana Eisenberg, *Mass Monitoring*, 90 S. Cal. L. Rev. 123, 125 (2017). Only twelve states, however, allow lifetime monitoring,[2] and of those, only two, North Carolina and California, mandate lifetime monitoring without any individualized assessment of risk, even for individuals who have completed their sentences, and without meaningful judicial review over

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2. These states are California, Florida, Kansas, Louisiana, Maryland, Michigan, Missouri, North Carolina, Oregon, Rhode Island, South Carolina, and Wisconsin. Cal. Penal Code § 3004(b) (West 2016); Fla. Stat. § 948.012(4) (2016); Kan. Stat. Ann. § 22-3717(u) (2016); La. Rev. Stat. Ann. § 15:560.3(A)(3) (2016); Md. Code Ann., Crim. Proc. § 11-723(d)(3)(i) (LexisNexis 2016); Mich. Comp. Laws § 750.520n (2016); Mo. Rev. Stat. § 217.735(4) (2016); N.C.G.S. §§ 14-208.40A(c), -208.40B(c); Or. Rev. Stat. §§ 137.700, 144.103 (2016); 11 R.I. Gen. Laws § 11-37-8.2.1 (2016); S.C. Code Ann. § 23-3-540 (Supp. 2018); Wis. Stat. § 301.48 (2016). *See generally Comment: Tracking the Constitution - the Proliferation and Legality of Sex-Offender GPS-Tracking Statutes*, 42 Seton Hall L. Rev. 1169, 1172–90 (2012) (categorizing types of GPS monitoring statutes). Georgia's lifetime monitoring statute, Ga. Code Ann. § 42-1-14(e) (2016), was declared unconstitutional by that state's Supreme Court. *See Park v. State*, 305 Ga. 348, 360–61, 825 S.E.2d 147, 158 (2019).

time. *See* Cal. Penal Code § 3004(b) (West 2016); N.C.G.S. §§ 14-208-40A, -208.40B, -208.43. Some states provide for both individualized assessments to determine if lifetime SBM is appropriate and the opportunity to petition a court to be removed from SBM. *See*, *e.g.*, La. Rev. Stat. Ann. § 15:560.5 (2016); Wis. Stat. § 301.48 (2016).[3] Other states only apply lifetime SBM to offenders who are subject to lifetime parole supervision or who otherwise would receive a sentence of life imprisonment. *See*, *e.g.*, Fla. Stat. § 948.012 (2016); Kan. Stat. Ann. § 22-3717(u) (2016); Mo. Rev. Stat. § 217.735 (2016); Or. Rev. Stat. § 144.103 (2016); 11 R.I. Gen. Laws § 11-37-8.2.1 (2016). Still other states provide for individualized assessments and sentencing discretion. *See*, *e.g.*, Md. Code Ann., Crim. Proc. § 11-723 (LexisNexis 2016); *People v. Kern*, 288 Mich. App. 513, 794 N.W.2d 362 (2010) (per curiam) (holding that defendants put on probation or sent to a local jail as opposed to the penitentiary are not subject to lifetime SBM under Michigan's statute so that the defendant, who was convicted of second-degree criminal sexual conduct, was, because of his jail sentence, not subject to Michigan's lifetime SBM program, citing Mich. Comp. Laws §§ 750.520, 791.285). Finally, several states give offenders the opportunity to petition a court to have the SBM requirement lifted. *See*, *e.g.*, Mo. Rev. Stat. § 217.735(5) (2016); S.C. Code Ann. § 23-3-540(H) (Supp. 2018). Another characteristic of most of the other eleven state lifetime SBM programs is that, compared with North Carolina's program, they apply to persons convicted of a smaller category of offenses, which typically include only the most egregious crimes involving child victims. As a result, North Carolina makes more extensive use of lifetime SBM than virtually any other jurisdiction in the country.

Grady's SBM Claims

Prior to the 14 May 2013 bring back hearing, Grady filed a motion to deny the State's SBM application and to dismiss the proceeding, in which he argued, *inter alia*, that "the imposition of the monitoring upon Defendant violates his rights to be free from unreasonable search and

3. The dissent refers to Wisconsin's SBM statute as "functionally identical" to North Carolina's statute, quoting *Belleau v. Wall*, 811 F.3d 929, 939 (7th Cir. 2016) (Flaum, J., concurring). While the two statutes may be identical in the sense that they involve GPS monitoring using an ankle bracelet, they do not establish functionally identical programs. Wisconsin's program subjects only child sex offenders to lifetime SBM; individualized assessments are required before some offenders can be enrolled in the program; the department administering the program can substitute passive position system monitoring for active SBM; and both the offender and the department can apply to a court to request termination of lifetime tracking. *See* Wis. Stat. § 301.48 (2016).

seizure as guaranteed by the Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution." At the hearing, the State argued that, based on the evidence of Grady's conviction for taking indecent liberties with a child and his prior conviction for second-degree sex offense, he met the statutory definition of being a "recidivist"—that is, a person who has a prior conviction for a reportable offense. N.C.G.S. § 14-208.6(2b). Grady conceded that he qualified as a recidivist under the statute but argued, *inter alia*, that "the imposition of the GPS monitoring device itself and the 24/7 tracking" constitute an unreasonable search and seizure under both the state and federal constitutions, and the statute subjecting him to SBM is "unconstitutional on its face, and as it applies to Mr. Grady." The trial court denied Grady's motion, finding that the SBM program is not unconstitutional. The trial court further found that Grady met the statutory definition of "recidivist" and, accordingly, ordered him to enroll in the SBM program "for the remainder of the defendant's natural life." Grady appealed the trial court's order imposing lifetime SBM to the Court of Appeals.

At the Court of Appeals, Grady argued that " 'the constant GPS monitoring (and the imposition of the GPS equipment for that purpose)' used in SBM violates his constitutional protections against unreasonable searches and seizures," *State v. Grady*, 233 N.C. App. 788, 759 S.E.2d 712, 2014 WL 1791246, at *1 (2014) (unpublished), relying on the United States Supreme Court's decision in *United States v. Jones*, 565 U.S. 400, 404 (2012) ("We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.' " (footnote omitted)). The Court of Appeals, in an unpublished opinion, determined that it was bound by the decision of a prior panel that had "considered and rejected the argument that 'if affixing a GPS to an individual's vehicle constitutes a search of the individual, then the arguably more intrusive act of affixing an ankle bracelet to an individual must constitute a search of the individual as well.' " *Grady*, 2014 WL 1791246, at *2 (quoting *State v. Jones*, 231 N.C. App. 123, 127, 750 S.E.2d 883, 886 (2013)). After this Court dismissed defendant's appeal and denied his petition for discretionary review, *State v. Grady*, 367 N.C. 523, 762 S.E.2d 460 (2014), the United States Supreme Court granted his petition for writ of certiorari, *Grady*, 135 S. Ct. at 1371.

In a per curiam opinion, the Supreme Court stated that the Court of Appeals' determination that North Carolina's "system of nonconsensual satellite-based monitoring does not entail a search within the meaning of the Fourth Amendment" is "inconsistent with [the] Court's

precedents." *Id.* at 1370; *see Jones*, 565 U.S. at 406 n.3 ("Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, . . . a search has undoubtedly occurred."); *see also Florida v. Jardines*, 569 U.S. 1, 11 (2013) (reaffirming that a search occurs "when the government gains evidence by physically intruding on constitutionally protected areas" (citing *Jones*, 565 U.S. at 409)). The Court opined that, in light of its previous decisions, "it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." *Grady*, 135 S. Ct. at 1370. The Court noted, however, that this conclusion did not end the analysis, because a search must be unreasonable in order to be unconstitutional. *Id.* at 1371. Accordingly, the Court granted defendant's petition for writ of certiorari, vacated the Court of Appeals' decision, and "remanded for further proceedings not inconsistent with this opinion." *Id.*

On 11 June 2015, this Court issued an order remanding the matter to the Court of Appeals for reconsideration in light of the decision of the United States Supreme Court. On 23 October 2015, defendant filed in the Court of Appeals a "Motion to Remand to Superior Court and to Stay the Order Imposing [SBM]." The Court of Appeals issued an order on 6 November 2015 granting defendant's motion to remand the case to superior court while denying his motion to stay SBM.

On 16 June 2016, the Superior Court in New Hanover County held a remand hearing to determine whether subjecting defendant to nonconsensual lifetime SBM constitutes a reasonable search under the Fourth Amendment. At the hearing, the State presented evidence, including: a certified copy of the judgment and commitment for defendant's prior conviction for second-degree sex offense; defendant's criminal record; printouts of N.C.G.S. §§ 14-208.5 (stating the "Purpose" of Article 27A) and 14-208.43 ("Request for termination of satellite-based monitoring requirement"); and two photographs of the equipment currently used in the program: the ExacuTrack One ankle monitor (or ET-1) and its accompanying "beacon"—a device that must be placed in the home of the individual subjected to SBM.

Grady, on the other hand, presented evidence that included statistical reports tending to show that sex offenders are less likely to reoffend than other categories of convicted felons and that the vast majority of sex offenses are committed against victims who know their offender, statistical information about individuals currently enrolled in the State's SBM program, the Policy and Procedure Manual from the Department of Community Corrections governing "Technology and

Monitoring Programs," including SBM, the ET-1's instructional "client guide" provided to monitored individuals, the Division's "Guidelines and Regulations" form that is required to be signed by monitored individuals, and an excerpt from the Division's "Train the Trainer" SBM training session.

The only witness called by the State was Scott Pace, a probation supervisor in the Division, who brought with him an ET-1 and a beacon. Officer Pace testified to the operation of the SBM equipment and to his understanding of the program. An individual enrolled in the SBM program is not permitted to remove the ET-1, which is required to be worn at all times, and it is a felony to attempt to remove or interfere with it. According to Pace, the ET-1 weighs 8.7 ounces, "about half a pound," and is "waterproof up to 15 feet," allowing the individual to shower, bathe, or swim in a pool or the ocean. Pace explained that the individual is responsible for maintaining the charge of the ET-1's lithium battery and added that "if they're moving a lot, if there's a lot of activity . . . the more battery it uses." Moreover, Pace stated that "[t]he batteries have a life span" and as the battery ages, "it won't hold a charge as long." The individual must charge the ET-1 two hours every day by plugging it into an electrical outlet, during which time the individual must remain tethered to the wall by the ET-1's fifteen foot charging cord. According to Pace, "we tell them to charge it two hours a day just so they don't lose the charge. Failure to charge the monitor, we'll lose signal, . . . and that is a violation."[4]

When the charge of the ET-1's battery runs low, Pace explained, "the unit will actually talk to you and it will say, 'low battery, go charge.' " "That message will keep repeating itself until they acknowledge" by placing a finger on a divot on the ET-1. Pace explained that officers can send other messages to individuals through the ET-1's audible message system, such as "Call your officer," and that "they're supposed to follow the message, whatever the message may be." Similarly, the ET-1 plays a repeating voice message when the signal is lost. Pace testified that "there can be issues with equipment" and the ET-1 can temporarily lose signal due to the positioning of satellites. Moreover, "[h]omes with metal roofs kind of interfere[ ] with the signal. Big buildings, such as WalMart. When they go in places such as that it could interfere with the signal." In those situations, Pace explained, individuals are "supposed to go outside and try to gain signal back" and to acknowledge the alert by pressing the divot on the ET-1.

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4. This instruction is reflected in the Division's "Train the Trainer" materials introduced into evidence by defendant, which states: "Charge for 2 hours per day."

Individuals subjected to SBM must also submit to quarterly equipment checks at their homes. Pace stated that every three months, Division officers go to the individual's house to "make sure that the equipment has not been tampered with . . . and that it's in correct working order." Pace testified that while an individual could technically refuse entry into the home, "[w]e prefer to go in the house" in order "to see where the beacon is at, because it has to be situated a certain way." Additionally, the Division's "Guidelines and Regulations," which the individual is required to sign upon enrollment, provide: "I understand a unit in the home will be assigned to me and it will be necessary for a designated representative of SCC to enter my residence or other location(s) where I may temporarily reside to install, retrieve, or periodically inspect the unit."

Pace testified that the "mapping function" allows him to retrieve historical location information "up to I think it's six months, and after six months we can call [the equipment provider], and back further than that they keep them, and they can send them to us via email." The mapping function also allows officers to observe monitored individuals in real time. As Pace testified, "For SBM cases, yes, it's 24-7, it's live, current location." Regarding the accuracy of the location information, Pace stated: "In my experience, it's been pretty accurate. I mean, people that's taken it off, I've gone right to the locations and retrieved units that people's taken off and discarded on streets, trash cans, in the woods. I mean, it's taken me right there to it, you know."

After receiving the evidence and considering the oral and written arguments of the parties, the superior court entered an order on 26 August 2016 upholding the imposition of lifetime SBM on defendant. The court summarized the evidence at length. Among other things, the trial court noted:

> The ankle monitor does not monitor or reveal the activities of the offender—it merely monitors his location. The device does not confine the person to their residence or any other specific location. The ankle monitor and related equipment requires a quarterly (three months) review/inspection by the State to ensure that the device is in proper working order.
>
> In addition to Officer Pace's testimony, the State also entered into evidence photographs of the SBM equipment, certified copies of the judgments for the two sex offenses, the defendant's criminal history, and statutory provisions of Part 5 of Article 27A of Chapter 14 of N.C.G.S. ("Sex

> Offender Monitoring"). In both his cross examination of the State's witness Officer Pace and in his case-in-chief, the defendant admitted into evidence, among other exhibits, multiple studies of recidivism rates of sex offenders versus other criminals; the State's policy, procedures and rules governing SBM, and additional photographs of the SBM equipment.

The court ultimately concluded[5] that

> based on the totality of the circumstances analysis, . . . satellite based monitoring of the defendant is a reasonable search.
>
> The Court has considered defendant's argument that the satellite based monitoring statute is facially unconstitutional. The Court rejects this argument and finds that the statute is constitutional on its face.

Accordingly, the trial court ordered defendant to enroll in SBM "for the remainder of [his] natural life." Defendant appealed the trial court's order to the Court of Appeals.

At the Court of Appeals, defendant argued that the State failed to establish that the imposition of lifetime SBM is a reasonable search. *Grady*, 817 S.E.2d at 22. In a divided opinion filed on 15 May 2018, the Court of Appeals reversed the trial court's SBM order. *Id.* at 28. The Court of Appeals majority noted that the imposition of SBM intruded upon defendant's Fourth Amendment interests by the physical attachment of the ankle monitor to his body, "a constitutionally protected area," and through the monitor's continuous GPS tracking. *Id.* at 25 (quoting *Jones*, 565 U.S. at [407] n.3). The majority determined that the physical intrusion caused by the permanent attachment of the ankle monitor, along with its audible voice messages and the necessity of charging it for two hours daily, was "more inconvenient than intrusive, in light of defendant's

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5. To determine the appropriate legal test of reasonableness under the Fourth Amendment, the trial court relied on two cases from other jurisdictions, *People v. Hallak*, 310 Mich. App. 555, 873 N.W.2d 811 (2015), *rev'd in part and remanded*, 499 Mich. 879, 876 N.W.2d 523 (2016) (per curiam order), and *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016). To assess North Carolina's interest in preventing recidivism, the trial court relied on *Smith v. Doe*, 538 U.S. 84, 103 (2003) ("The risk of recidivism posed by sex offenders is 'frightening and high.' " (quoting *McKune v. Lile*, 536 U.S. 23, 34 (2002) (plurality opinion)), and *McKune*, 536 U.S. at 32–33 ("Sex offenders are a serious threat in this Nation. . . . When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.")).

diminished expectation of privacy as a convicted sex offender." *Id.* On the other hand, the majority stated that the continuous GPS tracking was "uniquely intrusive." *Id.* (quoting *Belleau v. Wall*, 811 F.3d 929, 940 (7th Cir. 2016) (Flaum, J., concurring)). The majority acknowledged the State's compelling interest in protecting the public from sex offenders but determined that "the State failed to present any evidence of [SBM's] efficacy in furtherance of the State's undeniably legitimate interests." *Id.* at 27. Accordingly, the majority concluded that although, based solely on his status as a sex offender, "defendant's expectation of privacy is appreciably diminished as compared to law-abiding citizens," the State failed to establish "that lifetime SBM of defendant is a reasonable search under the Fourth Amendment." *Id.* at 28.

In a separate opinion, one member of the panel dissented from the majority's conclusion that lifetime SBM of defendant is unreasonable and thus would have affirmed the trial court's order. *Id.* (Bryant, J., dissenting). Believing that "the majority asks the State to meet a burden of proof greater than our General Assembly envisioned as necessary and greater than Fourth Amendment jurisprudence requires," *id.*, the dissenting judge concluded that under the totality of the circumstances, "the degree to which SBM participation promotes legitimate governmental interests—the prevention of criminal conduct or the apprehension of defendant should he reoffend," outweighed "the degree to which participation in the SBM program intrudes upon defendant's privacy." *Id.* at 31.

On 19 June 2018, the State filed a notice of appeal as of right based on the dissenting opinion in the Court of Appeals pursuant to N.C.G.S. § 7A-30(2).

Standard of Review

In reviewing a trial court order, "we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, . . . and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). We review decisions of the Court of Appeals for errors of law. *State v. Romano*, 369 N.C. 678, 685, 800 S.E.2d 644, 649 (2017) (citing *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994)).

"Whether a statute is constitutional is a question of law that this Court reviews de novo." *Id.* at 685, 800 S.E.2d at 649. "In exercising de novo review, we presume that laws enacted by the General Assembly

are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond [a] reasonable doubt." *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018) (quoting *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016)). "The presumption of constitutionality is not, however, and should not be, conclusive." *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 4, 413 S.E.2d 541, 543 (1992).

Analysis

Defendant argues that North Carolina's SBM program effects an unreasonable search and is unconstitutional both on its face and as applied to him under the Fourth Amendment to the United States Constitution. In light of our analysis of the program and the applicable law, we conclude that the State's SBM program is unconstitutional in its application to all individuals in the same category as defendant—specifically, individuals who are subject to mandatory lifetime SBM based solely on their status as a statutorily defined "recidivist"[6] who have completed their prison sentences and are no longer supervised by the State through probation, parole, or post-release supervision. We decline to address the application of SBM beyond this class of individuals.

"A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015); *see also id.* (explaining that facial challenges to "statutes authorizing warrantless searches" can be brought under the Fourth Amendment). A party making a facial challenge "must establish that a 'law is unconstitutional in all of its applications.' " *Id.* at 2451 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). In contrast, "the determination whether a statute is unconstitutional as applied is strongly influenced by the facts in a particular case." *State v. Packingham*, 368 N.C. 380, 393, 777 S.E.2d 738, 749 (2015), *rev'd and remanded*, 137 S. Ct. 1730 (2017). This case was remanded by the

6. We stress that our holding applies to individuals who, like defendant, are subjected to mandatory lifetime SBM based *solely* on a finding that they meet the statutory definition of a "recidivist." We do not address the constitutionality of the SBM program as applied to the other subcategories of offenders to which mandatory lifetime SBM applies, even if they may also qualify as a recidivist. *See* N.C.G.S. §§ 14-208.40A(c), -208.40B(c) (stating that an offender who is classified as a sexually violent predator, convicted of an aggravated offense, or is an adult convicted of statutory rape of a child or statutory sex offense with a victim under the age of thirteen must submit to SBM for life). In other words, contrary to the assertions by the dissent, if, for example, an offender is determined to be both a sexually violent predator and a recidivist (unlike Mr. Grady), our holding in this case does not address the constitutionality of an order requiring that offender to enroll in the SBM program for life on the grounds of being a sexually violent predator.

United States Supreme Court with instructions to "examine whether the State's monitoring program is reasonable." *Grady*, 135 S. Ct. at 1371. While this directive could be interpreted as instructing us to address the facial constitutionality of the State's SBM program in its entirety, we address instead the constitutionality of the SBM program as applied to the narrower category of recidivists to which defendant belongs. *See Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 472, 206 S.E.2d 141, 145 (1974) ("[W]hen asked to determine the constitutionality of a statute, the Court will do so only to the extent necessary to determine that controversy. It will not undertake to pass upon the validity of the statute as it may be applied to factual situations materially different from that before it." (citations omitted)).

The "basic purpose" of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967); *see Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."); *see also Riley v. California*, 134 S. Ct. 2473, 2494 (2014) ("[T]he Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity."). In reviewing the constitutionality of a search, "the ultimate measure . . . is 'reasonableness,' " which " ' "is judged by balancing [the search's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ' "[7] *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (quoting *Skinner v. Ry. Labor Execs.' Ass'n.*, 489 U.S. 602, 619 (1989)).

The Supreme Court has explained that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant" supported by a showing of probable cause.[8] *Id.* at

7. In the interest of brevity and clarity, additional references to this quotation will eliminate parenthetical information and internal quotation marks.

8. A judicial warrant serves to "assure[ ] the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope" and "also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case." *Skinner*, 489 U.S. at 622 (citations omitted); *see also Katz v. United States*, 389 U.S. 347, 357 (1967) (explaining that "the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police' " (alteration in original) (quoting *Wong Sun v. United State*s, 371 U.S. 471, 481–82 (1963))).

653 (citing *Skinner*, 489 U.S. at 619); *see Camara*, 387 U.S. at 528–29 ("[O]ne governing principle . . . has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." (citations omitted)). Therefore, we start with the "basic Fourth Amendment principle" that warrantless searches are presumptively unreasonable. *United States v. Karo*, 468 U.S. 705, 714–15 (1984).

Nonetheless, "there are exceptions to the warrant requirement. When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (citations omitted). Exceptions to the warrant requirement "are 'jealously and carefully drawn,' " and the "burden is on those seeking the exemption to show the need for it." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (first quoting *Jones v. United States*, 357 U.S. 493, 499 (1958); then quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)).

Additionally, in the absence of a warrant, "the Court has preferred 'some quantum of individualized suspicion . . . [as] a prerequisite to a constitutional search or seizure.' " *Maryland v. King*, 569 U.S. 435, 447 (2013) (alterations in original) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976)); *see also Chandler v. Miller*, 520 U.S. 305, 313 (1997) ("To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." (citing *Vernonia*, 515 U.S. at 652–53)). Yet individualized suspicion is not required in every case, because "[t]he touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." *Samson v. California*, 547 U.S. 843, 855 n.4 (2006); *see also King*, 569 U.S. at 447 ("[T]he Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." (quoting *Martinez-Fuerte*, 428 U.S. at 561)).

Here the State contends that the SBM program falls within a category of "special needs" searches, described in some cases as another exception to the requirement of an individualized warrant.[9] The Supreme

9. Defendant asserts, and the Court of Appeals below agreed, that the State waived its special needs argument by failing to raise this issue in the trial court. Given that the Supreme Court in its remand order cited to *Vernonia*, a special needs case that was cited by the State in the trial court, and given the significant role that this issue often plays in the totality-of-the-circumstances analysis, we will address this issue on the merits as part of the reasonableness inquiry. We note that the balancing test articulated in *Vernonia*, 515 U.S. at 652–53 ("[W]hether a particular search meets the reasonableness standard " 'is

Court has recognized that programmatic searches performed in the absence of a warrant or individualized suspicion may be permissible "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)).[10] "When such 'special needs'—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at 314 (first citing *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989); then citing *Skinner*, 489 U.S. at 668).

Although the State asserts, somewhat ambiguously, that SBM is "in full accord with the analysis applicable to special needs searches," the State never actually identifies[11] any special need "beyond the normal need for law enforcement." *Griffin v. Wisconsin*, 483 U.S. 868, 873

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judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ' " (quoting *Skinner*, 489 U.S. at 619)), is not unique to special needs cases, but rather is the same general Fourth Amendment balancing test that weighs " 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy,' " *King*, 569 U.S. at 448 (alteration in original) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)), or, as the Supreme Court phrased the test in its per curiam decision, the "nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations," *Grady*, 135 S. Ct. at 1371.

10. For example, the Court has recognized special needs in the context of a State's supervision of probationers by probation officers, "a situation in which there is an ongoing supervisory relationship—and one that is not, or at least not entirely, adversarial—between the object of the search and the decisionmaker." *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987); *see also*, *e.g.*, *Vernonia*, 515 U.S. at 653–54 (recognizing " 'special needs' to exist in the public school context" in which "children . . . have been committed to the temporary custody of the State as schoolmaster"); *cf. City of Indianapolis v. Edmond*, 531 U.S. 32, 44 n.1 (2000) (not recognizing any special need in the state's vehicular narcotics checkpoints because the "primary purpose . . . is to advance the general interest in crime control").

11. The State asserts that a special need must only go "beyond the regular law enforcement duty" and argues that the dangerousness of sex offenders gives rise to a special need just as the dangerousness of impaired drivers gave rise to a special need justifying the sobriety checkpoints in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990). In *Sitz* the Court did not find any special need; instead, it concluded that prior decisions involving checkpoints required addressing reasonableness under general balancing principles. *See id.* at 450 (rejecting the respondents' argument based on *Von Raab* "that there must be a showing of some special governmental need 'beyond the normal need' for criminal law enforcement before a balancing analysis is appropriate" and stating that

(1987) (quoting *T.L.O.*, 469 U.S. at 351). Because defendant is not on probation or supervised release, but rather is unsupervised, this is not a situation, as in *Griffin*, in which there is any "ongoing supervisory relationship" between defendant and the State. *Id.* at 879; *see also id.* at 875 (stating that "[probation] restrictions are meant to assure that the probation serves as a period of genuine rehabilitation"). Nor is there any indication in the record that the "primary purpose" of SBM is anything other than to "advance the general interest in crime control." *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 n.1 (2000).

On the contrary, as Officer Pace testified and as the State repeatedly made clear in its brief[12] and at oral arguments,[13] the primary purpose of SBM is to solve crimes. This intent is also reflected in the SBM program's enabling legislation, *see* N.C.G.S. § 14-208.40(d) (providing that the SBM program is designed to "monitor subject offenders and correlate their movements to reported crime incidents"); *see also id.* § 14-208.5 (2017) (providing that the purpose of the Article is to assist "law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders"), as well as the statutory definition of "satellite-based monitoring" in the Criminal Procedure

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Von Raab "was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways," "which utilized a balancing analysis" (citations omitted)). Other checkpoint cases that implicate special governmental needs are based on either controlling illegal immigration near the border or regulating highway safety. *See Edmond*, 531 U.S. at 41 ("We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. . . . [E]ach of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety.").

12. The State explained in its brief: "While the [ankle monitor] cannot itself physically prevent a crime, it is a useful investigative tool for law enforcement in *solving crimes and excluding monitored offenders as suspects*"; SBM "*speed[s] up apprehension of criminals* before they commit additional crimes"; "[t]his case presents one of those circumstances where the government's *need to detect or deter criminal violations* is sufficiently compelling to justify the search authorized by the [SBM] program for convicted sex offenders"; "[w]hile deterrence may be difficult to demonstrate, a more easily understood use of the location information gained from this search is *speed in 'apprehension of criminals before they commit additional crimes*' "; and SBM has " 'the potential to significantly improve both the criminal justice system and police investigative practices' by *quickly identifying those who are or may be guilty and quickly eliminating those who are not*." (Emphases added.) (Citations omitted.)

13. The State, when asked a direct question at oral argument ("Just so I look at this correctly, what does the State contend the *specific purpose* of this program is?"), responded: "The *specific purpose* of this program is to allow law enforcement to be able to *investigate and quickly apprehend sex offenders* to protect the public from sex offenders."

Act, *see id.* § 15A-101.1(3a) (defining SBM as "monitoring with [a] . . . device . . . that timely records and reports or records the person's presence near or within a crime scene or prohibited area or the person's departure from a specified geographic location, and that has incorporated into the software the ability to automatically compare crime scene data with locations of all persons being electronically monitored so as to provide any correlation daily or in real time"). Because the State has not proffered any "concerns other than crime detection," *Chandler*, 520 U.S. at 314, the "special needs" doctrine is not applicable here. *Cf. Park v. State*, 305 Ga. 348, 356, 825 S.E.2d 147, 155 (2019) (holding that Georgia's SBM program is not "divorced from the State's general interest in law enforcement" and therefore does not come within the scope of the special needs exception).

We cannot agree with defendant, however, that this determination is dispositive of the reasonableness inquiry. On the contrary, the Supreme Court instructed us that "[t]he reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 135 S. Ct. at 1371. Therefore, we must consider whether the warrantless, suspicionless search here is reasonable when "its intrusion on the individual's Fourth Amendment interests" is balanced "against its promotion of legitimate governmental interests." *Vernonia*, 515 U.S. at 652–53.

I. Intrusion Upon Reasonable Privacy Expectations

A. Nature of the Privacy Interest

In addressing the search's "intrusion on the individual's Fourth Amendment interests," "[t]he first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes," or, in other words, "the scope of the legitimate expectation of privacy at issue." *Id.* at 652–54, 658. Notably, "[t]he Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate,' " which "varies . . . with context, . . . depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park." *Id.* at 654 (quoting *T.L.O.*, 469 U.S. at 338 (majority opinion)). The SBM program implicates a number of constitutionally-recognized privacy concerns.

First, the SBM program, which requires "attach[ing] a device to a person's body, without consent," *Grady*, 135 S. Ct. at 1370, and which prohibits the removal of that device, implicates defendant's Fourth

Amendment interest in "be[ing] secure in [his] person." U.S. Const. amend. IV. The Supreme Court specifically noted that the SBM program "is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search." *Grady*, 135 S. Ct. at 1371. Additionally, the equipment checks performed by government officers every three months, during which defendant must allow them entrance into his home, implicate his "right . . . to be secure in [his] . . . house[ ]." U.S. Const. amend. IV; *see Silverman v. United States*, 365 U.S. 505, 511 (1961) (stating that "[a]t the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." (first citing *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066 (1765); then citing *Boyd v. United States*, 116 U.S. 616, 626–30 (1886)). Finally, the search's GPS location monitoring implicates an expectation of privacy recently addressed by the Supreme Court in *Carpenter v. United States*—defendant's "expectation of privacy in his physical location and movements." 138 S. Ct. 2206, 2215 (2018).

The Court in *Carpenter*, after analyzing two lines of cases stemming from *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Jones*, 565 U.S. 400 (2012), concluded that "when the Government accessed CSLI [cell-site location information] from the [petitioner's] wireless carriers, it invaded [the petitioner's] reasonable expectation of privacy in the whole of his physical movements" and thereby conducted a search. *Carpenter*, 138 S. Ct. at 2219. The Court explained:

> A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S., at 351–352. . . .
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> . . . Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." [*Jones*, 565 U.S.] at 415 (opinion of SOTOMAYOR, J.). These location records "hold for many Americans the 'privacies of life.' " *Riley*, 134 S. Ct., at 2494–2495 (quoting *Boyd*, 116 U.S., at 630). And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional

> investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.
>
> In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*. Unlike the bugged container in *Knotts* or the car in *Jones*, a cell phone—almost a "feature of human anatomy," *Riley*, 134 S. Ct., at 2484—tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.

Id. at 2217–18 (first alteration in original) (citations omitted).

The SBM program "present[s] even greater privacy concerns than the" CSLI considered in *Carpenter*. *Id.* at 2218. While a cell phone tracks more closely the movements of its owner than the bugged container in *Knotts* or the car in *Jones* because it is "almost a 'feature of human anatomy,' " *id.*, the ankle monitor becomes, in essence, a feature of human anatomy, *see id.* ("[W]hen the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user."). Thus, SBM does not, as the trial court concluded, "merely monitor[ ] [defendant's] location"; instead, it "gives police access to a category of information otherwise unknowable," *id.*, by "provid[ing] an all-encompassing record of the holder's whereabouts," and "an intimate window into [defendant's] life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations,' " *id.* at 2217 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)); *id.* ("These location records 'hold for many Americans the "privacies of life." ' " (quoting *Riley*, 134 S. Ct. at 2494–95)). As the Court of Appeals majority stated, the SBM program's "continuous warrantless search of defendant's location" is "uniquely intrusive." *Grady*, 817 S.E.2d at 25 (majority opinion) (quoting *Belleau*, 811 F.3d at 940).

The State disputes the legitimacy of defendant's expectations of privacy, contending that defendant's legitimate expectations of privacy

are diminished due to his status as a convicted sex offender.[14] Even if, as the State contends, defendant's expectations of privacy, in comparison to those of the public at large, are "greatly diminished," even "drastically reduced," "by virtue of the various conditions imposed by the sex offender registry, including the ongoing collection of otherwise private information made available to law enforcement and the public at large," defendant's expectations of privacy are not completely eliminated. Moreover, the State has vastly overstated the extent to which defendant's expectation of privacy is diminished by the requirement that he participate in the sex offender registry. When registering with the sex offender registry, an individual must give the sheriff certain information, including, in pertinent part: the person's full name, any aliases, date of birth, sex, race, height, weight, eye color, hair color, driver's license number, home address, the type of offense for which the person was convicted, the date of conviction, the sentence imposed, a current photograph taken by the sheriff at the time of registration, the person's fingerprints taken by the sheriff at the time of registration, and any online identifier that the person uses or intends to use. N.C.G.S. § 14-208.7(b) (2017). Most of this information becomes public record and is part of the registry that is maintained by the Department of Public Safety and made available for public inspection on the Internet. *Id.* § 14-208.10 (2017). Before changing their addresses, individuals required to register also must report in person and give written notice to the sheriff; the

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14. The Supreme Court has found certain types of individuals to have *diminished* expectations of privacy, including individuals arrested for serious offenses, *see King*, 569 U.S. at 462 ("The expectations of privacy of an individual taken into police custody 'necessarily [are] of a diminished scope.' " (alteration in original) (quoting *Bell v. Wolfish*, 441 U.S. 520, 557 (1979))), probationers and parolees, *see, e.g.*, *Griffin*, 483 U.S. at 874 (explaining that "[p]robation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments" and probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions' " (second and third alterations in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972))); *see also Samson*, 547 U.S. at 850 ("On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."), railroad employees based upon their voluntary participation in an industry with a history of extensive regulation, *Skinner*, 489 U.S. at 627 (stating that "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively"), and high school athletes based upon both "the schools' custodial and tutelary responsibility for children," *Vernonia*, 515 U.S. at 656, and the students' voluntary participation in school sports, *id.* at 657 (stating that "[s]chool sports are not for the bashful" and "there is 'an element of "communal undress" inherent in athletic participation' " (quoting *Schaill v. Tippecanoe Cty. Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988)), amended by *Schaill*, 864 F.2d 1309 (1989)). The Supreme Court has never reached such a conclusion with respect to individuals convicted of committing sex crimes who are not subject to ongoing governmental supervision.

same in-person reporting requirements apply to registrants who intend to move to another state, change their academic status, change their employment status (if obtaining or terminating employment at an institution of higher education), change or add an online identifier, or change their name. *Id.* § 14-208.9 (2017). Additionally, an offender is subject to criminal penalties for failure to comply with the registration requirements. *Id.* § 14-208.11 (2017).

None of the conditions imposed by the registry implicate an individual's Fourth Amendment "right . . . to be secure in [his] person[ ]" or his expectation of privacy "in the whole of his physical movements," *Carpenter*, 138 S. Ct. at 2219. We recognize that an individual required to register has a diminished expectation of privacy with respect to the information and other materials provided to the sheriff and made available to the public online, but we cannot agree with the State that these statutory requirements "greatly diminish[ ]" that individual's expectation of privacy in every context.[15] Even if defendant has no reasonable expectation of privacy concerning where he lives because he is required to register as a sex offender, he does not thereby forfeit his expectation of privacy in all other aspects of his daily life. This is especially true with respect to unsupervised individuals like defendant who, unlike probationers and parolees, are not on the "continuum of possible [criminal] punishments" and have no ongoing relationship with the State. *Griffin*, 483 U.S. at 874; *see also Packingham*, 137 S. Ct. at 1737 (holding unconstitutional a state statute that prohibited sex offenders from accessing social networking websites and noting the "troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system"). The State does not explain how defendant's provision of limited information concerning his address, employment, and appearance, in addition to his photograph and fingerprints, as part of a "civil, regulatory scheme" meaningfully reduces his expectation of privacy in his body and in his every movement every day for the rest of his life. *See*, *e.g.*, *Park*, 305 Ga. at 355, 825 S.E.2d at 154 (holding that there is no reduced expectation of privacy by virtue of participation in a sex offender registry because "[w]hile the registration requirements . . . reveal information such as the convicted sex offender's address and restrict certain areas where the offender may be legally present . . . this has nothing to do with State officials *searching* that individual

15. The same is true of other limitations to which our dissenting colleagues direct our attention, including the exclusion of sex offenders from certain occupations and certain locations, such as schools.

by attaching a device to his body and constantly tracking that person's movements in order to look for evidence of a crime without a warrant").

The State also argues, relying on *Bowditch*, that defendant's expectations of privacy are diminished due to his status as a convicted felon. *See Bowditch*, 364 N.C. at 349–50, 700 S.E.2d at 11 ("[I]t is beyond dispute that convicted felons do not enjoy the same measure of constitutional protections, including the expectation of privacy under the Fourth Amendment, as do citizens who have not been convicted of a felony." (citations omitted)). However, this reads too much into *Bowditch*'s limited assessment of Fourth Amendment protections. The Court in *Bowditch* rejected the defendants' challenges to the SBM program under the ex post facto clauses of our state and federal constitutions, concluding that the legislature established North Carolina's SBM program not as a punishment but as a civil, regulatory scheme. *Id.* at 351–52, 700 S.E.2d at 12–13. In support of this contention, Mr. Bowditch argued that the SBM program was punitive because it required people to waive their Fourth Amendment rights with respect to their homes by granting Division of Community Corrections personnel regular access to their residences for equipment maintenance. *Id.* at 363–64, 700 S.E.2d at 19–20 (Hudson, J., dissenting) (in-home equipment maintenance requirement "is a clear infringement on their Fourth Amendment rights"). In response, the majority concluded that "felons convicted of multiple counts of indecent liberties with children are not visited by DCC personnel for random searches, but simply to ensure the SBM system is working properly." *Id.* at 350, 700 S.E.2d at 11 (majority opinion). *Bowditch* did not address the defendants' expectations of privacy with respect to the physical search of their person or their expectations of privacy in their location and movements.

Moreover, the cases relied upon in *Bowditch* to support the general proposition that persons convicted of felonies forfeit certain constitutional protections either deal exclusively with prisoners and probationers, do not hold that a conviction creates a diminished expectation of privacy, or do not address privacy rights at all. *See Griffin*, 483 U.S. at 880 (upholding certain limited warrantless searches of individuals' homes during their probation); *Velasquez v. Woods*, 329 F.3d 420 (5th Cir. 2003) (per curiam) (rights of inmates serving prison sentences); *Russell v. Gregoire*, 124 F.3d 1079, 1093–94 (9th Cir. 1997) (stating that an analysis of privacy rights does not assume a diminished expectation of privacy simply because the individual was previously convicted of a crime), *cert. denied*, 523 U.S. 1007 (1998); *Jones v. Murray*, 962 F.2d 302, 310–11 (4th Cir.) (holding that Virginia's DNA data bank program, requiring inmates to involuntarily provide a blood sample before their release, is a

reasonable search under the Fourth Amendment because inmates have a "questionable claim of privacy to protect" their identity and because the intrusion is "minimal"), *cert. denied*, 506 U.S. 977 (1992); *Standley v. Town of Woodfin*, 362 N.C. 328, 661 S.E.2d 728 (2008) (does not address privacy rights); *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479 (2005) (does not involve privacy rights).

Contrary to the State's argument, there is no precedent for the proposition that persons such as defendant, who have served their sentences and whose legal rights have been restored to them (with the exception of the right to possess firearms, *see* N.C.G.S. § 13-1 (2017)), nevertheless have a diminished expectation of privacy in their persons and in their physical locations at any and all times of the day or night for the rest of their lives. Indeed, courts that have examined this question in the Fourth Amendment context have reached a contrary conclusion. *See Friedman v. Boucher*, 580 F.3d 847, 858 (9th Cir. 2009) (Nonconsensual DNA collection was an unreasonable search under the Fourth Amendment; no diminished expectation of privacy exists because "Friedman was not on parole. He had completed his term of supervised release successfully and was no longer the supervision of [sic] any authority."); *Trask v. Franco*, 446 F.3d 1036, 1043–44 (10th Cir. 2006) (holding that the plaintiff "enjoyed the full protection of the Fourth Amendment" because her probation had been discharged); *Moore v. Vega*, 371 F.3d 110, 116 (2d Cir. 2004) (stating that while parolees have diminished liberty interests, "[b]ecause plaintiff is not a parolee, she cannot be subjected to the same burdens upon her privacy"); *Doe v. Prosecutor*, 566 F. Supp. 2d 862, 883 (S.D. Ind. 2008) (declining to find a diminished expectation of privacy based upon a sex crime conviction, opining that "[a] person's status as a felon who is no longer under any form of punitive supervision therefore does not permit the government to search his home and belongings without a warrant"); *see also Park*, 305 Ga. at 354, 825 S.E.2d at 153 ("It cannot be said that an individual who has completed the entirety of his or her criminal sentence, including his or her parole and/or probation requirements, would have the same diminished privacy expectations as an individual who is *still* serving his or her sentence."); *State v. Ross*, 423 S.C. 504, 511–12, 815 S.E.2d 754, 757 (2018) (holding that lifetime SBM for a defendant not on probation and "no longer under the jurisdiction of the sentencing court" involves a different Fourth Amendment analysis than that applicable to a defendant who was on probation); *cf. Commonwealth v. Feliz*, 481 Mass. 689, 691, 119 N.E.3d 700, 704 (2019) (holding that Massachusetts's SBM program, as applied to the particular defendant, a probationer, was an unconstitutional search under Article 14 of the Massachusetts Declaration of Rights).

While a person's status as a convicted sex offender may affect the extent to which the State can infringe upon fundamental rights, "the fact of 'diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.' " *Carpenter*, 138 S. Ct. at 2219 (quoting *Riley*, 134 S. Ct. at 2488). A person may have a lessened interest in the privacy of his address because he has already made that information public, or a lessened interest in the privacy of matters material to his voluntary participation in a certain activity, *e.g.*, *Vernonia*, 515 U.S. at 657 (discussing voluntary participation in school athletics), but having served his sentence, paid his debt to society, and had his rights restored, his expectation of privacy is not automatically and forever "significantly diminished" under the Fourth Amendment for all purposes. Instead, except as reduced for possessing firearms and by providing certain specific information and materials to the sex offender registry, defendant's constitutional privacy rights, including his Fourth Amendment expectations of privacy, have been restored.

B. Character of the Intrusion Complained of

"Having considered the scope of the legitimate expectation of privacy at issue here, we turn next to the character of the intrusion that is complained of," which contemplates the "degree" of and "manner" in which the search intrudes upon legitimate expectations of privacy. *Id.* at 658. In that regard, we note first that the trial court is required to order lifetime SBM, without any individual assessment of the offender or his offense characteristics, for individuals in the same category as defendant—that is, any unsupervised individual who meets the statutory definition of a "recidivist."

According to the State, "the duration of these searches *may be limited* since offenders ordered to enroll for life may petition to be removed after only one year." (Emphasis added.) (Citing N.C.G.S. § 14-208.43.) Yet this "[r]equest for termination" process does little to remedy what is absent at the front end of this warrantless search—that is, "the detached scrutiny of a" judicial officer "ensur[ing] an objective determination whether an intrusion is justified in any given case." *Skinner*, 489 U.S. at 622 (citation omitted). The termination requests are directed not to a judicial officer but the Post-Release Supervision and Parole Commission, which is furnished no meaningful criteria[16] for evaluating

16. As stated above, the Commission may only consider termination of SBM "[i]f it is determined that the person has not received any additional reportable convictions during the period of satellite-based monitoring and the person has substantially complied with the provisions of this Article ["Sex Offender and Public Protection Registration Programs"]." N.C.G.S. § 14-208.43(c).

these requests other than the vague direction that "the Commission may terminate the monitoring requirement if the Commission finds that the person is *not likely to pose a threat to the safety of others*." N.C.G.S. § 14-208.43(c) (2017) (emphasis added). Given that defendant has been statutorily deemed to pose such a threat to the safety of others that he must maintain lifetime registration with the statewide registry, *id.* § 14-208.23, and is prohibited for the remainder of his life from being "[o]n the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds," *id.* § 14-208.18(a)(1) (2017), and from being "[o]n the State Fairgrounds during the period of time each year that the State Fair is conducted," *id.* § 14-208.18(a)(4) (2017), it would appear that few, if any, sex offenders are ever likely to satisfy that requirement. Indeed, this incongruity bears out in practice, as from the years 2010 through 2015, the Commission received sixteen requests for termination by individuals subjected to lifetime SBM and denied all of them.

The lack of judicial discretion in ordering the imposition of SBM on any particular individual and the absence of judicial review of the continued need for SBM is contrary to the general understanding that judicial oversight of searches and seizures, in the form of a warrant requirement, is an important check on police power. Indeed, the South Carolina Supreme Court has held that electronic monitoring under their state law " 'must be ordered by the court' only after the court finds electronic monitoring would not be an unreasonable search based on the totality of the circumstances presented in an individual case." *Ross*, 423 S.C. at 515, 815 S.E.2d at 759. Similarly, that Court also held that it was unconstitutional to impose lifetime satellite monitoring with no opportunity for judicial review, stating: "The complete absence of any opportunity for judicial review to assess a risk of re-offending, . . . is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending." *State v. Dykes*, 403 S.C. 499, 508, 744 S.E.2d 505, 510 (2013) (citations omitted), *cert. denied*, 572 U.S. 1089 (2014). Thus, the fact that North Carolina's mandatory SBM program involves no meaningful judicial role is important in the analysis of the constitutionality of the program.

Mr. Grady, of course, must not only wear the half-pound ankle monitor at all times and respond to any of its repeating voice messages, but he also must spend two hours of every day plugged into a wall charging the ankle monitor. We cannot agree with the Court of Appeals that these

physical restrictions,[17] which require defendant to be tethered to a wall for what amounts to one month out of every year, are "more inconvenient than intrusive." *Grady*, 817 S.E.2d at 25; *see T.L.O.*, 469 U.S. at 337 ("[E]ven a limited search of the person is a substantial invasion of privacy." (citing *Terry v. Ohio*, 392 U.S. 1, 24–25 (1967)).

Nor can we agree with the State that "[t]he physical intrusion here is minimal." The State, in reliance upon *Maryland v. King*, asserts: "Just as DNA swabbing is not a significant intrusion beyond that associated with fingerprinting, so too SBM is not a significant intrusion beyond that associated with sex offender registration." In *King* the Court determined that, in comparison to the intrusions that accompanied valid arrests, including booking, photographing, fingerprinting, and a search of "the person and the property in his immediate possession," "including 'requir[ing] at least some detainees to lift their genitals or cough in a squatting position,' " *King*, 569 U.S. at 462 (alteration in original) (first quoting *United States v. Edwards*, 415 U.S. 800, 803 (1974); then quoting *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 334 (2012)), the DNA swab—"[a] gentle rub along the inside of the cheek"—"involve[d] an even more brief and still minimal intrusion," *id.* at 463; *see also*, *e.g.*, *Vernonia*, 515 U.S. at 658 (concluding that the intrusion caused by the process of collecting samples for urinalysis was "*negligible*" where the "conditions [of doing so] are nearly identical to those typically encountered in public restrooms" (emphasis added)); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 448, 450–51 (1990) (concluding that the "measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is *slight*" when the checkpoints involved "preliminary questioning and observation by checkpoint officers" and "[t]he average delay for each vehicle was approximately 25 seconds" (emphasis added)). In light of what we view as the substantial differences between, on the one hand, an individual having to register his address, photograph, and other limited details pertaining to himself and the offense or offenses for which he was convicted with the sheriff and, on the other hand, an individual

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17. The Supreme Court has made clear that any restrictions that accompany a search must be considered in evaluating the search's intrusiveness. *See Skinner*, 489 U.S. at 618 ("In view of our conclusion that the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches, we need not characterize the employer's antecedent interference with the employee's freedom of movement as an independent Fourth Amendment seizure. . . . For present purposes, it suffices to note that any limitation on an employee's freedom of movement that is necessary to obtain the blood, urine, or breath samples contemplated by the regulations must be considered in assessing the intrusiveness of the searches effected by the Government's testing program. (citing *United States v. Place*, 462 U.S. 696, 707–09 (1983))).

being required to wear an ankle appendage, which emits repeating voice commands when the signal is lost or when the battery is low, and which requires the individual to remain plugged into a wall every day for two hours, we cannot conclude, as the Court did in *King*, that "[t]he additional intrusion . . . is not significant" or that the SBM program "does not increase the indignity already attendant to" the sex offender registry. 569 U.S. at 459, 464; *see also Feliz*, 481 Mass. at 704, 119 N.E.3d at 713 (stating that "GPS monitoring . . . gathers much more information than" taking blood samples for a DNA database "and gathers this information over a much longer period of time. The experience of accommodating a device that remains attached to the body for a prolonged period of time differs materially from the one-time, minimal physical intrusion occasioned by a properly conducted DNA test.").

In our view, the physical intrusion accompanying SBM is distinct in its nature from that attendant upon sex offender registration. Notably, in considering whether Alaska's sex offender registration process constituted a retroactive punishment in violation of the Ex Post Facto Clause, the Supreme Court stated that the registration process "is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." *Smith v. Doe*, 538 U.S. 84, 99 (2003); *see id.* at 105 ("[T]he notification system is a passive one: An individual must seek access to the information."). With the ET-1 and its repeating voice commands, of course, an individual must "appear in public with some visible"—and audible—"badge of past criminality." *Id.* at 99.

In addition to the SBM program's physical intrusiveness, we also note the lifetime impingement upon defendant's expectation of privacy "in the whole of his physical movements." *Carpenter*, 138 S. Ct. at 2219. Numerous courts have recognized the intrusiveness of this aspect of SBM, which makes vast information about a person available to the State at the click of a mouse. The Court of Appeals majority stated, and we agree, that the SBM program's "continuous, warrantless search of defendant's location" by GPS technology is "uniquely intrusive." *Grady*, 817 S.E.2d at 25. As the D.C. Circuit observed:

> Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as

> does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups – and not just one such fact about a person, but all such facts.

United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010) (footnote omitted), *aff'd sub nom. State v. Jones*, 565 U.S. 400. Simply put, GPS monitoring permits "a detailed chronicle of a person's physical presence compiled every day, every moment." *Carpenter*, 138 S. Ct. at 2220. And even in an era in which GPS capabilities on cell phones are well known, society's expectation has been that such comprehensive and detailed information about an individual's movements would be private. *See Jones*, 565 U.S. at 430 (Alito, J., concurring in judgment). Compiling and maintaining a complete record of our every movement is "not what we expect anyone to do, and it reveals more than we expect anyone to know." *Maynard*, 615 F.3d at 563 (citation omitted).

In sum, in light of the physical intrusiveness of the ET-1, the quarterly equipment checks, and the extent to which GPS locational tracking provides an "intimate window" into an individual's "privacies of life," we conclude that the mandatory imposition of lifetime SBM on an individual in defendant's class works a deep, if not unique, intrusion upon that individual's protected Fourth Amendment interests.

II. Nature and Purpose of the Search

The balancing analysis that we are called upon to conduct here requires us to weigh the extent of the intrusion upon legitimate Fourth Amendment interests against the extent to which the SBM program sufficiently "promot[es] . . . legitimate governmental interests" to justify the search, thus rendering it reasonable under the Fourth Amendment. *Vernonia*, 515 U.S. at 652–53. In this aspect of the balancing test, we "consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it." *Id.* at 660.

Our earlier conclusion that the nature of the State's concern was not "beyond the normal need for law enforcement" does not, of course, constitute a holding that the State's interest in solving crimes and facilitating

apprehension of suspects so as to protect the public from sex offenders is not compelling. "Sexual offenses are among the most disturbing and damaging of all crimes, and certainly the public supports the General Assembly's efforts to ensure that victims, both past and potential, are protected from such harm." *Bowditch*, 364 N.C. at 353, 700 S.E.2d at 13 (Hudson, J., dissenting). Nonetheless, the question remains whether the SBM program's "*promotion* of legitimate governmental interests" outweighs "its intrusion on the individual's Fourth Amendment interests." *Vernonia*, 515 U.S. at 653 (emphasis added); *see King*, 569 U.S. at 461 ("[A] significant government interest does not alone suffice to justify a search. The government interest must outweigh the degree to which the search invades an individual's legitimate expectations of privacy.").

In its order, the trial court summarized portions of the testimony of the State's only witness, Mr. Pace. While this section of the order explains in some detail what the SBM does not prohibit or restrict, it does not address what, if anything, the evidence showed about how successfully the program advances its stated purpose of protecting the public from sex offenders. *See* N.C.G.S. § 14-208.5 ("[I]t is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article."). Although the trial court did not make any findings based upon Mr. Pace's testimony concerning the efficacy issue, Mr. Pace testified that wearing the SBM device will not prevent anyone from committing a crime, but that it could be a useful investigative tool if a crime has already been committed. According to Pace, unsupervised individuals in the SBM program like Grady are monitored by officers in Raleigh. Pace testified that while "officers are required by policy" in the case of supervised individuals to "trail their points three times a week," he was "not sure about unsupervised cases," stating, "All I know is the statute says that we have to monitor them." This is reflected in the DCC's Policy and Procedure Manual, which mandates that for supervised individuals, officers will "[r]eview points 3 times per week for patterns of movement indicating risk for re-offense and issues related to public safety" but contains no guidelines for the monitoring of unsupervised individuals.

The State did not present any evidence in the trial court regarding the recidivism rates of sex offenders. The State relies, as did the trial court, on the Supreme Court's decision in *McKune v. Lile*, in which the

Court stated that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." 536 U.S. 23, 33 (2002) (plurality opinion) (first citing Crimes Against Children Research Ctr., Univ. of N.H., *Fact Sheet 5; Sex Offenses* 24, 27; then citing Bureau of Justice Statistics, U.S. Dep't of Justice, *Recidivism of Prisoners Released in 1983*, at 6 (1997)); *id.* at 34 (describing the "risk of recidivism" among sex offenders as "frightening and high"). Yet, the Supreme Court subsequently stated in *United States v. Kebodeaux* that while "[t]here is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals," "[t]here is also conflicting evidence on the point." 570 U.S. 387, 395–96 (2013) (citations omitted). Aside from the fact that these statements are not evidence, the judicial statements upon which the trial court and the State rely are, when considered in their entirety, inconclusive.

At the hearing, defendant presented evidence tending to show that recidivism rates for sex offenders are lower than the recidivism rates for other offenders. For instance, defendant presented excerpts from reports of the North Carolina Sentencing and Policy Advisory Commission concerning "Offenders Placed on Probation or Released from Prison" for the years 2005–06, 2008–09, 2010–11, and 2013 which show that in North Carolina, "[s]ex offenders generally had lower recidivism rates than most groups." Defendant also presented an April 2014 "Special Report" from the Department of Justice, Bureau of Justice Statistics, studying "Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010," which shows that "[a]mong violent offenders, the annual recidivism rates of prisoners sentenced for homicide or sexual assault were lower than those sentenced for assault or robbery across the 5-year period." Thus, the only actual evidence concerning the threat posed by the recidivism of sex offenders tends to suggest that sex offender recidivism rates are not unusually high.

The lack of evidence in this case contrasts sharply with the record that the Supreme Court has examined and found sufficient in other Fourth Amendment contexts. For example, in *Vernonia* the Court reviewed extensive evidence of the importance of controlling drug use by students as well as particular facts about the crisis that existed in that school district, in which disciplinary actions had reached "epidemic proportions." *Vernonia*, 515 U.S. at 661–63. Similarly, in *Samson*, empirical evidence documented the recidivism rates of California's parolees. *Samson*, 547 U.S. at 853. These cases make clear that the extent of a problem justifying the need for a warrantless search cannot simply be

assumed; instead, the existence of the problem and the efficacy of the solution need to be demonstrated by the government.

Our dissenting colleagues contend that we must defer to the General Assembly's legislative findings concerning the significance of the problem the SBM program is intended to address and the risk of sex offenders re-offending, as codified at N.C.G.S. § 14-208.5 (stating the "Purpose" of Article 27A), despite the absence of any record evidence supporting the State's position; however, legislative findings are entitled to only limited deference in determining the constitutionality of legislative enactments, *see Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 44, 175 S.E.2d 665, 673 (1970). Specifically, the Court in *Martin*, after quoting the relevant legislative findings, stated:

> If the constitutionality of a statute . . . depends on the existence or nonexistence of certain facts and circumstances, the existence of such facts and circumstances will generally be presumed for the purpose of giving validity to the statute, . . . if such a state of facts can reasonably be presumed to exist, and if any such facts may be reasonably conceived in the mind of the court. *This rule does not apply if the evidence is to the contrary, or if facts judicially known or proved, compel otherwise.*

Id. at 44, 175 S.E.2d at 673 (ellipsis in original) (emphasis added) (citation omitted)); *see also*, *e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) ("That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether. On the contrary, we have stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.' " (plurality opinion) (first quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989); then citing *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)). As we have already noted, in this case the only evidence contained in the record fails to support the legislative findings as they are characterized and relied upon by our dissenting colleagues.[18]

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18. The dissent further states that the legislature's "finding is supported by United States Supreme Court precedent." In the same vein, the trial court relied upon *McKune*, as well as two cases from other jurisdictions, *Hallak* and *Belleau*, rather than the evidence presented at the hearing. Yet, as we noted above, the Supreme Court subsequently observed in *Kebodeaux* that while "[t]here is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals," "[t]here is also

Aside from the inconsistency between the relevant legislative findings and the actual evidence contained in the record, the statement of purpose found in N.C.G.S. § 14-208.5, was enacted when the sex offender registration program was created in 1995 and retained as amended in 1997, and predates the creation of the SBM program in 2007. The extent to which this provision's findings relate specifically to SBM is limited, as evidenced by the statutory language, which contemplates the need to know where sex offenders live rather than the need for twenty-four hour real-time monitoring of their every movement. *See* N.C.G.S. § 14-208.5 (stating "that law enforcement officers[ ] . . . are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction," that "[r]elease of information about these offenders will further the governmental interests of public safety," and that "it is the purpose of this Article to assist law enforcement . . . by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies"). Furthermore, while N.C.G.S. § 14-208.5 is relevant to, but not dispositive of, the "nature and immediacy of" the State's concern in protecting the public from sex offenders, *Vernonia*, 515 U.S. at 660, the statute says absolutely nothing about the effectiveness of SBM in the "promotion of legitimate governmental interests," *id.* at 652–53. Thus, the legislative findings upon which our dissenting colleagues rely are not determinative of the outcome with respect to this constitutional issue.

The State also argues that the SBM program "is a useful investigative tool for law enforcement in solving crimes and excluding monitored offenders as suspects" and "speed[s] up apprehension of criminals before they commit additional crimes." The State did not present any empirical evidence demonstrating that the SBM program effectively advances this interest. Moreover, the State has not directed this Court to, nor are we aware of, a single instance dating back to the initial implementation of the SBM program in January 2007 in which the SBM program

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conflicting evidence on the point." 570 U.S. at 395–96. Moreover, in *Samson*, while the Court relied on its prior decisions in concluding that "[t]he State's interests [in supervising parolees] . . . are substantial," 547 U.S. at 853 (first citing *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998); then citing *Griffin*, 483 U.S. at 879; and then citing *United States v. Knights*, 534 U.S. 112, 121 (2001)), this did not end the inquiry. Rather, the Court also considered the available evidence and expressly concluded that "[t]he empirical evidence presented in this case *clearly demonstrates* the significance of these interests to the State of California." *Id.* (emphasis added). Here, in contrast to *Samson*, the empirical evidence before the trial court does not "clearly demonstrate[ ] the significance of" the State's interest in the continuous satellite-based monitoring of recidivist sex offenders. *Id.*

assisted law enforcement in apprehending or exonerating a suspected sex offender in North Carolina, or anywhere else. The State's inability to produce evidence of the efficacy of the lifetime SBM program in advancing any of its asserted legitimate State interests weighs heavily against a conclusion of reasonableness here.

The State also argues that the SBM program serves as an effective deterrent. Deterrence, of course, is one of "the two primary objectives of criminal punishment." *Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997). Because the SBM program is not a form of criminal punishment, but rather a "civil, regulatory scheme," "[t]he SBM program's foremost purpose is not to deter crime." *Bowditch*, 364 N.C. at 351–52, 700 S.E.2d at 12–13 (majority opinion).[19] Moreover, even if the State can permissibly justify the intrusive effects of the SBM program based on this "secondary effect," *id.* at 351, 700 S.E.2d at 12, the State has not presented any evidence demonstrating that the SBM program is effective at deterring crime.[20] Thus, the State's deterrence argument, like the other arguments it has advanced with respect to the efficacy issue, fails for lack of evidentiary support.

It is well established that the State bears the burden of proving the reasonableness of a warrantless search. *Coolidge*, 403 U.S. at 455. While the State's asserted interests here are without question legitimate, what this Court is duty bound to determine is whether the warrantless search imposed by the State on recidivists under the SBM program actually serves those legitimate interests. The State has the burden of coming forward with some evidence that its SBM program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise

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19. The dissent's contention that "the SBM program's primary purpose is to serve the special need of reducing sex crime recidivism through deterrence" directly contradicts the decision of the Court in *Bowditch*. 364 N.C. at 351–52, 700 S.E.2d at 12–13 (stating "[t]he SBM program's foremost purpose is not to deter crime").

20. The dissent suggests that the efficacy of SBM as a deterrent is "self-evident." However, there is social science research that addresses this question. *See*, *e.g.*, Marc Renzema, *Evaluative research on electronic monitoring*, *in Electronically Monitored Punishment: International and critical perspectives*, 247, 247–70 (Mike Nellis, Kristel Beyens & Dan Kaminski eds., 2013) (summarizing all research available on the deterrent effect of electronic monitoring); Deeanna M. Button et al., *Using Electronic Monitoring to Supervise Sex Offenders: Legislative Patterns and Implications for Community Corrections Officers*, 20 Crim. Just. Pol'y Rev. 414, 418 (2009) (reporting that the most thorough review to date of research on electronic monitoring effectiveness concluded that "applications of electronic monitoring as a tool for reducing crime are not supported by existing data"). At an absolute minimum, we are not satisfied that unsupported assumptions of the type upon which our dissenting colleagues rely suffice to render an otherwise unlawful search reasonable.

protects the public. Simply put, as the U.S. Supreme Court explained in *Ferguson v. City of Charleston*, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." 532 U.S. 67, 86 (2001) (quoting *Edmond*, 531 U.S. at 42). Here, despite having the burden of proof, the State concedes that it did not present any evidence tending to show the SBM program's efficacy in furthering the State's legitimate interests. *Grady*, 817 S.E.2d at 27. We cannot simply assume that the program serves its goals and purposes when determining whether the State's interest outweighs the significant burden that lifetime SBM imposes on the privacy rights of recidivists subjected to it. *Cf. Doe v. Cooper*, 842 F.3d 833, 846 (4th Cir. 2016) ("[N]either anecdote, common sense, nor logic, in a vacuum, is sufficient to carry the State's burden of proof. Thus, while the State's argument may be conceptually plausible, it presented no evidence or data to substantiate it before the district court." (citing *United States v. Carter*, 669 F.3d 411, 418–19 (4th Cir. 2012))).

To be clear, the scope of North Carolina's SBM program is significantly broader than that of other states. Lifetime monitoring for recidivists is mandated by our statute for anyone who is convicted of two sex offenses that carry a registration requirement. A wide range of different offenses are swept into this category. For example, a court is required to impose lifetime SBM on an offender who twice attempts to solicit a teen under the age of sixteen in an online chat room to meet with him, regardless of whether the person solicited was actually a teen or an undercover officer, or whether any meeting ever happened. *See* N.C.G.S. § 14-202.3 (2017); *State v. Fraley*, 202 N.C. App. 457, 688 S.E.2d 778, *disc. rev. denied*, 364 N.C. 243, 698 S.E.2d 660 (2010). Not only does the lifetime imposition of SBM vastly exceed the likely sentence such an offender would receive on a second offense, in addition, the State has simply failed to show how monitoring that individual's movements for the rest of his life would deter future offenses, protect the public, or prove guilt of some later crime.

Applying the correct legal standard to the record in this case, we conclude that the State has not met its burden of establishing the reasonableness of the SBM program under the Fourth Amendment balancing test required for warrantless searches. In sum, we hold that recidivists, as defined by the statute, do not have a greatly diminished privacy interest in their bodily integrity or their daily movements merely by being also subject to the civil regulatory requirements that accompany the status of being a sex offender. The SBM program constitutes a substantial

intrusion into those privacy interests without any showing by the State that the program furthers its interest in solving crimes that have been committed, preventing the commission of sex crimes, or protecting the public. In these circumstances, the SBM program cannot constitutionally be applied to recidivists in Grady's category on a lifetime basis as currently required by the statute.

Conclusion

For the reasons stated, we hold that the application of the relevant portions of N.C.G.S. §§ 14-208.40A(c) and 14-208.40B(c) to individuals in the same category as defendant, under which these individuals are required to submit to a mandatory, continuous, nonconsensual search by lifetime satellite-based monitoring, violates the Fourth Amendment to the United States Constitution. The category to which this holding applies includes only those individuals who are not on probation, parole, or post-release supervision; who are subject to lifetime SBM solely by virtue of being recidivists as defined by the statute; and who have not been classified as a sexually violent predator, convicted of an aggravated offense, or are adults convicted of statutory rape or statutory sex offense with a victim under the age of thirteen. As applied to these individuals, the intrusion of mandatory lifetime SBM on legitimate Fourth Amendment interests outweighs the "promotion of legitimate governmental interests." *Vernonia*, 515 U.S. at 653.

The generalized notions of the dangers of recidivism of sex offenders, for which the State provided no evidentiary support, cannot justify so intrusive and so sweeping a mode of surveillance upon individuals, like defendant, who have fully served their sentences and who have had their constitutional rights restored. The unsupported assumption—that if a crime is committed at some unspecified point in the future, the ankle monitor worn during all of the intervening years by one of these individuals, who may or may not pose a risk, may potentially aid in inculpating or exonerating that individual—does not advance the State's interest in a manner that outweighs the intrusiveness of mandatory lifetime SBM upon that individual's legitimate expectations of privacy. In contrast to the SBM provisions governing other offenders, which include an individualized "risk assessment" and judicial determinations regarding whether the individual "requires the highest possible level of supervision and monitoring," and, if so, for how long, N.C.G.S. §§ 14-208.40A(d)-(e), -208.40B(c); *see*, *e.g.*, *State v. Griffin*, 818 S.E.2d 336, 338–39, 342 (N.C. Ct. App. 2018) (explaining that at the bring back hearing, the State introduced a "Static-99," "an actuarial report designed to estimate the probability of sex offender recidivism, which placed Defendant in

the 'moderate-low' category," noting, *inter alia*, that the defendant did not complete the SOAR sex offender treatment program while in prison, but reversing the trial court's imposition of thirty years of SBM),[21] the provisions governing recidivists present no opportunity for determinations by the court regarding what particular risk, if any, is posed by the individual and whether a particular duration of SBM will, in any meaningful way, serve the State's interest in combating that risk. We conclude that in such circumstances, the Fourth Amendment, which "secure[s] 'the privacies of life' against 'arbitrary power' " and "place[s] obstacles in the way of a too permeating police surveillance," *Carpenter*, 138 S. Ct. at 2214 (first quoting *Boyd*, 116 U.S. at 630; then quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)), prohibits the mandatory imposition of lifetime SBM on this class of individuals.

We note that the remedy we employ here is neither squarely facial nor as-applied. *See Citizens United v. FEC*, 558 U.S. 310, 331 (2010) ("[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." (citing *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 477–78 (1995))); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1321, 1341 (2000) (stating that "[t]here is no single distinctive category of facial, as opposed to as-applied, litigation" and "facial challenges are less categorically distinct from as-applied challenges than is often thought"). For instance, the statutory provisions authorizing lifetime SBM do not delineate between supervised and unsupervised offenders, nor do they specify the exact type of monitoring hardware that is to be used or what regulations the Division may adopt to administer the program and track monitored individuals. Our holding is as-applied in the sense that it addresses the current implementation of the SBM program and does not enjoin all of the program's applications or even all applications of the specific statutory provision we consider here (authorizing lifetime SBM based on a finding that an individual is a recidivist) because this provision is still enforceable against a recidivist during the period of his or her State supervision and because our holding does not extend to a recidivist who also has been convicted of an aggravated offense, or is also an adult convicted

21. We refer to this case solely to illustrate how the SBM provisions for other offenders allow an opportunity for an individualized determination, whereas the SBM provisions that apply to the class of offenders at issue here provide none.

of statutory rape or statutory sex offense with a victim under the age of thirteen, or is also a sexually violent predator. On the other hand, our holding is facial in that it is not limited to defendant's particular case but enjoins application of mandatory lifetime SBM to other unsupervised individuals when the SBM is authorized based solely on a "recidivist" finding that does not involve a sexually violent predator classification, an aggravated offense, or statutory rape or statutory sex offense with a victim under the age of thirteen by an adult. Thus, our holding has both facial and as-applied characteristics. *See Doe v. Reed*, 561 U.S. 186, 194 (2010) (stating that the plaintiffs' claim "obviously has characteristics of both" as-applied and facial challenges).

Regardless, the Supreme Court has explained that "[t]he label is not what matters" and to the extent that a "claim and the relief that would follow . . . reach beyond the particular circumstances of" the party before the court, the party "must . . . satisfy our standards for a facial challenge to the extent of that reach." *Id.* (citing *United States v. Stevens*, 559 U.S. 460, 472–73 (2010)); *see, e.g.*, *Patel*, 135 S. Ct. at 2450–51 (explaining that a facial challenge requires that "no set of circumstances exists under which the [statute] would be valid," or in other words, "that a 'law is unconstitutional in all of its applications' " (first quoting *United States v. Salern*o, 481 U.S. 739, 745 (1987) (alteration in original); then quoting *Wash. State Grange*, 552 U.S. at 449)). Here the "reach" of our holding extends to applications of mandatory lifetime SBM of unsupervised individuals authorized solely on a finding that the individual is a recidivist and without any findings that the individual was convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen, or is a sexually violent predator. For the reasons stated, including the uncorroborated assertions regarding the extent of the general threat posed by the recidivism of sex offenders and the lack of any showing by the State that SBM effectively promotes its interest in combating that threat, the lack of any individualized assessment of the offender or his offense characteristics and of any meaningful opportunity for termination of SBM, and the unique intrusiveness of SBM upon legitimate privacy interests of recidivists, we conclude that no circumstances exist in which these applications would be valid.

The dissent takes issue with the facial aspect of our holding, contending that the Court must assess whether lifetime SBM can ever reasonably be applied to an individual who qualifies as a recidivist "in all circumstances," including the worst offenders such as sexually violent predators. According to the dissent, it must be established that "a statute

could never constitutionally require enrollment of a defendant in lifetime SBM whose conduct meets the statutory definition of a recidivist." But the dissent mistakes the reach of our holding and contemplates circumstances beyond the applications of SBM we consider here. An inquiry into whether any statute, or any application of a statute, could permissibly require enrollment in lifetime SBM of an individual who happens to qualify as a recidivist on some other basis is separate from an inquiry into whether these specific applications of the SBM program authorizing a lifetime search of individuals solely *because* they are recidivists are permissible—when considering, "the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 135 S. Ct. at 1371.

In *Patel* the Supreme Court explained that "when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant." 135 S. Ct. at 2451. The SBM statutes include multiple provisions authorizing lifetime warrantless searches, and here we address a limited application of one such provision. Specifically, we consider—and limit our holding to—a warrantless search of an unsupervised individual that is authorized based solely on a finding that the individual is a recidivist, with no finding (or even any record evidence) that the individual was convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen, or is a sexually violent predator.[22] For the reasons discussed, the State has not established that

22. The dissent chides our decision for not investigating the "most heinous crimes" that also meet the statutory requirements of recidivists, such as aggravated offenses and sexually violent predators. We explicitly exclude such applications of SBM that are authorized based on these classifications from the extent of the reach of our remedy, which is concerned only with lifetime SBM authorized based solely on the fact that an individual is a recidivist. We decline to address whether the interests of the State and the individual with respect to sex offenders who commit these "most heinous crimes" would permissibly authorize mandatory lifetime SBM under the Fourth Amendment balancing test. Nonetheless, the dissent, in seeking to enlarge the scope of our holding, ventures outside of the record, considers background information regarding defendant's first conviction that was not presented to the trial court in this case, and then makes its own finding of fact that defendant's first conviction was an aggravated offense. While this off-shore fishing expedition is ultimately irrelevant because it involves information not properly before the Court, we note that it illustrates one of the flaws in the application we enjoin—that is, the mandatory imposition of lifetime SBM solely because an individual is a recidivist precludes any individualized assessment of the offender, in which the State could present, and the trial court could consider, other bases that may permissibly authorize the search when balancing "the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 135 S. Ct. at 1371; *cf. Miller v. Alabama*, 567 U.S. 460, 489 (2012) (holding mandatory sentencing laws

this is a reasonable, categorical basis for the imposition of lifetime SBM under the Fourth Amendment. Thus, the warrantless search authorized by this application of the SBM program can never be reasonable, or, in other words, this portion of the "law is unconstitutional in all of its applications." *Id.* at 2451 (quoting *Wash. State Grange*, 552 U.S. at 449). The fact that, even with respect to this same defendant, there may potentially be *different* statutory provisions that, in considering "the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations," *Grady*, 135 S. Ct. at 1371, *may* constitutionally authorize a warrantless lifetime search—though we express no opinion on the validity of such searches at this time—is irrelevant because those searches do not involve applications of the specific statutory provision that we herein enjoin. *See Patel*, 135 S. Ct. at 2451 ("[T]he constitutional 'applications' that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute.").

We reach this decision mindful of our duty, "to declare the law unconstitutional in a proper case," which "cannot be declined," *S. Ry. Co. v. Cherokee County*, 177 N.C. 87, 88, 97 S.E. 758, 759 (1919), and also to "not undertake to pass upon the validity of the statute as it may be applied to factual situations materially different from that before it," *Bulova Watch Co.*, 285 N.C. at 472, 206 S.E.2d at 145 (citations omitted); *see also, e.g.*, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006) ("[W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force or to sever its problematic portions while leaving the remainder intact." (first citing *United States v. Raines*, 362 U.S. 17, 20–22 (1960); then citing *United States v. Booker*, 543 U.S. 220, 227–29 (2005))). As this Court has previously explained, "[a] statute may be valid in part and invalid in part. If the parts are independent, or separable, but not otherwise, the invalid part may be rejected and the valid part may stand, provided it is complete in itself and capable of enforcement." *State v. Smith*, 265 N.C. 173, 179, 143 S.E.2d 293, 298 (1965) (quoting *Constantian v. Anson County*, 244 N.C. 221, 228, 93 S.E.2d 163, 168 (1956)); *see also Pope v. Easley*, 354 N.C. 544, 548, 556 S.E.2d 265, 268 (2001) (per curiam) ("[T]he inclusion of a severability clause within legislation will be interpreted as a clear statement of legislative intent to strike an unconstitutional provision and to allow the balance to

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imposing life without parole on all juvenile homicide offenders "regardless of their age and age-related characteristics and the nature of their crimes" facially unconstitutional).

be enforced independently." (citing *Fulton Corp. v. Faulkner*, 345 N.C. 419, 421[–22], 481 S.E.2d 8, 9 (1997))). Given that other provisions of the SBM program can be enforced independently of the specific applications we enjoin here, and given the inclusion of a severability clause by the General Assembly in the SBM enabling legislation, *see* ch. 247, sec. 21, 2005 N.C. Sess. Laws (Reg. Sess. 2006) at 1085 ("The provisions of this act are severable. If any provision is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions of the act that can be given effect without the invalid provision."), we decline to address, and express no opinion on, the constitutionality of either the broader statutory framework or other provisions not implicated by the current appeal. Those provisions, as valid enactments of the General Assembly, are presumed to be constitutional and remain fully in effect. We are only ruling on the statute as currently written.

Thus, our decision today does not address whether an individual who is classified as a sexually violent predator, or convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen may still be subjected to mandatory lifetime SBM—regardless of whether that individual is also a recidivist. N.C.G.S. §§ 14-208.40A(c), -208.40B(c). These applications of the SBM program are not before the Court at this time. Furthermore, we do not address whether an individual who has "committed an offense that involved the physical, mental, or sexual abuse of a minor" can be subjected to SBM for a term of years specified by the court if, following a risk assessment by the Division, "the court determines that the offender does require the highest possible level of supervision and monitoring." *Id.* §§ 14-208.40A(d)-(e), -208.40B(c). Moreover, because our holding enjoins application only to unsupervised individuals, and because of the independent statutory provisions governing conditions for parole, post-release supervision, and probation, an individual who is a recidivist is still automatically subject to SBM during the period of State supervision. *See id.* §§ 15A-1374(b1) (2017) (stating that "[i]f a parolee is in a category described by G.S. 14-208.40(a)(1) . . . the [Post-Release Supervision and Parole] Commission must require as a condition of parole that the parolee submit to [SBM]"), -1368.4(b1)(6) (2017) (requiring that an individual "in the category described by G.S. 14-208.40(a)(1)" submit to SBM as a condition of post-release supervision), -1343(b2)(7) (2017) (mandating that an individual "described by G.S. 14-208.40(a)(1)" submit to SBM as a special condition of probation).

In sum, for the foregoing reasons we conclude that the Court of Appeals erred in limiting its holding to the constitutionality of the

program as applied only to defendant, when the analysis of the reasonableness of the search applies equally to anyone in defendant's circumstances. Because we conclude that the relevant portions of N.C.G.S. §§ 14-208.40A(c) and 14-208.40B(c) are unconstitutional as applied to all individuals in the category herein described, we modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

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

Justice NEWBY dissenting.

The Supreme Court of the United States held that the North Carolina statutory scheme for satellite-based monitoring (SBM) of a limited class of sex offenders effected a Fourth Amendment search and remanded this case for consideration of whether the search was reasonable. As the Supreme Court stated, "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 135 S. Ct. 1368, 1371, 191 L. Ed. 2d 459, 462 (2015) (per curiam). For guidance, the Supreme Court provided two examples of categorical searches which specifically addressed the reasonableness inquiry. *Id.* at 1371, 191 L. Ed. 2d at 462–63 (citing *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995)). This case raises substantial competing interests: the State's interest in protecting children from sexual abuse and an individual's right to privacy from government monitoring. The Fourth Amendment's reasonableness test requires balancing these interests to determine whether the government's SBM is a reasonable search of this limited class of sex offenders.

Using the remand as an opportunity to make a broad policy statement, the majority, though saying it addresses only one statutory classification, recidivist, applies an unbridled analysis which understates the crimes, overstates repeat sex offenders' legitimate expectations of privacy, and minimizes the need to protect society from this limited class of dangerous sex offenders. The majority's sweeping opinion could be used to strike down every category of lifetime monitoring under the SBM statute.

The majority appears to pick and choose between the characteristics of as-applied and facial challenges in finding a statute wholly unconstitutional. Nonetheless, its analysis does not support its conclusion that the statute is unconstitutional, either facially or as applied to this defendant. Its approach does not consider the specific facts of this defendant's convictions and improperly classifies this defendant's crimes under the statute. Creating an "as-applied" category not found in the statute, the majority fails to conduct the proper constitutionality inquiry, which requires it to consider lifetime SBM for the highest risk sex offender that falls within the statute's recidivist category. To reach its result, the majority minimizes and mischaracterizes the heinous crimes committed by defendant and others covered by the statute and diminishes the State's significant interest in protecting its citizens. The majority usurps the role of the legislature, denying the legislature's findings of the significance of this societal problem and rejecting the efficacy of its solution. Further, it rejects the facts found by the trial court and finds its own.

Here defendant's crimes of sexually assaulting children on two occasions make him a member of two statutory classes of sex offenders—aggravated offenders and recidivists—whom the General Assembly has determined to be among the most dangerous to society. Sex offenders who target children pose a unique threat to public safety, and the State's interest in protecting children from sexual assault is paramount. Sadly, these despicable crimes targeting vulnerable children are on the rise. The General Assembly carefully crafted a regulatory framework to protect the public by deterring sexual violence. To accomplish this purpose, the statute provides lifetime SBM for only a small group of the worst sex offenders. While courts must continue to carefully review the government's intrusions upon reasonable privacy interests as search technology develops, here the State's paramount interest outweighs the State's intrusion into defendant's diminished Fourth Amendment privacy interests. Because the SBM program is constitutional, both facially and as applied to defendant, I respectfully dissent.

I. Facts and Procedural History

Defendant's crimes qualify him as an aggravated sex offender and a violent recidivist under the statutory framework.[1] On 10 May 1996, defendant, then aged seventeen, committed a sexual assault involving anal sex on a seven-year-old boy while the victim's younger brother watched. Defendant was charged with first-degree sexual offense and

1. Because defendant's status as a recidivist was uncontested, neither party fully developed the record as to the other lifetime SBM categories applicable to defendant's crimes.

taking indecent liberties with children. On 16 January 1997, he pled no contest to a second-degree sex offense, defined as "engag[ing] in a sexual act . . . by force and against the will of the other person," and received a sentence of seventy-two to ninety-six months. N.C.G.S. § 14 -27.5(a) (2013) (current version at *id.* § 14-27.27(a) (Supp. 2018)).

On 5 August 2002, defendant was released from prison. Only seventeen months later on 6 January 2004, defendant was convicted of not having registered as a sex offender. The trial court suspended his twenty-one to twenty-six month sentence and ordered thirty-six months of probation. On 21 September 2004, defendant received notice of multiple probation violations, and after a hearing, the trial court granted defendant another chance by placing him on intensive supervision on 16 December 2004. On 23 February 2005, however, defendant's probation was revoked because of additional probation violations, and the trial court reinstated defendant's active sentence.

Beginning in January 2005, before the revocation of his probation and while under intensive supervision, defendant, then aged twenty-six, engaged in an illegal sexual relationship with and impregnated a fifteen-year-old girl. On 13 September 2006, defendant pled guilty to taking indecent liberties with a child, and the State dismissed a statutory rape charge. Defendant received and served a sentence of thirty-one to thirty-eight months. The Department of Correction (DOC) unconditionally discharged defendant on 25 January 2009.

On 12 March 2010, DOC sent defendant a letter giving notice of defendant's upcoming SBM determination hearing. Before that hearing could take place, however, defendant was arrested on 16 July 2010 for again failing to properly comply with the sex offender registry requirements. On 27 October 2010, defendant pled guilty and this time received a sentence of twenty-four to twenty-nine months. Defendant was released from prison on 24 August 2012, and on 14 May 2013, the trial court conducted defendant's SBM determination hearing and concluded that defendant's two sex crimes were "sexually violent offenses" and that defendant met the criteria for a recidivist sex offender.[2] *See id.*

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2. Though not addressed by the trial court, defendant's conviction for anally penetrating a seven-year-old boy constitutes an "aggravated offense" under the statute, providing an alternate and independent ground for imposing lifetime SBM. *See* N.C.G.S. § 14-208.6(1a) (Supp. 2018) (An "[a]ggravated offense" is "[a]ny criminal offense that includes . . . engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old."). That defendant is an aggravated offender is a conclusion of law, not a finding of fact, because the underlying facts of and conviction for the assault that satisfy the statutory criteria were previously found by a trial court.

§ 14-208.6(2b), (5) (Supp. 2018). As required by statute, the trial court ordered defendant to enroll in lifetime SBM. *See id.* § 14-208.40B(c) (2017). Significantly, since enrolling in SBM more than six years ago, defendant has not been charged with any additional offenses.

Defendant appealed the SBM order, and the Court of Appeals affirmed the trial court order. *State v. Grady*, 233 N.C. App. 788, 759 S.E.2d 712, 2014 WL 1791246, at *2–3 (2014) (unpublished). Upon further appeal to the United States Supreme Court, defendant asserted enrollment in lifetime SBM violates the Fourth Amendment. Concluding that continuous satellite-based location monitoring effects a Fourth Amendment search, the Supreme Court vacated the lower court's judgment and remanded this case to our Court to "examine whether the State's monitoring program is reasonable" under the Fourth Amendment. *Grady*, 135 S. Ct. at 1371, 191 L. Ed. 2d at 463.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. U.S. Const. amend. IV.

> The Fourth Amendment prohibits only unreasonable searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. *See, e.g.*, *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006) (suspicionless search of parolee was reasonable); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) (random drug testing of student athletes was reasonable).

Grady, 135 S. Ct. at 1371, 191 L. Ed. 2d at 462–63. The Supreme Court's remand mandate instructed this Court to determine whether lifetime SBM is a reasonable search for those classified as the most dangerous sex offenders. "[W]e 'examin[e] the totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment." *Samson*, 547 U.S. at 848, 126 S. Ct. at 2197, 165 L. Ed. 2d at 256 (second alteration in original) (quoting *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 591, 151 L. Ed. 2d 497, 505 (2001)). This examination must consider the government's purpose in conducting the search and the nature of the search balanced with the degree of intrusion upon the recognized privacy interest. *See Grady*, 135 S. Ct. at 1371, 191 L. Ed. 2d at 462–63. In assessing reasonable expectations of privacy, "[t]he Fourth Amendment does not protect all subjective expectations

of privacy, but only those that society recognizes as 'legitimate.' What expectations are legitimate varies, of course, with context." *Vernonia*, 515 U.S. at 654, 115 S. Ct. at 2391, 132 L. Ed. 2d at 575 (citing and quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337–38, 105 S. Ct. 733, 740–41, 83 L. Ed. 2d 720, 731–32 (1985)).

By citing *Samson* and *Vernonia*, the Supreme Court suggested that both the general reasonableness test and special needs doctrine are pertinent in evaluating the reasonableness of the SBM statute. *See Samson*, 547 U.S. at 852 n.3, 126 S. Ct. at 2199 n.3, 165 L. Ed. 2d at 259 n.3 (applying a general reasonableness test); *Vernonia*, 515 U.S. at 653, 115 S. Ct. at 2391, 132 L. Ed. 2d at 574 (applying the special needs doctrine). Though involving different criteria, both analyses require the balancing test specified in the remand order to determine whether the statute at issue here is valid. *See Samson*, 547 U.S. at 848, 126 S. Ct. at 2197, 165 L. Ed. 2d at 256; *Vernonia*, 515 U.S. at 652–53, 115 S. Ct. at 2390, 132 L. Ed. 2d at 574.

In *Samson* the Supreme Court applied "general Fourth Amendment principles" to evaluate the reasonableness of a statute that required parolees to agree to any warrantless search, without cause, at any time. 547 U.S. at 846, 853 n.3, 126 S. Ct. at 2196, 2200 n.3, 165 L. Ed. 2d at 255, 260 n.3. The Supreme Court evaluated the search's reasonableness "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 848, 126 S. Ct. at 2197, 165 L. Ed. 2d at 256 (quoting *Knights*, 534 U.S. at 118–19, 122 S. Ct. at 591, 151 L. Ed. 2d at 505). The Supreme Court first concluded that parolees "have severely diminished expectations of privacy by virtue of their status alone." *Id.* at 852, 126 S. Ct. at 2199, 165 L. Ed. 2d at 259. Then viewing that diminished privacy in the totality of the circumstances, the Supreme Court concluded the warrantless search did not intrude upon "an expectation of privacy that society would recognize as legitimate," despite the unlimited breadth of the right to search and regardless of the crime of conviction. *Id.* at 852, 126 S. Ct. at 2199, 165 L. Ed. 2d at 259. Therefore, balancing no intrusion upon any reasonable expectation of privacy against the State's substantial interests in deterring recidivism, the Supreme Court found the statute constitutional under the Fourth Amendment. *Id.* at 853, 857, 126 S. Ct. at 2200, 2202, 165 L. Ed. 2d at 259–60, 262.

In *Vernonia* the Supreme Court applied the same balancing test for a warrantless search "when special needs, beyond the normal need for law enforcement, ma[d]e the warrant . . . requirement impracticable."

515 U.S. at 653, 115 S. Ct. at 2391, 132 L. Ed. 2d at 574 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 3168, 97 L. Ed. 2d 709, 717 (1987)). A school policy required that high school athletes consent to random drug screenings in order to participate in school athletics. *Id.* at 650, 115 S. Ct. at 2389, 132 L. Ed. 2d at 572. The Court determined that student athletes had diminished expectations of privacy because the school had a special relationship with the students (*in loco parentis*) and because "[p]ublic school locker rooms [where the drug screenings take place] . . . are not notable for the [bodily] privacy they afford." *Id.* at 655–57, 115 S. Ct. at 2391–93, 132 L. Ed. 2d at 575–77. Next, the Court examined the intrusion upon privacy by the drug screening process and determined it had a "negligible" effect on the defendant's privacy interests. *Id.* at 658, 115 S. Ct. at 2393, 132 L. Ed. 2d at 578. Moreover, the State's important interest in deterring drug use among teenagers, particularly for the narrow, at-risk category of student athletes, justified the search under a Fourth Amendment reasonableness analysis. *Id.* at 661–62, 665, 115 S. Ct. at 2395, 2397, 132 L. Ed. 2d at 579–80, 582.

On remand in the present case, this Court further remanded this matter to the trial court to proceed according to the United States Supreme Court's mandate. The trial court held a new hearing on 16 June 2016. The State introduced evidence that defendant's GPS ankle monitor weighs less than nine ounces. The monitor holds a charge for about three days, but offenders are encouraged to charge the monitor two hours per day. A "beacon" set up in defendant's home helps preserve the monitor's battery life when defendant is in the beacon's range. A probation officer reviews the monitor and the beacon every three months to ensure the equipment is operating correctly. Unsupervised offenders, like defendant, have no direct contact with probation officers except for quarterly reviews. The monitor provides continuous location tracking of defendant. The SBM system displays defendant's location information as a series of points with arrows that are overlaid onto a map, and a probation officer can view the information as a still image or an image in motion. Officers have access to defendant's live location as well as historic location data for the preceding six months. As of 30 June 2015, only two probation officers were responsible for monitoring the data from over five hundred unsupervised offenders.

In its order, the trial court again determined that defendant's crimes were "sexually violent offenses," which required him to register as a sex offender, and that he was a recidivist, which met the criteria for lifetime SBM. In assessing the reasonableness of the search, the trial court noted the State's evidence characterizing the ankle monitor as

small, nonintrusive, and "not prohibit[ing] any defendant from traveling, working, or otherwise enjoying the ability to legally move about as he wishes." The trial court found that "[t]he ankle monitor does not monitor or reveal the activities of the offender—it merely monitors his location."

While the trial court noted defendant's submission of the State's policies governing SBM and multiple studies of recidivism rates, it found persuasive the long line of United States Supreme Court decisions acknowledging the special threat of repeat sex offenders. The trial court stated:

> The United States Supreme Court has long recognized the dangers of recidivism in cases of sex offenders. *Smith v. Doe*, 538 U.S. 84, 103 (2003) ("The risk of recidivism posed by sex offenders is frightening and high."); *McKune v. Lile*, 536 U.S. 24, 34 (2002) ("[s]ex offenders are a serious threat [ ] in this nation . . . . When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."). Additionally, it is within the purview of state governments to recognize and reasonably react to a known danger in order to protect its citizens. *Samson v. California*, 547 U.S. 843, 848 (2006) ("This Court has acknowledged the grave safety concerns that attend recidivism" and "the Fourth Amendment does not render the States powerless to address these concerns effectively.").

(second alteration in original). Ultimately, the trial court concluded "that based on the totality of the circumstances . . . [SBM] of the defendant is a reasonable search. The Court has considered the defendant's argument that the [SBM] statute is facially unconstitutional. The Court rejects this argument and finds that the statute is constitutional on its face."[3]

When substantial and immediate harm threatens children, a State may take proactive, programmatic measures to prevent that harm. *See*

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3. At the various stages throughout the appellate process, it has been unclear whether defendant is making a facial or an as-applied challenge. Generally, it appears defendant has asserted a facial challenge or has attempted to articulate a hybrid of facial and as-applied challenges. On remand from the United States Supreme Court, the trial court explicitly found the statute to be constitutional on its face, thereby indicating that defendant's argument, at least as understood by the trial court, was that the statute was facially unconstitutional. The Court of Appeals, however, held that the State failed to meet its evidentiary burden that the statute was reasonable as applied to defendant. *See State v. Grady*, 817 S.E.2d 18, 28 (N.C. Ct. App. 2018). Defendant argues both facial and as-applied invalidity in his brief here.

Bd. of Educ. v. Earls, 536 U.S. 822, 835–38, 122 S. Ct. 2559, 2567–69, 153 L. Ed. 2d 735, 747–49 (2002); *Vernonia*, 515 U.S. at 658 n.2, 115 S. Ct. at 2393 n.2, 132 L. Ed. 2d at 578 n.2 (noting the search at issue was a "prophylactic" "blanket search" designed to protect students and deter drug use). The General Assembly has clearly stated the purpose of North Carolina's "Sex Offender and Public Protection Registration Programs" is to proactively protect children and others from dangerous sex offenders:

> The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest.
>
> The General Assembly also recognizes that persons who commit certain other types of offenses against minors . . . pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest. Further, the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. . . .
>
> Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C.G.S. § 14-208.5 (2017).

Likewise, the United States Supreme Court has recognized that " 'sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.' And it is clear that a legislature 'may pass valid laws to protect children' and other victims of sexual

assault 'from abuse.' " *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736, 198 L. Ed. 2d 273, 281 (2017) (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244–45, 122 S. Ct. 1389, 1399, 152 L. Ed. 2d 403, 417 (2002)). Furthermore, " '[t]he victims of sex assault are most often juveniles,' and '[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.' " *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4, 123 S. Ct. 1160, 1163, 155 L. Ed. 2d 98, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 32–33, 122 S. Ct. 2017, 2024, 153 L. Ed. 2d 47, 56–57 (2002) (plurality opinion)). The Supreme Court has emphasized the magnitude of the harm inflicted upon victims, noting a sexual assault on a child "has a permanent psychological, emotional, and sometimes physical impact on the child." *Kennedy v. Louisiana*, 554 U.S. 407, 435, 128 S. Ct. 2641, 2658, 171 L. Ed. 2d 525, 548 (2008) (citations omitted); *see also id.* at 467–68, 128 S. Ct. at 2676–77, 171 L. Ed. 2d at 568–69 (Alito, J., dissenting) (discussing the long-term developmental problems sexually abused children can experience (citations omitted)).

Thus, the General Assembly has determined violent sex offenders should be deterred from committing additional sex offenses. To further its paramount interest in protecting the public—especially children—from sex offenders, the General Assembly enacted various programs to monitor and deter sex offenders after their release. For example, "North Carolina, like every other state in the nation, enacted a sex offender registration program to protect the public from the unacceptable risk posed by convicted sex offenders." *State v. Bryant*, 359 N.C. 554, 555, 614 S.E.2d 479, 480 (2005), *superseded on other grounds by statute*, An Act to Protect North Carolina's Children/Sex Offender Law Changes, Ch. 247, Sec. 8.(a), 2005 N.C. Sess. Laws (Reg. Sess. 2006) 1065, 1070. *See generally Smith v. Doe*, 538 U.S. 84, 103, 123 S. Ct. 1140, 1145, 155 L. Ed. 2d 164, 174–75 (2003). Similarly, with the encouragement of Congress, forty-eight states and the District of Columbia have electronic monitoring available for some sex offenders.[4] *See* 42 U.S.C. § 16981 (2012)

4. *See* 28 C.F.R. § 2.204(b)(2)(iii) (2018) (permitting electronic tracking in Washington, D.C.); Ala. Code § 15-20A-20 (LexisNexis 2018); Alaska Stat. § 12.55.027(d), (g)(3) (2018); Ariz. Rev. Stat. Ann. § 13-902(G) (Supp. 2018); Ark. Code Ann. § 12-12-923 (2016); Cal. Penal Code § 3004(b) (West Supp. 2019); Colo. Rev. Stat. §§ 18-1.3-204(2)(a)(XIV.5), -1007(2) (2018); Conn. Gen. Stat. Ann. § 53a-30(a)(14) (West Supp. 2019); Del. Code Ann. tit. 11, § 4121(u) (2015); Fla. Stat. Ann. § 948.30(2)-(3) (West Supp. 2019); Ga. Code Ann. § 42-1-14(e) (Supp. 2017); Haw. Rev. Stat. Ann. § 706-624(2)(p) (LexisNexis Supp. 2018); Idaho Code § 18-8308(3) (2016); 730 Ill. Comp. Stat. Ann. 5/5-8A-6 (West Supp. 2019); Ind. Code Ann. § 11-13-3-4(j) (LexisNexis Supp. 2018); Iowa Code Ann. § 692A.124(1) (West 2016); Kan. Stat. Ann. § 22-3717(u) (Supp. 2018); La. Stat. Ann. § 15:560.4(A) (2012); Me. Rev. Stat. Ann. tit. 17-A, § 1204(2-A)(N) (Supp. 2018); Md. Code Ann., Crim. Proc. § 11-723(d)(3)(i)

(current version at 34 U.S.C.A. § 20981 (West 2017)) (authorizing grants to states that implement twenty-four-hour, continuous GPS monitoring programs for sex offenders).

North Carolina's "sex offender monitoring program . . . uses a continuous satellite-based monitoring system" for narrowly and categorically defined classes of sex offenders who present a significant enough threat of reoffending to "require[ ] the highest possible level of supervision and monitoring." N.C.G.S. § 14-208.40(a) (2017). The four categories of offenders who require continuous lifetime SBM to protect public safety are (1) sexually violent predators, (2) recidivists, (3) aggravated offenders, and (4) adults convicted of statutory rape or a sex offense with a victim under the age of thirteen. *Id.* § 14-208.40A(c) (2017). A "sexually violent predator" is a person who "has been convicted of a sexually violent offense," such as rape or incest, and "who suffers from a mental abnormality or personality disorder," as determined by a board of experts, that makes the person likely to purposely foster relationships with the intent of sexual victimization or to engage in sexually violent offenses against strangers. *Id.* §§ 14-208.6(5)-(6), -208.20 (2017 & Supp. 2018). Second, "recidivists" have had at least two "reportable convictions." *Id.* § 14-208.6(2b). Reportable convictions are serious crimes, including "sexually violent offenses" and various "offense[s] against a minor," such as kidnapping. *Id.* § 14-208.6(1m), (4)(a) (Supp. 2018). Third, perpetrators of aggravated offenses have convictions for "engaging in a sexual act involving vaginal, anal, or oral penetration" either (1) through use or threat of force or (2) with a child under twelve years old. *Id.* § 14-208.6(1a) (Supp. 2018). The fourth category includes convictions of any sex act by a person over eighteen years old against any victim under thirteen years old. *Id.* § 14-27.28 (2017).

(LexisNexis 2018); Mass. Ann. Laws ch. 265, § 47 (LexisNexis Supp. 2019); Mich. Comp. Laws Ann. § 750-520n(1) (West Supp. 2019); Minn. Stat. Ann. § 609.135(5a)(b)(8), (5a)(c) (West 2018); Miss. Code Ann. § 99-19-84 (2015); Mo. Ann. Stat. § 217.735(4) (West Supp. 2019); Mont. Code Ann. § 46-18-206 (2017); Neb. Rev. Stat. Ann. § 83-174.03(4)(g) (LexisNexis 2019); Nev. Rev. Stat. Ann. § 176A.410(2)(b) (LexisNexis 2016); N.H. Rev. Stat. Ann. § 651:2(V)(b) (LexisNexis Supp. 2018); N.J. Stat. Ann. § 30:4-123.92 (West 2008); N.M. Stat. Ann. § 31-21-10.1(E) (Supp. 2018); N.Y. Penal Law § 65.10(4), (5-a) (McKinney Supp. 2019); N.C.G.S. § 14-208.40A(c) (2017); N.D. Cent. Code § 12.1-32-07(3)(f) (Supp. 2017); Ohio Rev. Code Ann. § 2929.13(L) (West Supp. 2019); Okla. Stat. Ann. tit. 22, § 991a(A)(12) (West Supp. 2019); Or. Rev. Stat. § 144.103(2)(c) (2017); 42 Pa. Stat. and Cons. Stat. Ann. § 9799.30 (West 2014); 11 R.I. Gen. Laws § 11-37-8.2.1 (Supp. 2018); S.C. Code Ann. § 23 -3-540 (Supp. 2018); S.D. Codified Laws § 24-15A-24 (2013); Tenn. Code Ann. § 40-39-303 (Supp. 2018); Tex. Code Crim. Proc. Ann. art. 42A.301(b)(16) (West 2018); Utah Code Ann. § 77-18-1(8)(d) (LexisNexis Supp. 2018); Va. Code Ann. § 19.2-303 (2015); Wash. Rev. Code Ann. § 9.94A.704(5)(b) (West 2019); W. Va. Code Ann. § 62-11D-3(a) (LexisNexis 2014); Wis. Stat. Ann. § 301.48 (West 2019); Wyo. Stat. Ann. § 7-13-1102(b)(i) (2017).

In short, mandatory SBM applies only to a small subset of individuals who commit the most serious sex crimes or are repeat offenders. The General Assembly has determined certain convicted sex offenders—namely sexually violent predators, recidivists, perpetrators of aggravated offenses, and adults who sexually victimize children under thirteen years old—"pose a high risk of engaging in sex offenses even after being released from incarceration . . . and that protection of the public from sex offenders is of paramount governmental interest." *Id.* § 14-208.5. Accordingly, the statute categorically requires the trial court to "order the offender to enroll in a satellite-based monitoring program for life." *Id.* § 14-208.40A(c). Though the program is commonly referred to as "lifetime" monitoring, one year after a defendant completes his sentence, probation, or parole, the defendant may petition the Post-Release Supervision and Parole Commission for termination of enrollment. *Id.* §§ 14-208.41(a), -208.43 (2017). The defendant must show he has not been convicted of any additional qualifying convictions, has substantially complied with the SBM and registration programs, and "is not likely to pose a threat to the safety of others." *Id.* § 14-208.43(c).

II. The Majority's Holding

The majority "hold[s] that the application of the relevant portions of N.C.G.S. §§ 14-208.40A(c) and 14-208.40B(c) to individuals in the same category as defendant, under which these individuals are required to submit to a mandatory, continuous, nonconsensual search by lifetime satellite-based monitoring, violates the Fourth Amendment to the United States Constitution. The category to which this holding applies includes only those individuals who are not on probation, parole, or post-release supervision; who are subject to lifetime SBM solely by virtue of being recidivists as defined by the statute; and who have not been classified as a sexually violent predator, convicted of an aggravated offense, or are adults convicted of statutory rape or statutory sex offense with a victim under the age of thirteen." Thus, the majority "conclude[s] that the Court of Appeals erred in limiting its holding to the constitutionality of the program as applied only to defendant, when the analysis of the reasonableness of the search applies equally to anyone in defendant's circumstances."

It is undisputed that defendant is a recidivist. To qualify as a recidivist under the statute, a defendant must have multiple "reportable convictions." *Id.* § 14-208.6(2b). For example, reportable convictions include comparatively minor sex crimes where the victim is not physically harmed, such as secretly photographing a person for the purpose of gratifying sexual desires (a Class I felony) or solicitation of a child

using a computer to commit a sex act (a Class H felony), as well as those society would consider as the worst sex crimes, such as first-degree forcible rape (a Class B1 felony) and child sex trafficking (a Class B2 felony). *See id.* § 14-208.6(4)(a), (d). If a defendant is convicted of at least two reportable offenses, he qualifies as a recidivist, and the trial court must order the defendant's enrollment in lifetime SBM. Considering the various crimes within the statute's purview, a proper constitutional analysis requires an understanding of the distinction between a facial challenge to the statute and a challenge only as applied to defendant. An as-applied challenge would maintain that the statute is overly broad by including defendant within the recidivist classification, whereas a facial challenge asserts that the statute operates unconstitutionally as to all possible defendants who qualify as recidivists.

The majority holds SBM for any unsupervised defendant falling within the recidivist category is unconstitutional without stating why its analysis applies precisely, but only, to those in this category. Despite its holding, the majority's logic seems to concede the SBM statute's constitutionality. Like those crimes of many other violent sex offenders, defendant's crimes fit two statutory categories: recidivist and aggravated offender. The majority suggests that SBM is unconstitutional for the recidivist category but not for the aggravated offender. Concluding SBM is constitutional for an aggravated offender who is also a recidivist undermines the holding that the entire recidivist category is unconstitutional.

III. Reasonableness As Applied to Defendant

An as-applied challenge concedes a statute's general constitutionality but instead "claim[s] that a statute is unconstitutional on the facts of a particular case or in its application to a particular party." *As-Applied Challenge*, *Black's Law Dictionary* (10th ed. 2014). The majority fails to conduct such an analysis. Instead of focusing on the individualized facts of defendant's case as required by an as-applied challenge, the majority generally uses defendant's "circumstances" to create its category encompassing all unsupervised recidivist sex offenders, regardless of the individual offenses represented. *Cf. Graham v. Florida*, 560 U.S. 48, 91–96, 130 S. Ct. 2011, 2039–42, 176 L. Ed. 2d 825, 856–60 (2010) (Roberts, C.J., concurring in judgment) (promoting a fact-based, instead of a categorical, approach for as-applied challenges). Thus, the majority facially strikes down N.C.G.S. § 14-208.40A(b)(ii) and related provisions that require lifetime SBM for recidivists. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2457–58, 192 L. Ed. 2d 435, 453 (2015) (Scalia, J., dissenting) (remarking that "the *reasoning* of a decision may suggest

that there is no permissible application of a particular statute . . . . [and] in this sense, the facial invalidation of a statute is a logical consequence of the Court's opinion, [even if it is] not the immediate effect of its judgment" (citation omitted)). An as-applied challenge should focus on the specific facts underlying a defendant's convictions, and a defendant's as-applied challenge fails if the defendant's conduct is the targeted harm the General Assembly intended to curtail. *See Bryant*, 359 N.C. at 565, 614 S.E.2d at 486 (stressing that "the role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests" and that "[t]he role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials" (quoting *Henry v. Edmisten*, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986))). If, however, the statute is overly broad as applied to defendant's specific circumstances, the statute is unconstitutional as applied to him. *See Britt v. State*, 363 N.C. 546, 549–50, 681 S.E.2d 320, 322–23 (2009).

In *Britt* this court analyzed an as-applied challenge to a new statute that prohibited the plaintiff from owning a firearm because of his nonviolent, drug-related felony conviction decades earlier. *Id.* at 547, 681 S.E.2d at 321. The plaintiff complied with the statute and then challenged its constitutionality as applied to him. *Id.* at 548–49, 681 S.E.2d at 322. After noting his longstanding law-abiding history and, when allowed, his lawful and peaceful possession of firearms, this Court restored the plaintiff's right to possess a firearm. *Id.* at 550, 681 S.E.2d at 323 ("[I]t 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."). In other words, by examining both the plaintiff's previous conviction and subsequent actions, this Court determined that the statute was overly broad and thus unconstitutional as applied to the plaintiff.

Here the statute is not overly broad as applied to defendant because it appears he, as a consequence of his aggravated and repeated sex crimes, poses exactly the public danger the legislature sought to address. He forcibly sodomized a seven-year-old boy with another child watching and, as a result, spent six years in prison. Upon release, defendant failed to register as a sex offender and was placed on probation. He received notice of multiple probation violations, and after a hearing, the trial court gave defendant a second chance by placing him on intensive supervision. While subject to intensive supervision and less than three years after his release from prison, defendant began an illegal

sexual relationship with a minor, whom he impregnated. After serving his subsequent prison sentence, defendant again failed to comply with sex offender registry requirements. His resulting two-year prison sentence delayed his initial SBM hearing until he was again released. Since 1996, when not incarcerated, the longest period of time defendant has not committed a sex crime against a minor is the six years (from 2013 to the present) he has been enrolled in SBM. Thus, his underlying convictions for sexually violent offenses and subsequent actions contravene any as-applied argument, for defendant sits squarely within the class of aggravated and recidivist offenders the General Assembly intended to address.

IV. Facial Reasonableness of the Statute

A facial challenge maintains the statute "always operates unconstitutionally." *Facial Challenge*, *Black's Law Dictionary* (10th ed. 2014). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707 (1987); *see also Patel*, 135 S. Ct. at 2449, 2451, 192 L. Ed. 2d at 443, 446 (majority opinion) (applying the *Salerno* standard to a Fourth Amendment facial challenge). In other words, to succeed in a facial challenge, defendant must shoulder the heavy burden of showing that the statute's SBM requirement could never be reasonably applied to any offender who falls within the statutorily defined categories. *See Patel*, 135 S. Ct. at 2451, 192 L. Ed. 2d at 445 ("[A] [party] must establish that a 'law is unconstitutional in all of its applications.' " (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151, 160 (2008))). In the present case, defendant therefore must prove a statute could never constitutionally require enrollment of a defendant in lifetime SBM whose conduct meets the statutory definition of a recidivist. In other words, to support its holding, the majority must show that lifetime SBM is unreasonable for the most heinous crimes that meet the statutory requirements of recidivists and determine if SBM is unreasonable as to every defendant who committed those crimes.

Even though, as discussed, defendant's history of repeated sexual assaults on children places him squarely within the class of those identified by the legislature as requiring SBM to deter their behavior, defendant's behavior here does not encompass all possible scenarios in which the lifetime SBM statute may apply to recidivists. To support its holding, the majority must show that lifetime SBM is unreasonable for everyone

who meets the recidivist classification in all circumstances, including the worst violent offenders. Of note, the United States Supreme Court has upheld civil commitment statutes targeting some of these sexually violent predators. *See Kansas v. Hendricks*, 521 U.S. 346, 350, 117 S. Ct. 2072, 2076, 138 L. Ed. 2d 501, 508 (1997). Thus, the balancing test must include the incremental impact on reasonable privacy interests of those for whom civil commitment may be available.

Under both *Samson*'s test for individuals with diminished expectations of privacy and *Vernonia*'s special needs doctrine, the lifetime SBM statute is facially constitutional. A Seventh Circuit panel applied the mandate provided by the United States Supreme Court in *Grady* to an SBM statute "functionally identical to" North Carolina's statute. *Belleau v. Wall*, 811 F.3d 929, 939 (7th Cir. 2016) (Flaum, J., concurring). The court held, *inter alia*, that lifetime SBM constituted a reasonable search under *Grady*. *Id.* at 936–37 (majority opinion).

Belleau was a sexually violent predator recently released from civil commitment. *Id.* at 931. The court first noted Belleau's privacy interests were "severely curtailed as a result of his criminal activities" even though he was not on parole or probation because "persons who have demonstrated a compulsion to commit very serious crimes . . . must expect to have a diminished right of privacy as a result of the risk of their recidivating—and . . . the only expectation of privacy that the law is required to honor is an 'expectation . . . that society is prepared to recognize as reasonable.' " *Id.* at 935 (third alteration in original) (quoting *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576, 588 (1967) (Harlan, J., concurring)). The majority discussed at length the dangers and underreporting of child sexual assaults as well as the high rates of recidivism among convicted sex offenders. *Id.* at 932–34. Thus, the court concluded the "*incremental* effect of the challenged statute" on Belleau's privacy was "slight," and the search was reasonable under the Fourth Amendment. *Id.* at 934–35, 936–37.

In a concurring opinion, Judge Flaum likewise concluded that the lifetime SBM statute did not violate the Fourth Amendment. In doing so he examined "two threads of Fourth Amendment case law: searches of individuals with diminished expectation of privacy [as in *Samson*] . . . and 'special needs' searches [as in *Vernonia*]." *Id.* at 939 (Flaum, J., concurring). Because the monitoring program's primary purpose was to reduce recidivism, Judge Flaum determined the program served a valid special need; nevertheless, a complete analysis of the search also must balance the public interest and the intrusion on reasonable privacy interests in a context-specific inquiry. *Id.* at 939–40. Judge Flaum first

recognized the government's strong interest in protecting juveniles from sex offenders. *Id.* at 940 (citing *Lile*, 536 U.S. at 32–33, 122 S. Ct. at 2024, 153 L. Ed. 2d at 56–57 (plurality opinion)). While acknowledging the significant privacy interest at issue, *id.* (citing *Riley v. California*, 573 U.S. 373, 396, 134 S. Ct. 2473, 2490, 189 L. Ed. 2d 430, 447–48 (2014)), he opined that "the weight of this privacy interest [was] somewhat reduced by Belleau's diminished expectation of privacy. . . . [because] a felon's expectation of privacy lies somewhere in-between that of a parolee or probationer and an ordinary citizen," *id.* at 940–41 (citations omitted). Judge Flaum concluded that because the intrusion upon this diminished privacy was "relatively limited in its scope" when compared with the State's purpose, the SBM statute constituted a reasonable Fourth Amendment search. *Id.* at 941.

Here, as did the trial court, I agree with the reasoning of the Seventh Circuit and would hold North Carolina's SBM program effects a reasonable search. First, lifetime SBM enrollees have reduced privacy expectations given the nature of their acts and the resulting convictions. Second, the incremental intrusion upon this reduced privacy is slight. Third, the State's interest in, and its special need for, deterring recidivist violent sex offenders is paramount. Finally, this governmental interest outweighs the intrusion upon an SBM enrollee's diminished expectation of privacy in a context-specific balancing test that considers the totality of the circumstances.

The Seventh Circuit's analysis is persuasive here because, for all considerations relevant to a Fourth Amendment analysis, the Wisconsin SBM statute is "functionally identical to" the North Carolina SBM statute. *Id.* at 939. Both statutes require continuous lifetime SBM for a categorically defined group of convicted sex offenders. *See* N.C.G.S. § 14-208.40; Wis. Stat. Ann. § 301.48(2) (West 2019). The civil SBM programs may apply to unsupervised offenders after they have completed parole, probation, or civil commitment. *See Belleau*, 811 F.3d at 932 (majority opinion) (recognizing that the offender was "not on bail, parole, probation, or supervised release"); *State v. Grady*, 817 S.E.2d 18, 24 (N.C. Ct. App. 2018) ("Unsupervised offenders . . . are statutorily required to submit to SBM . . . ."). Moreover, in one notable difference, the Wisconsin statute prohibits certain offenders from ever requesting termination of lifetime SBM and does not allow any offender to petition for termination for at least twenty years, but the North Carolina statute allows a person to apply for termination of "lifetime" SBM beginning one year following the offender's release from prison and completion of any post-release supervision. *Compare* Wis. Stat. Ann. § 301.48(6)(b)(2), (3), *with* N.C.G.S. § 14-208.43(a).

An analysis of facial constitutionality starts with defining the scope of the privacy interests involved. "[I]t is beyond dispute that convicted felons do not enjoy the same measure of constitutional protections, including the expectation of privacy under the Fourth Amendment, as do citizens who have not been convicted of a felony." *State v. Bowditch*, 364 N.C. 335, 349–50, 700 S.E.2d 1, 11 (2010) (citations omitted); *see also Vernonia*, 515 U.S. at 654, 115 S. Ct. at 2391, 132 L. Ed. 2d at 575 ("[T]he legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State."). Because of their own conduct and propensities that led to their underlying convictions and statutory classifications, felony sex offenders face a plethora of rights restrictions, specifically a reduction in their Fourth Amendment privacy expectations "that society recognizes as 'legitimate.' " *Vernonia*, 515 U.S. at 654, 115 S. Ct. at 2390–91, 132 L. Ed. 2d at 575 (quoting *T.L.O.*, 469 U.S. at 338, 105 S. Ct. at 741, 83 L. Ed. 2d at 732).

For example, restrictions on firearms possession and voting rights evince a felon's reduced constitutional protections. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S. Ct. 2783, 2816–17, 171 L. Ed. 2d 637, 678 (2008) (affirming that the "longstanding prohibitions on the possession of firearms by felons" survive Second Amendment scrutiny); *Richardson v. Ramirez*, 418 U.S. 24, 56, 94 S. Ct. 2655, 2671, 41 L. Ed. 2d 551, 572 (1974) (holding that disenfranchisement of convicted felons who had completed their sentences did not violate the Equal Protection Clause). Furthermore, the sex offender registration requirements of all fifty states manifest a diminished expectation of privacy for sex offenders. *Cf. Smith*, 538 U.S. at 89–90, 123 S. Ct. at 1145, 155 L. Ed. 2d at 174–75. Society clearly does not afford violent sex offenders a full legitimate expectation of location-based privacy, as exemplified by the limitations on sex offenders' movements. *See* N.C.G.S. § 14-208.18(a)(1), (4) (2017) (prohibiting sex offenders from being present at "any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds," as well as the State Fair); *Standley v. Town of Woodfin*, 362 N.C. 328, 333, 661 S.E.2d 728, 732 (2008) (upholding prohibition on convicted sex offenders entering public parks). Felony sex offenders may also be barred from certain occupations and professions, a harsh sanction that limits them from choosing where they work and what type of livelihood they may pursue. *E.g.*, N.C.G.S. § 84-28(b)(1), (c) (2017) (attorney); *id.* § 90-14(a)(7), (c) (2017) (medical doctor); *id.* § 93-12(9)(a) (2017) (certified public accountant); *id.* § 93A-6(b)(2) (2017) (real estate broker). Thus, while recidivist sex offenders have a somewhat greater expectation of privacy than a probationer or parolee, they do not have

the same expectations of privacy as members of the general public in light of their prior offenses.[5,6] *See Belleau*, 811 F.3d at 934–35 (majority opinion) ("Focus[ing] . . . on the *incremental* effect of the challenged statute on . . . privacy . . . [reveals that the] effect is slight" in the context of a convicted violent sex offender's diminished expectation of privacy); *see also Samson*, 547 U.S. at 852, 126 S. Ct. at 2199, 165 L. Ed. 2d at 259 (finding no intrusion upon a parolee's diminished expectation of privacy); *Vernonia*, 515 U.S. at 658, 115 S. Ct. at 2393, 132 L. Ed. 2d at 577 (concluding the intrusion upon privacy was "negligible" in light of student athlete's reduced expectation of privacy at school).

First, the physical limitations imposed by SBM are "more inconvenient than intrusive" and do not materially invade defendant's diminished privacy expectations. *Grady*, 817 S.E.2d at 25. As noted by the trial court, the ankle monitor weighs less than nine ounces, and it "does not

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5. The majority asserts that "except as reduced for possessing firearms and by providing certain specific information and materials to the sex offender registry, defendant's constitutional privacy rights, including his Fourth Amendment expectations of privacy, have been restored." The majority's logic is backwards. Defendant's expectation of privacy is not reduced "by" the sex offender registry; rather, the sex offender registry may require defendant to provide information *because* his privacy rights are reduced. The majority offers no explanation for why the scope of diminished privacy expectations is restricted to only those reductions implicated by firearm possession and the sex offender registry. Rather, the actual issue is what reductions in reasonable expectations of privacy does society recognize as legitimate for recidivist violent sex offenders. *See Vernonia*, 515 U.S. at 654, 115 S. Ct. at 2391, 132 L. Ed. 2d at 575 (quoting *T.L.O.*, 469 U.S. at 338, 105 S. Ct. at 741, 83 L. Ed. 2d at 732).

6. In *Carpenter v. United States*, the Supreme Court held that, for citizens without a reduced expectation of privacy, government tracking of a suspect's location without a warrant substantially intrudes upon reasonable privacy rights. 138 S. Ct. 2206, 2217, 201 L. Ed. 2d 507, 521 (2018). There the police acquired the defendant's cell site location information (CSLI) containing the time-stamped locations of his cell phone for an extended period of time. *See id.* at 2217, 2220, 201 L. Ed. 2d at 521, 525 (narrowly limiting the holding to "legitimate expectation[s] of privacy in the record of [the defendant's] physical movements as captured through CSLI"). The Court expressed concern that allowing police to surreptitiously invade reasonable expectations in this manner would expose an expansive class of individuals (i.e., anyone with a cell phone) to unfettered government surveillance. *See id.* at 2218, 201 L. Ed. 2d at 522 ("Only the few without cell phones could escape this tireless and absolute surveillance."). Here those concerns are not present. Lifetime SBM only applies to a narrow, statutorily defined class of convicted sex offenders. The police have no discretion over who is searched, and thus the SBM program does not raise the same concerns of arbitrary, universal tracking at issue in *Carpenter*. *See id.* at 2213, 201 L. Ed. 2d at 517 ("The basic purpose of [the Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." (internal quotation marks and citation omitted)); *see also id.* at 2214, 201 L. Ed. 2d at 518 ("[A] central aim of the Framers was to place obstacles in the way of too permeating police surveillance." (internal quotation marks and citation omitted)).

prohibit any defendant from traveling, working, or otherwise enjoying the ability to legally move about as he wishes." Charging the monitor takes at most two hours per day, which poses an insignificant burden considering the ubiquity of other personal electronic devices the average person charges every day.

Second, regarding the effect on other privacy interests, SBM falls on a spectrum of possible "regulatory schemes that address the recidivist tendencies of convicted sex offenders." *Bowditch*, 364 N.C. at 341, 700 S.E.2d at 6. At one end of the continuum, civil commitment involves a highly invasive affirmative restraint and deprivation of rights similar to imprisonment. *See Hendricks*, 521 U.S. at 350, 117 S. Ct. at 2076, 138 L. Ed. 2d at 508; *Belleau*, 811 F.3d at 932. Next, career and travel limitations significantly restrict the exercise of fundamental freedoms. Finally, on the other end of the sex offender civil regulatory spectrum, registration statutes impose the fewest restrictions on a defendant's liberty, yet they still require the offender to provide certain information to law enforcement and the public. *See* N.C.G.S. § 14-208.10 (2017).

At the urging of Congress, every state has adopted a sex offender registration act that requires collection, maintenance, and distribution of information about the registered sex offender and imposes penalties for noncompliance. *E.g.*, N.C.G.S. § 14-208.7 (2017). *See generally Smith*, 538 U.S. at 89–90, 123 S. Ct. at 1145, 155 L. Ed. 2d at 174–75. The purposes of sex offender registration are to provide notification to the community and deter future sex offenses. *See Smith*, 538 U.S. at 102–03, 123 S. Ct. at 1152, 155 L. Ed. 2d at 183. When registering, a sex offender must provide his full name, any aliases, date of birth, sex, race, height, weight, eye color, hair color, driver's license number, home address, the type of offense, the date of conviction, the sentence imposed, a current photograph, fingerprints, and any online identifiers (such as social media usernames). N.C.G.S. § 14-208.7(b). Every six months, the sex offender must verify that his registration information has not changed, and the registrant must provide timely updates regarding any change of address or name, enrollment status in school, or online identifiers. *Id.* §§ 14-208.9, -208.9A (2017). Moreover, the sex offender's name, sex, address, physical description, picture, conviction dates, offenses, sentences imposed, and registration status are publicly available, and "[t]he sheriff shall release any other relevant information that is necessary to protect the public concerning a specific person." *Id.* § 14-208.10. Ten years after registering, a sex offender may petition to terminate his registration. *Id.* § 14-208.12A (2017).

Thus, along the spectrum of possible regulatory schemes, SBM's privacy intrusion is most similar to sex offender registration. Both programs mandate disclosing information to the State that is not ordinarily required for the general public. Both protect the public through deterrence. Both allow for termination, SBM after one year and registration after ten years. In contrast with the other options, "[t]he SBM program does not detain an offender [or resemble imprisonment] in any significant way." *Bowditch*, 364 N.C. at 349, 700 S.E.2d at 11. Additionally, "[t]he monitoring taking place in the SBM program is far more passive and is distinguishable from the type of State supervision imposed on probationers," and "[o]ccupational debarment is far more harsh than an SBM program." *Id.* at 346, 349, 700 S.E.2d at 9–10; *see also Doe v. Bredesen*, 507 F.3d 998, 1005 (6th Cir. 2007) (citing *Smith*, 538 U.S. at 100, 123 S. Ct. at 1151, 155 L. Ed. 2d at 181) (noting SBM is less harsh than occupational debarment), *cert. denied*, 555 U.S. 921, 129 S. Ct. 287, 172 L. Ed. 2d 210 (2008).

Accordingly, in the totality of the circumstances, SBM that provides information regarding physical location and movements effects a small, incremental intrusion in the context of the diminished expectation of privacy that society would recognize as legitimate. SBM does not prevent a defendant from going anywhere he is otherwise allowed to go. The tracking mechanism only passively collects location data; as the trial court found, "[T]he ankle monitor does not monitor or reveal the activities of the offender—it merely monitors his location." *See also Belleau*, 811 F.3d at 936 ("It's untrue that 'the GPS device burdens liberty . . . by its continuous surveillance of the offender's activities'; it just identifies locations; it doesn't reveal what the wearer of the device is doing at any of the locations." (alteration in original) (quoting *Commonwealth v. Cory*, 454 Mass. 559, 570, 911 N.E.2d 187, 196 (2009))). Where a defendant is unsupervised, no one regularly monitors the defendant's location, significantly lessening the degree of intrusion. *See id.* at 941 (Flaum, J., concurring). Furthermore, though the program is referred to as "lifetime" monitoring, a defendant may petition to be removed from SBM after one year. N.C.G.S. § 14-208.43 (permitting termination if a defendant shows he has not been convicted of any additional qualifying convictions, has substantially complied with the SBM program, and "is not likely to pose a threat to the safety of others"). Therefore, in the context of diminished privacy expectations, SBM's degree of intrusion is minimal.

On the other hand, regarding "the public interest, in this case, the state's interest can hardly be overstated." *Belleau*, 811 F.3d at 940. The General Assembly has "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. More specifically, "[t]he General Assembly also recognizes . . . that the protection of [sexually abused] children is of great governmental interest." *Id.* This finding is supported by United States Supreme Court precedent, congressional action, the public policy of all fifty states, and "the moral instincts of a decent people." *Packingham*, 137 S. Ct. at 1736, 198 L. Ed. 2d at 281; *see* 34 U.S.C.A. § 20981; *Conn. Dep't of Pub. Safety*, 538 U.S. at 4, 123 S. Ct. at 1163, 155 L. Ed. 2d at 103; *Smith*, 538 U.S. at 89–90, 123 S. Ct. at 1145, 155 L. Ed. 2d at 174–75.[7] Therefore, requiring enrollment in SBM accomplishes the General Assembly's purpose of protecting the public by deterring violent sex offenders from committing further sex crimes, thereby "promot[ing] . . . legitimate governmental interests." *Samson*, 547 U.S. at 848, 126 S. Ct. at 2197, 165 L. Ed. 2d at 256 (quoting *Knights*, 534 U.S. at 119, 122 S. Ct. at 591, 151 L. Ed. 2d at 505).[8]

Finally, the paramount governmental interest outweighs the minimal intrusion upon diminished privacy interests when considering the totality of possible circumstances that may arise under the statute. Here the facially challenged statutes reasonably provide for lifetime SBM for the worst recidivist sexual offenders, and lifetime SBM is significantly less invasive than civil commitment or other regulatory options available for those offenders. The majority, however, putting itself in the

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7. When presented with conflicting evidence supporting the legislature's public policy determinations, courts should defer to the legislature's findings of fact, especially where, like here, that determination is overwhelmingly corroborated. Additionally, the trial court considered "multiple studies of recidivism rates of sex offenders versus other criminals" and found the search reasonable in light of this evidence.

8. "[I]t is undisputed that the [SBM] law promotes deterrence . . . . [which] appears to be the primary purpose of the law." *Belleau*, 811 F.3d at 943; *accord Bredesen*, 507 F.3d at 1007. Moreover, the efficacy of SBM as a deterrent is self-evident: The search "deter[s] future offenses by making the plaintiff aware that he is being monitored and is likely therefore to be apprehended should a sex crime be reported at a time, and a location, at which he is present." *Belleau*, 811 F.3d at 935 (majority opinion); *see also Vernonia*, 515 U.S. at 663, 115 S. Ct. at 2395–96, 132 L. Ed. 2d at 581 (remarking that the "efficacy" of the search was "self-evident" where the goal was to deter drug use by athletes and the school promulgated the drug-testing policy so that athletes would know they would be tested); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 629–30, 109 S. Ct. 1402, 1420, 103 L. Ed. 2d 639, 668 (1989) (recognizing that it is "common sense" that employees must "know they will be tested" for drugs and alcohol in order to deter substance abuse). Thus, there is no need for individualized inquiries into the efficacy of deterring a particular defendant, nor is the State required to prove this common sense principle with empirical evidence. Nonetheless, since 1996, when not incarcerated, the longest period of time defendant has not committed a sex crime against a minor is the six years he has been subject to SBM.

place of the legislature, would draft a statute excluding sexually violent recidivists from mandatory lifetime SBM, yet the case law is clear that courts should not assume the role of the legislature when the legislative categories are reasonable. *See*, *e.g.*, *Smith*, 538 U.S. at 103–04, 123 S. Ct. at 1153, 155 L. Ed. 2d at 184 ("[Where] [t]he legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class[,] . . . . [a State is] not preclude[d] . . . from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences."); *Bredesen*, 507 F.3d at 1007 ("[O]ur role is not to invalidate the [SBM] program if the . . . Legislature has not struck the perfect balance between the regulatory purpose of the program and its burdens on [our] citizens, but rather to determine whether the means chosen are reasonable."). The majority expresses concern that "[a] wide range of different offenses are swept into" the statute's definition of recidivist, but if the statute is ever overbroadly applied to a defendant, he can bring an as-applied challenge that takes into account his specific convictions, circumstances, and facts. *See Britt*, 363 N.C. at 549–50, 681 S.E.2d at 322–23.

Moreover, the majority's sweeping analysis jeopardizes most applications of the lifetime SBM statute. Despite the majority's strenuous insistence that its reasoning only addresses lifetime SBM for recidivists without affecting lifetime SBM for sexually violent predators, aggravated offenders, and adults who otherwise sexually victimize children under thirteen years old, the facts, analysis, and ultimate outcome of this case demonstrate otherwise. The majority's approach is devoid of any discussion as to why SBM is unconstitutional for the worst crimes that would place a defendant in the statutory category of recidivist. Further, by upholding the reversal, without remand of the trial court's order requiring lifetime SBM, the majority's disposition does not effect the result it claims in its reasoning. Rather, affirming the Court of Appeals' reversal removes defendant, whose convictions satisfy the statutory definition for an aggravated offender, from the lifetime SBM program without directing the trial court to determine whether he qualifies for lifetime SBM as an aggravated offender. This decision would seem to prevent lifetime SBM for a defendant who is a recidivist but also qualifies for lifetime SBM under a different statutory subsection.[9] Thus, not only does the majority's facial analysis fail to consider all possible scenarios in

9. Notably, the trial court could not alternatively enroll a recidivist defendant in SBM for a term of years either. N.C.G.S. § 14-208.40A(d).

which the lifetime SBM statute may apply to recidivists, but it also does not address the specific result of its holding on defendant here. Because the statute requiring lifetime SBM can be constitutionally applied to sexually violent recidivists, such as defendant, defendant's facial challenge should fail.

V. Special Needs Search[10]

Lastly, the SBM program serves a "special need[ ], beyond the normal need for law enforcement, [that] make[s] the warrant and probable-cause requirement impracticable." *Vernonia*, 515 U.S. at 653, 115 S. Ct. at 2391, 132 L. Ed. 2d at 574 (quoting *Griffin*, 483 U.S. at 873, 107 S. Ct. at 3168, 97 L. Ed. 2d at 717). The special needs doctrine does not apply where "the primary purpose of the . . . program is to uncover evidence of ordinary criminal wrongdoing," *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42, 121 S. Ct. 447, 454, 148 L. Ed. 2d 333, 343 (2000), but conversely, "a program satisfies a special need if the program 'is not undertaken for the investigation of a specific crime,' " *Belleau*, 811 F.3d at 940 (quoting *Green v. Berge*, 354 F.3d 675, 678 (7th Cir. 2004)). " '[S]pecial needs' have been found 'not because the rules [for warrants and probable cause] are inconvenient to follow,' but rather 'because in such situations, the rules are not needed to prevent the mischief that [warrants] are designed to prevent.' " *United States v. Amerson*, 483 F.3d 73, 82 (2d Cir. 2007) (second alteration in original) (quoting *Nicholas v. Goord*, 430 F.3d 652, 680 (2d Cir. 2005) (Lynch, J., concurring), *cert. denied*, 549 U.S. 953, 127 S. Ct. 384, 166 L. Ed. 2d 270 (2006)), *cert. denied*, 552 U.S. 1042, 128 S. Ct. 646, 169 L. Ed. 2d 515 (2007). "The need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the 'interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer.' " *Maryland v. King*, 569 U.S. 435, 447, 133 S. Ct. 1958, 1969–70, 186 L. Ed. 2d 1, 20 (2013) (alteration in original) (quoting *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667, 109 S. Ct. 1384, 1391, 103 L. Ed. 2d 685, 703 (1989)); *see also Delaware v. Prouse*, 440 U.S. 648, 653–54, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667

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10. Because defendant has a reduced expectation of privacy, the special needs doctrine does not apply here. *See Maryland v. King*, 569 U.S. 435, 463, 133 S. Ct. 1958, 1978, 186 L. Ed. 2d 1, 30 (2013) ("The special needs cases . . . do not have a direct bearing on the issues presented in this case, because unlike the search of a citizen who has not been suspected of a wrong, [the defendant] has a reduced expectation of privacy."); *Samson*, 547 U.S. at 852 n.3, 126 S. Ct. at 2199 n.3, 165 L. Ed. 2d at 259 n.3 ("[W]e [do not] address whether . . . [the] search . . . is justified as a special need . . . because our holding under general Fourth Amendment principles renders such an examination unnecessary."). Nevertheless, in accordance with the Supreme Court's mandate and in response to the majority opinion, I discuss the application of the special needs doctrine *arguendo*.

(1979) (remarking that the Fourth Amendment's purpose "is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials" (footnote omitted)).

Thus, case law recognizes that the government's interest in deterring at-risk individuals from activity detrimental to public safety is a special need when the search does not constitute an investigation of a specific crime and does not involve the exercise of discretion by law enforcement officers. *See Vernonia*, 515 U.S. at 658 n.2, 115 S. Ct. at 2393 n.2, 132 L. Ed. 2d at 578 n.2 (distinguishing the "prophylactic and distinctly *non*punitive purposes (protecting student athletes from injury, and deterring drug use in the student population)" of the programmatic search effected by drug testing from " 'evidentiary' searches, which generally require probable cause"); *see also Von Raab*, 489 U.S. at 666, 109 S. Ct. at 1391, 103 L. Ed. 2d at 702 (upholding a drug-screening program "to deter drug use" among certain United States Customs Service employees as a special needs search); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 632–33, 109 S. Ct. 1402, 1421–22, 103 L. Ed. 2d 639, 670 (1989) (finding that, because a drug-screening program for railroad employees was "designed not only to discern [drug and alcohol] impairment but also to deter it," the search was a special needs search that furthered the government's interest in deterring "hazardous conduct" that puts the public at risk).

Here the SBM program's primary purpose is to serve the special need of "protecting the public against recidivist tendencies of convicted sex offenders." *Bowditch*, 364 N.C. at 351, 700 S.E.2d at 12 (recognizing deterrence as a purpose and effect of SBM). Because "there is no specific crime to give rise to probable cause," the search effected by the SBM program is not predicated on the judgment or discretion of law enforcement or any other government official, and "[a]ccordingly, the traditional safeguards of the Fourth Amendment, such as the warrant requirement, are unworkable." *Belleau*, 811 F.3d at 941.[11] Thus, the SBM program is constitutional pursuant to the special needs doctrine.

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11. As a secondary benefit, the program creates a repository of information that law enforcement may use to detect or preclude the enrollee's involvement in future sex offenses. While the "[i]nformation gathered from this program may, at some later time, be used as evidence in a criminal prosecution, . . . the program is setup [sic] to obviate the likelihood of such prosecutions" and, therefore, still falls within the scope of the special needs doctrine. *Belleau*, 811 F.3d at 940. Furthermore, the collection of this information provides the deterrent effect.

VI. Conclusion

"Although privacy is a value of constitutional magnitude, it must yield, on occasion, to the state's substantial interest to protect the public through reasonable regulations in appropriate circumstances. This case presents one of those circumstances." *Belleau*, 811 F.3d at 939. The search arising from the SBM statute for a limited category of high-risk recidivist sex offenders, given the totality of the circumstances, is a reasonable search under the Fourth Amendment. The purpose of the SBM program in protecting the public from sex crimes is of paramount importance. As demonstrated by several other constitutionally sound regulations designed to protect the public from sex offenders, defendant's reasonable expectation of privacy is significantly diminished because of his multiple child sex offenses. Given his diminished privacy expectations, the incremental nature of the search providing location information and the method of data collection via an ankle bracelet are more inconvenient than intrusive. While courts must continue to "approach the government's use of [GPS technology] with caution, to ensure that it does not upset the balance of rights bestowed by the Constitution," *id.* at 938–39, the SBM search here is reasonable, and the statute is constitutional. The decision of the Court of Appeals should be reversed and the trial court's SBM order reinstated. Accordingly, I respectfully dissent.

Justice MORGAN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
ROBERT DWAYNE LEWIS

No. 140PA18

Filed 16 August 2019

1. Search and Seizure—warrant—search of residence—probable cause

A search warrant did not establish probable cause to search a residence where it did not connect defendant with the residence and provided no basis for the magistrate to conclude that evidence of the robberies being investigated would likely be found inside the home.

2. Search and Seizure—probable cause—warrant—probable cause

Probable cause for a warrant to search a vehicle did not exist where the officer had the necessary information but did not include it in the affidavit. Some of that information was contained in an unsworn attachment listing the property to be searched.

Justice MORGAN concurring in part and dissenting in part.

Justice NEWBY joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a consolidated appeal from two decisions of the Court of Appeals, one a published opinion reported at 816 S.E.2d 212 (N.C. Ct. App. 2018), vacating and remanding judgments entered on 7 February 2017 by Judge Richard T. Brown in Superior Court, Hoke County, and the other an unpublished opinion reported at 812 S.E.2d 730 (N.C. Ct. App. 2018), vacating and remanding judgments entered on 6 April 2017 by Judge Kendra D. Hill in Superior Court, Johnston County. Heard in the Supreme Court on 13 May 2019 in session in the Halifax County Courthouse in the Town of Halifax pursuant to section 18B.8 of Chapter 57 of the 2017 Session Laws of the State of North Carolina.

Joshua H. Stein, *Attorney General*, *by Milind Dongre*, *Assistant Attorney General*, *for the State-appellant/appellee.*

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

DAVIS, Justice.

This case presents the unique circumstances of an officer possessing information that would suffice to establish probable cause for the issuance of a search warrant but failing to include pertinent portions of this information in his affidavit in support of the warrant. Because we conclude that the omission of key facts in the search warrant application in this case resulted in a lack of probable cause for the issuance of the search warrant for either defendant's residence or vehicle, we affirm in part and reverse in part the decision of the Court of Appeals.

Factual and Procedural Background

On 21 September 2014, a man armed with a handgun and wearing dark clothing and a blue piece of cloth covering his face entered a Family Dollar store in Hoke County. The man told a store employee to take the money from the store's safe, place the money in a bag, and give the bag to him. After the employee complied with his demand, the man told her to go into the bathroom and stay there until he had exited the store. A witness outside the store saw the man flee the scene in a dark blue Nissan Titan pickup truck.

A similar robbery occurred at a Dollar General store in Hoke County on 26 September 2014. On that occasion, as two employees were closing the store, a man holding a handgun and wearing dark clothing and a blue face covering approached them. He directed the employees to empty the money from the safe and cash registers into a bag and give it to him. The suspect then ordered the employees to enter the bathroom and remain there until he left the store.

Two days later, on 28 September, a third robbery took place at another Dollar General store in Hoke County. A man armed with a handgun and wearing dark clothing and a blue face covering ordered store employees to give him the money in the store's safe. Upon obtaining the money, the man ordered the employees to go into the bathroom and then fled the premises. Law enforcement officers did not receive a description of the vehicle driven by the suspect for either the 26 September or 28 September robberies.

A fourth robbery took place during the early morning hours of 19 October 2014 at a Sweepstakes store in Smithfield in nearby Johnston County. A man armed with a handgun wearing dark clothing and a blue face covering forced an employee to retrieve money from the store's safe. As he exited the store, the man was recognized and identified as defendant Robert Dwayne Lewis by a Smithfield police officer who was

familiar with him from a previous encounter. Defendant fled the scene in a dark gray Kia Optima. Law enforcement officers subsequently engaged in a high-speed pursuit but were unable to apprehend defendant during the chase.

That same day, officers from the Smithfield Police Department notified the Hoke County Sheriff's Office of the Sweepstakes store robbery and asked that deputies be on the lookout for a dark gray Kia Optima being driven by defendant. The officers also provided the license plate number of the Kia Optima and informed the Sheriff's Office that the address associated with the Kia Optima's registration was 7085 Laurinburg Road in Raeford, North Carolina.

Shortly after beginning his shift at 7:00 a.m. on 19 October 2014, Deputy Tim Kavanaugh of the Hoke County Sheriff's Office drove past the residence located at 7085 Laurinburg Road. He observed a blue Nissan Titan truck parked in the yard in front of the home. Deputy Kavanaugh did not, however, see a Kia Optima matching the description of the vehicle observed in connection with the Smithfield robbery earlier that morning.

Deputy Kavanaugh then continued with his normal patrol duties. He drove back by the home at 7085 Laurinburg Road at approximately 1:00 p.m. on that same day. At that time, Deputy Kavanaugh saw a dark gray Kia Optima parked in the yard in front of the house in addition to the Nissan Titan that he had previously observed. He then parked across the street from the home "[t]o see if [he] could possibly identify anybody coming from the residence . . . or . . . one of the vehicles leaving from the residence."

Shortly thereafter, a man matching the suspect's description exited the house and walked to the residence's mailbox across the street. Deputy Kavanaugh approached the man and asked him for his name. The man identified himself as Robert Lewis, after which Deputy Kavanaugh immediately placed him under arrest.

After arresting defendant, Deputy Kavanaugh approached the residence and spoke to Waddell McCollum, defendant's stepfather, on the front doorstep of the home. McCollum informed Deputy Kavanaugh that defendant lived at the residence. He further stated that defendant owned the Kia Optima and that, although McCollum owned the Nissan Titan, defendant also drove that vehicle on occasion.

When he finished speaking to McCollum, Deputy Kavanaugh walked over to the Kia Optima parked in the front yard "and looked inside

of the passenger area, the rear of the vehicle, and observ[ed] in plain sight a BB&T money bag on the passenger floor of the vehicle." Deputy Kavanaugh also saw dark clothing in the back seat of the Kia.

Following defendant's arrest, Detective William Tart of the Hoke County Sheriff's Office—who had been investigating the three Hoke County robberies—prepared a search warrant application seeking permission to search the residence at 7085 Laurinburg Road as well as the Nissan Titan and Kia Optima parked in front of the home. The sworn affidavit accompanying Detective Tart's search warrant application described in detail the 21 September, 26 September, and 28 September 2014 Hoke County robberies as well as the 19 October 2014 Johnston County robbery. The affidavit noted the similarities between the four robberies as to both the clothing worn by the robber and the manner in which the crimes were carried out. The affidavit also stated that Smithfield police officers had identified defendant as the perpetrator of the 19 October 2014 robbery and that he had been arrested at the 7085 Laurinburg Road residence. The affidavit, however, failed to (1) disclose that defendant lived at 7085 Laurinburg Road, (2) contain any other information linking defendant to that address, (3) describe the circumstances surrounding his arrest at that address, or (4) mention Deputy Kavanaugh's interactions with defendant or his stepfather.

With regard to the vehicles, the affidavit stated that defendant had driven away from the 21 September Hoke County robbery in a dark blue Nissan Titan and that he had fled the scene of the 19 October Johnston County robbery in a Kia Optima. The affidavit further related that a dark blue Nissan Titan "was observed at the residence of 7085 Laurinburg Road . . . on October 19, 2014 by Hoke County Patrol Deputies when serving a felony arrest warrant on [defendant]." The affidavit did not mention the fact that Deputy Kavanaugh had also seen a Kia Optima parked in front of the residence. Nor did it relate that the deputy had seen potentially incriminating evidence upon looking into the window of the Kia Optima.

An unsworn attachment to the search warrant application listed a "dark blue Nissan Titan pick-up truck" and a "gray 2013 Kia Optima EX four door car" among the property to be searched by law enforcement officers if the warrant was issued. This attachment also contained registration information and a VIN number for each vehicle. Based upon the information provided in Detective Tart's affidavit, a magistrate issued a search warrant for the 7085 Laurinburg Road residence, the Nissan Titan, and the Kia Optima.

Detective Tart executed the search warrant on 19 October 2014. He seized various items of evidence that were located inside the Kia Optima. These items included the BB&T bank bag that Deputy Kavanaugh had previously viewed through the window of the vehicle, which contained receipts and other documents connected to the Smithfield robbery. Detective Tart also seized a blue helmet liner that was consistent with the face covering worn by the suspect and a rusty handgun from the Kia.[1]

On 21 September 2015, defendant was indicted by a Hoke County grand jury on three counts of robbery with a dangerous weapon, five counts of second-degree kidnapping, and one count of attempted robbery with a dangerous weapon.[2] He was indicted on 5 October 2015 by a Johnston County grand jury on charges of robbery with a dangerous weapon and two counts of second-degree kidnapping. A second Johnston County grand jury subsequently indicted him on 2 November 2015 for common law robbery.[3]

On 2 March 2016, defendant filed motions to suppress in both the Superior Court, Hoke County and the Superior Court, Johnston County in which he sought to exclude evidence obtained during the execution of the search warrant by Detective Tart. In his motion, he argued that the evidence should be suppressed on the grounds that (1) an "insufficient connection" existed "between the items sought and property to be searched," and (2) the search of the Kia Optima was not permissible under the plain view doctrine.

Defendant's motion to suppress was heard on 7 April 2016 in Superior Court, Hoke County before the Honorable Tanya T. Wallace. Both Deputy Kavanaugh and Detective Tart testified at the hearing. During his testimony, Deputy Kavanaugh related that he traveled to the Laurinburg Road residence on 19 October 2014 in response to a report from Johnston County law enforcement officers that a possible suspect living at that location had been seen fleeing the scene of the Smithfield robbery in a Kia Optima. He further testified that the report provided a description of the suspect as well as his name (identifying him as defendant) and address. Deputy Kavanaugh also stated that while on the premises of the residence, he spoke with defendant's stepfather,

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1. The record is unclear as to the nature of the evidence discovered by Detective Tart during his search of the residence or the Nissan Titan.

2 Defendant's indictment for attempted robbery with a dangerous weapon stemmed from a separate incident that allegedly occurred on 9 September 2014.

3. The indictment for common law robbery was based on a separate incident alleged to have occurred on 30 August 2014.

who confirmed that defendant lived at 7085 Laurinburg Road. Deputy Kavanaugh testified that following his conversation with defendant's stepfather, he observed dark clothing and a BB&T bank bag through the window of the Kia Optima.

On 10 June 2016, the trial court entered an order denying defendant's motion to suppress. In its order, the court concluded that the affidavit in support of Detective Tart's search warrant application sufficiently established probable cause to support the magistrate's issuance of a warrant authorizing a search of the 7085 Laurinburg Road residence, the Nissan Titan, and the Kia Optima. The court further ruled that "[n]otwithstanding the affidavit of probable cause to search the Kia," the evidence viewed by Deputy Kavanaugh through the window of the Kia Optima before issuance of the search warrant was lawfully obtained under the plain view doctrine.

On 7 February 2017, defendant entered an *Alford* plea in Superior Court, Hoke County as to all the charges for which he had been indicted in that county but expressly preserved his right to appeal the denial of his motion to suppress. The Honorable Richard T. Brown sentenced him to three consecutive terms of 103 to 136 months of imprisonment. Defendant gave timely notice of appeal from the Hoke County judgments to the Court of Appeals.

On 6 April 2017, defendant entered an *Alford* plea in Superior Court, Johnston County to the charges for which he had been indicted in that venue. He once again preserved his right to appeal the denial of his motion to suppress.[4] The Honorable Kendra D. Hill sentenced him to terms of imprisonment of 103 to 136 months for his robbery with a dangerous weapon conviction, 50 to 72 months for each second-degree kidnapping conviction, and 25 to 39 months for his common law robbery conviction—all to be served consecutively. Defendant filed a timely notice of appeal from the Johnston County judgments to the Court of Appeals.

In the Court of Appeals, defendant argued that Judge Wallace erred by denying his motion to suppress because (1) the search warrant affidavit submitted by Detective Tart was insufficient to establish probable cause to search either the home at 7085 Laurinburg Road or the two vehicles parked in front of the residence, and (2) the plain view doctrine

4. No separate order was entered in the Superior Court, Johnston County matter in connection with defendant's motion to suppress. Instead, it appears from the record that Judge Wallace's order was made a part of the court file in the Johnston County case.

did not permit the search of the Kia Optima. On 1 May 2018, the Court of Appeals issued two opinions regarding defendant's separate appeals from the Hoke County and Johnston County judgments. A published opinion, *State v. Lewis*, 816 S.E.2d 212 (N.C. Ct. App. 2018) (*Lewis I*), addressed defendant's Hoke County appeal, and an unpublished opinion, *State v. Lewis*, 812 S.E.2d 730, 2018 WL 2016031 (N.C. Ct. App. 2018) (unpublished) (*Lewis II*), addressed his Johnston County appeal.

In its published opinion, the Court of Appeals held that the affidavit supporting Detective Tart's search warrant application was sufficient to establish probable cause to search the Nissan Titan and Kia Optima parked in front of the residence but was insufficient to establish probable cause to search the dwelling itself. *Lewis I*, 816 S.E.2d at 213. With regard to its conclusion that the search warrant affidavit did not establish probable cause to search the home, the Court of Appeals noted that the affidavit failed to state that defendant resided at 7085 Laurinburg Road. *Id.* at 217. The Court of Appeals further reasoned that, based solely upon the information contained in the affidavit, "7085 Laurinburg Road could have been . . . someone else's home with no connection to Lewis at all. That Lewis visited that location, without some indication that he may have stowed incriminating evidence there, is not enough to justify a search of the home." *Id.*

With regard to the vehicles, the Court of Appeals held that probable cause existed for the issuance of the warrant because Detective Tart's affidavit "contained enough information, together with reasonable inferences drawn from that information, to establish a substantial basis to believe that the evidence sought probably would be found in the blue Nissan Titan and Kia Optima located at 7085 Laurinburg Road." *Id.* at 216. The Court of Appeals explained its reasoning as follows:

> There was evidence that the same suspect committed four robberies, the first while driving a dark blue Nissan Titan and the fourth while driving a Kia Optima. Later on the same day of the fourth robbery, officers arrested Lewis. When they located him they saw—of all the makes, models, and colors of all the vehicles in the world—a dark blue Nissan Titan, matching the description of the vehicle used in the first robbery. These facts were more than sufficient for the magistrate to conclude that, if officers returned to that location and found a dark blue Nissan Titan and Kia Optima there, there was probable cause to believe that those vehicles contained evidence connected to the robberies.

Id. at 217.

Because it could not determine from the record "which evidence officers seized from the vehicles and which evidence they seized from the home," the Court of Appeals vacated defendant's convictions and remanded the case "with instructions for the trial court to allow [defendant's] motion to suppress the evidence seized from the residence located at 7085 Laurinburg Road." *Id.* Based upon its holding that probable cause supported the issuance of the search warrant for the vehicles, the Court of Appeals did not address defendant's additional argument that a search of the Kia Optima was not supported by the plain view doctrine. *Id.* at 217. In its opinion in *Lewis II*, the Court of Appeals reached identical conclusions regarding the trial court's order denying defendant's motions to suppress.[5]

The State filed petitions for discretionary review on the issue of whether probable cause existed to support a search of the residence. Defendant, in turn, filed petitions for discretionary review on the issue of whether the search warrant affidavit established probable cause to search the Kia Optima. We granted all of the parties' petitions.[6]

Analysis

The Fourth Amendment to the United States Constitution states that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. " '[A] neutral and detached magistrate,' not an 'officer engaged in the often competitive enterprise of ferreting out crime,' must determine whether probable cause exists." *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016) (quoting *Illinois v. Gates*, 462 U.S. 213, 240, 76 L. Ed. 2d 527, 549 (1983)). This determination must be based upon the totality of the circumstances. *E.g.*, *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 597 (2014).

"The task of the issuing magistrate is simply to make a practical, common[-]sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State*

5. Based upon its ruling that defendant's convictions must be vacated, the Court of Appeals dismissed as moot a petition for certiorari filed by defendant seeking review of the factual basis for his *Alford* pleas to the two second-degree kidnapping charges. *Lewis II*, 2018 WL 2016031, at *1.

6. The parties' appeals from *Lewis I* and *Lewis II* were subsequently consolidated for review by this Court.

v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257–58 (1984) (quoting *Gates*, 462 U.S. at 238, 76 L. Ed. 2d at 548). It is well established that "a magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant." *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) (citation omitted). This Court has opined that "as long as the pieces fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched, a magistrate has probable cause to issue a warrant." *Allman*, 369 N.C. at 294, 794 S.E.2d at 303.

We have recognized that "great deference should be paid a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258. Thus, "[r]eviewing 'courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.' " *Allman*, 369 N.C. at 294, 794 S.E.2d at 303 (second and third alterations in original) (quoting *State v. Riggs*, 328 N.C. 213, 221, 400 S.E.2d 429, 434 (1991)). "This deference, however, is not without limitation. A reviewing court has the duty to ensure that a magistrate does not abdicate his or her duty by 'mere[ly] ratif[ying] . . . the bare conclusions of [affiants].' " *Benters*, 367 N.C. at 665, 766 S.E.2d at 598 (alterations in original) (quoting *Gates*, 462 U.S. at 239, 76 L. Ed. 2d at 549).

I. Search of Residence

[1] We first address whether the search warrant affidavit at issue established probable cause for law enforcement officers to conduct a search of the residence located at 7085 Laurinburg Road. In evaluating the sufficiency of the affidavit, we are guided by our decision in *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972).

In *Campbell* the defendant lived in a home with two roommates. *Id.* at 130, 191 S.E.2d at 756. All three residents of the dwelling were suspected drug dealers with outstanding arrest warrants for the sale and possession of narcotics. *Id.* at 130, 191 S.E.2d at 756. Law enforcement officers sought to obtain a search warrant for the residence. The affidavit in support of the warrant stated that the affiant possessed arrest warrants for the three men living in the home. *Id.* at 130, 191 S.E.2d at 756. It further reported that the defendant and his roommates "all have sold narcotics to Special Agent J. M. Burns of the SBI and are all actively involved in drug sales to Campbell College students; this is known from personal knowledge of affiant, interviews with reliable confidential informants and local police officers." *Id.* at 130, 191 S.E.2d at 756.

We held that the affidavit was "fatally defective," explaining our reasoning as follows:

> The affidavit implicates those premises *solely as a conclusion of the affiant.* Nowhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling. The inference the State seeks to draw from the contents of this affidavit—that narcotic drugs are illegally possessed on the described premises—does not reasonably arise from the facts alleged. Therefore, nothing in the foregoing affidavit affords a reasonable basis upon which the issuing magistrate could conclude that any illegal possession or sale of narcotic drugs had occurred, or was occurring, on the premises to be searched.

Id. at 131, 191 S.E.2d at 757.

This Court reached a contrary conclusion in *Allman* with respect to whether a search warrant affidavit established probable cause to search the defendant's residence. In *Allman*, the defendant, Brittany Allman, lived in a home with half-brothers named Sean Whitehead and Jeremy Black, to whom she was not related.[7] *Allman*, 369 N.C. at 292, 794 S.E.2d at 302. Law enforcement officers sought a search warrant for the residence after stopping a vehicle in which Whitehead and Black were traveling, leading to the discovery of 8.1 ounces of marijuana and over $1600 in cash inside the car. *Id.* at 292–93, 794 S.E.2d at 302.

The affidavit accompanying the search warrant in *Allman*—in addition to describing the discovery of contraband in the vehicle—stated that the affiant had run criminal record checks on the two men and learned that both of them had been previously charged with offenses related to the sale and possession of illegal drugs. *Id.* at 295, 794 S.E.2d at 304. The affidavit further stated the following:

> During the vehicle stop, Whitehead maintained that he and Black lived at 30 Twin Oaks Drive in Castle Hayne, North Carolina. . . .

7. Although the opinion in *Allman* related primarily to the activities of Whitehead and Black, the defendant was also charged with offenses pertaining to the manufacture, possession, and sale or delivery of illegal drugs.

> On the same day as the vehicle stop, [the affiant] went to 30 Twin Oaks Drive. When he got there, he discovered that neither half-brother lived at that address but that Whitehead's and Black's mother, Elsie Black, did. Ms. Black told Detective Bacon that the two men lived at 4844 Acres Drive in Wilmington and had not lived at 30 Twin Oaks Drive for about three years. She described the Acres drive property as a small one-story residence that had "a big, tall privacy fence in the backyard" and said that "there should be an old red truck and an old white truck at the house." At that point, another detective went to 4844 Acres Drive. The property matched the description given by Ms. Black, and one of the two trucks outside of the house was registered to Jeremy Black.

Id. at 295, 794 S.E.2d at 304 (footnote omitted).

This Court held that the facts set out in the affidavit were sufficient to establish probable cause to search the Acres Drive residence that the defendant shared with the two men. *Id.* at 298, 794 S.E.2d at 306. While "acknowledg[ing] that nothing in Detective Bacon's affidavit directly linked defendant's home with evidence of drug dealing," *id.* at 297, 794 S.E.2d at 305, we determined that the magistrate could have reasonably inferred that evidence of drug dealing was likely to be found in the home

> [b]ased on the mother's statement that Whitehead and Black really lived at [the same residence as the defendant] . . . . [a]nd based on the insight from Detective Bacon's training and experience that evidence of drug dealing is likely to be found at a drug dealer's home, and the fact that Whitehead lied about where he and Black lived . . . .

Id. at 296, 794 S.E.2d at 305. We distinguished the facts and result in *Allman* from our decision in *Campbell*, in part, by noting that "while a suspect in this case lied to [the officer who stopped their vehicle] about his true address, nothing in the *Campbell* opinion indicates that any of the subjects of that search lied to the authorities about their home address. So *Campbell* does not alter our conclusion." *Id.* at 297, 794 S.E.2d at 305.

In *State v. McKinney*, 368 N.C. 161, 775 S.E.2d 821 (2015), we likewise distinguished *Campbell* in holding that probable cause supported the issuance of a warrant to search the dwelling of a suspected drug dealer. *Id.* at 166, 775 S.E.2d at 825–26. In *McKinney*, law enforcement officers received a tip that the defendant was conducting drug deals in

his apartment as well as in the parking lot of his apartment complex. *Id.* at 162, 775 S.E.2d at 823. In response to the tip, officers began surveilling the defendant's residence. They observed a visitor leave the dwelling after only being there six minutes. *Id.* at 162, 775 S.E.2d at 823. After stopping the visitor's vehicle for a traffic violation, officers discovered marijuana in the car and $4258 in cash on the driver's person. *Id.* at 162, 775 S.E.2d at 823. Officers arrested Roy Foushee, the driver of the vehicle, and subsequently found texts on his cell phone in which he appeared to have arranged a drug transaction with the defendant that coincided with the timing of his visit to the defendant's apartment. *Id.* at 162, 775 S.E.2d at 823.

Following this arrest, law enforcement officers sought and obtained a search warrant for the defendant's apartment. The affidavit accompanying the warrant application "described the nature of the citizen complaint that triggered the investigation, the results of the officers' surveillance, the arrest of Foushee, the material found on Foushee's person and in his car, and the text messages recovered from Foushee's telephone." *Id.* at 162, 775 S.E.2d at 823. In concluding that the statements contained in the affidavit were sufficient to support the issuance of a search warrant for the defendant's residence, we distinguished the circumstances at issue in that case from those of *Campbell*. "Unlike the case at bar, the affidavit in *Campbell* included no information indicating that drugs had been possessed in or sold from the dwelling to be searched. As a result, *Campbell* does not control the outcome here." *Id.* at 166, 775 S.E.2d at 826.

In the present case the search warrant affidavit submitted by Detective Tart contained statements that a suspect wearing dark clothing, using a blue face covering, and carrying a handgun had committed similar robberies of Hoke County stores on 21 September, 26 September, and 28 September 2014. The affidavit also stated that the suspect fled the scene of the first robbery in a "dark blue Nissan Titan with an unknown NC registration. This description is consistent with a dark blue Nissan Titan that was observed at the residence of 7085 Laurinburg Road . . . on October 19, 2014 by Hoke County Patrol Deputies when serving a felony arrest warrant on Robert Lewis."

The affidavit further asserted that a Sweepstakes store in Johnston County was robbed "in the earlier hours of [the] morning" of 19 October by a man armed with a handgun who was wearing dark clothing and a blue face covering. The affidavit stated that "[t]he clothing description and method of operation were similar to those robberies previously described within Hoke County." In addition, the affidavit contained a

statement that the suspect had been identified as defendant by Smithfield law enforcement officers and had fled the scene in a Kia Optima.

Critical to our analysis of this issue, however, is the information that was *not* contained in Detective Tart's affidavit. His affidavit failed to set forth any of the circumstances surrounding defendant's arrest at 7085 Laurinburg Road and offered no explanation as to why law enforcement officers had gone to that address in the first place. Notably, the affidavit did not include the fact that the address had been provided by Johnston County law enforcement officers. It also failed to include any details of Deputy Kavanaugh's conversation with defendant's stepfather—who had confirmed that defendant lived in the home—and contained no mention of the fact that a Kia Optima was parked in front of the residence at the time of defendant's arrest.

We conclude that the information contained in the affidavit failed to establish the existence of probable cause to search the residence at 7085 Laurinburg Road. The affidavit simply did not connect defendant with the residence that the officers wished to search in any meaningful way beyond the mere fact that he was arrested there and that a dark blue Nissan Titan was observed in the vicinity of the house at that time. Defendant could have been present at 7085 Laurinburg Road at the time of his arrest for any number of reasons. Absent additional information linking him to the residence or connecting the house with criminal activity, no basis existed for the magistrate to infer that evidence of the robberies would likely be found inside the home.

The State relies heavily on *Allman* in support of its argument that probable cause existed to support the issuance of a search warrant for 7085 Laurinburg Road even in the absence of evidence directly linking the residence with the robberies. But *Allman* is easily distinguishable. In that case the officer's affidavit established that a suspected drug dealer had lied about where he lived—suggesting that evidence of criminal activity would likely be found in his residence. *Allman*, 369 N.C. at 295, 794 S.E.2d at 304. The affidavit further noted that law enforcement officers had later received information from the suspects' mother as to their actual address and subsequently corroborated that information before applying for a search warrant. *Id.* at 295, 794 S.E.2d at 304. Unlike the present case, the affidavit in *Allman* stated not only that the residence to be searched was connected to the suspects but also that—based on the officer's training and experience and the fact that one of the suspects had lied about where they lived—it likely contained evidence of the crime for which a warrant was sought. *Id.* at 295–96, 794 S.E.2d at 304. *McKinney* is likewise distinguishable from the present case because the

search warrant affidavit there contained information implicating both the defendant and his residence in the criminal activity being investigated. *McKinney*, 368 N.C. at 166, 775 S.E.2d at 826.

We therefore hold that the allegations contained in Detective Tart's affidavit failed to provide the magistrate with a sufficient basis from which to conclude that probable cause existed to search the 7085 Laurinburg Road residence.[8] Accordingly, we affirm the ruling of the Court of Appeals that defendant's motion to suppress evidence seized from the residence should have been allowed.

II. Search of the Kia Optima

[2] The final issue before us is whether Detective Tart's affidavit in support of the search warrant established probable cause to support a search of the Kia Optima.[9] Defendant argues that the Court of Appeals erred in affirming the trial court's determination that probable cause existed to support that search because the affidavit failed to "explain why evidence . . . would be found in the Kia Optima listed as a vehicle to be searched" or "state that there was a Kia Optima at the Laurinburg Road address."

In focusing—as we must—not on the totality of the evidence that Detective Tart had gathered but rather solely on the information that was actually set out in his affidavit, we agree that the affidavit failed to establish probable cause for the search of the Kia Optima. As noted above, the statements in Detective Tart's affidavit failed to mention the presence of a Kia Optima at 7085 Laurinburg Road at the time of defendant's arrest. Indeed, beyond stating that defendant fled the scene of the 19 October 2014 robbery in a "new model 4-door Kia Optima," the affidavit provided no other information whatsoever concerning the Kia Optima.[10]

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8. We note that in its order denying defendant's motion to suppress, the trial court relied, in part, upon testimony at the suppression hearing from Deputy Kavanaugh and Detective Tart that was not contained in Detective Tart's affidavit. The court's reliance on this testimony was improper because it was required to evaluate the existence of probable cause for the search warrant based solely on the information in the affidavit that was available to the magistrate at the time the warrant was issued. *See Benters*, 367 N.C. at 673–74, 766 S.E.2d at 603 (appellate court erred in determining existence of probable cause to support issuance of search warrant by "relying upon facts elicited at [the suppression] hearing that went beyond 'the four corners of [the] warrant.' " (second alteration in original)).

9. In his appeal to this Court, defendant has not argued that probable cause was lacking for the search of the Nissan Titan. Therefore, that issue is not before us.

10. The affidavit failed to mention that Deputy Kavanaugh had even seen the Kia Optima, much less that he had observed the presence of potentially incriminating evidence upon looking through the window of the vehicle.

It is true that an unsworn attachment to the search warrant application listed "[a] gray 2013 Kia Optima EX four door car with NC registration BMB4863; VIN# 5XXGN4A7XDG192163" among the property to be searched by officers upon execution of the search warrant. But Detective Tart's sworn affidavit itself contained no mention of this identifying information for the vehicle. Nor did it explain how this information had been obtained. Consequently, while the information possessed by Detective Tart would have been sufficient to authorize a search warrant for the Kia Optima had it all been contained within his affidavit, his failure to include crucial information concerning the vehicle rendered the affidavit insufficient to establish probable cause.

Accordingly, we hold that the Court of Appeals erred in affirming the trial court's determination that probable cause existed to support the issuance of a search warrant for the Kia Optima. Because the Court of Appeals did not address the trial court's alternative ruling that the search of the vehicle was supported under the plain view doctrine, we remand this case to the Court of Appeals for a determination of that issue.

Conclusion

For the reasons set forth above, we affirm the portions of the Court of Appeals' decisions holding that defendant's motion to suppress should have been allowed as to evidence seized from defendant's residence and reverse the portions of the Court of Appeals' decisions holding that probable cause existed to support the issuance of the search warrant for the Kia Optima. The Court of Appeals' ruling that probable cause existed to support the search of the Nissan truck is not before us and is left undisturbed. We remand this case for determination by the Court of Appeals whether the evidence seized from the Kia Optima was admissible under the plain view doctrine.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Justice MORGAN concurring in part and dissenting in part.

I respectfully dissent from the position taken by my learned colleagues of the majority that there was a lack of probable cause for the issuance of the search warrant by the magistrate to authorize law enforcement's search of defendant's Kia Optima. While I agree with the majority view which concludes that the Court of Appeals correctly determined that defendant's motion to suppress should have been allowed as to evidence seized from his residence because the information contained in the search warrant did not sufficiently connect defendant to the house

so as to provide a basis for the magistrate to infer that evidence of the robberies would likely be found in the home, nonetheless I disagree with the outcome that the lower appellate court should be reversed regarding its determination that probable cause existed to authorize the magistrate's issuance of the search warrant. Since I would therefore affirm in totality the decision of the Court of Appeals, consequently there would be no need for the case to be remanded to the lower appellate court, as directed by the majority, for a determination concerning whether the evidence seized from the Kia Optima was admissible under the plain view doctrine, because the application of the doctrine would be of no consequence in light of the finding of probable cause.

My discomfort with the majority's opinion stems from its regrettable rigidity in tightly clinging to the legal rudiments of the establishment and recognition of probable cause in search warrant affidavits which this Court has historically declared, while exhibiting its remarkable reticence to equally embrace the practical realities which law enforcement officers and magistrates must face in the establishment and recognition of probable cause in search warrant affidavits which this Court has also addressed in its opinions. In my view, an appropriate balance of the considerations of legal requirements and practical aspects which this Court has cited regarding the existence of probable cause in search warrant applications would better serve the ends of justice in the instant case by determining the existence of probable cause in the search warrant affidavit at issue to allow the search of defendant's Kia Optima, demonstrating the proper balancing approach between legal requirements and practical aspects which govern the ascertainment of probable cause in search warrant affidavits, and providing a clearer precedent for law enforcement officers and magistrates to consult in order to better comprehend the salient circumstances to be submitted and evaluated for the existence of probable cause in search warrants.

The majority is certainly correct in its recitation of principles enunciated by this Court in such cases as *State v. Allman*, 369 N.C. 292, 794 S.E.2d 301 (2016), *State v. Benters*, 367 N.C. 660, 766 S.E.2d 593 (2014), *State v. Sinapi*, 359 N.C. 394, 610 S.E.2d 362 (2005), and *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984) regarding the requirement that a neutral and detached magistrate is to issue a search warrant only upon the existence of probable cause being shown, with such a determination to be made based upon the totality of the circumstances in arriving at a practical and commonsense decision in light of all of the circumstances set forth in the affidavit. The prevailing viewpoint also recognizes the considerations declared in these rulings that appellate

"courts should not invalidate [search] warrant[s] by interpreting [search warrant] affidavit[s] in a hypertechnical, rather than a commonsense, manner," *State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 429, 434 (1991) (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)), and that a magistrate is entitled to draw reasonable inferences from the material supplied through application for a search warrant and has probable cause to issue the warrant "as long as the pieces fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched . . . ." *Allman*, 369 N.C. at 294, 794 S.E.2d at 303 (citing *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984) (per curiam) and *Gates*, 462 U.S. at 230–31).

In the present case, while the majority has demonstrated its awareness of all of these guiding principles by citing them in its opinion, unfortunately the majority readily implements only the standards that it chooses to employ, and conveniently neglects the standards that it chooses to ignore. The majority has elected to emphasize that the investigating detective's search warrant affidavit "failed to mention the presence of a Kia Optima at 7085 Laurinburg Road at the time of defendant's arrest" and that "beyond stating that defendant fled the scene of the 19 October 2014 robbery in a 'new model 4-door Kia Optima,' the affidavit provided no other information whatsoever concerning the Kia Optima." However, as to the fact that "an unsworn attachment to the search warrant application listed '[a] gray 2013 Kia Optima EX four door car with NC registration BMB4863; VIN# 5XXGN4A7XDG192163' among the property to be searched by officers upon execution of the search warrant," the majority has elected to minimize the extensive detail utilized to identify the vehicle sought to be searched by opting to emphasize that the investigating detective's "sworn affidavit itself contained no mention of this identifying information for the vehicle." Based on these considerations, the majority concludes that if all of the aforementioned information had been contained in the investigating detective's sworn search warrant affidavit rather than in an unsworn attachment to the search warrant application, coupled with a sworn description of the manner in which he obtained this identifying information for the Kia Optima, then the search warrant would have been deemed to contain the requisite probable cause.

In applying this Court's enunciated principles that a magistrate is entitled to draw inferences from the material supplied to obtain a search warrant based upon the totality of the circumstances in arriving at a practical and commonsense decision in light of all of the circumstances set forth in the affidavit, I conclude that the magistrate satisfactorily

determined that probable cause existed for the issuance of a search warrant to authorize law enforcement's search of defendant's Kia Optima. The majority's requirement that the information which establishes probable cause must be *included in* the sworn search warrant affidavit instead of *attached to* the sworn search warrant affidavit in order to be considered by a magistrate invokes the type of hypertechnical mandate for a probable cause determination which this Court has expressly disavowed. Unfortunately, however, the majority here demands this kind of precision in lieu of the magistrate's practical and commonsense approach to construe the informative material which was physically appended to the sworn search warrant affidavit as being inherently intended in its presentation format to illustrate that it was a part of the entire search warrant application to be evaluated by the magistrate as to its fair probability that a police officer executing the warrant would find contraband or evidence of the Johnston County robbery in the Kia Optima. In light of all of these facts and circumstances which were being navigated by two different law enforcement agencies in two different counties which were coordinating their investigative resources in an effort to resolve a spate of crimes, the magistrate involved here should have been accorded the authority to refrain from imposing a hypertechnical requirement upon the investigating detective in favor of the practical and commonsense decision to consider the totality of the information contained in the combined application of the sworn search warrant affidavit as well as the unsworn attachment of detailed information which was physically appended to it in order to arrive at the determination of the existence of probable cause to search defendant's vehicle.

In the very first sentence of its opinion, the majority acknowledges that this case presents unique circumstances regarding an officer's possession of information "that would suffice to establish probable cause for the issuance of a search warrant but fail[s] to include pertinent portions of this information in his affidavit in support of the warrant." "The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Riggs*, 328 N.C. at 222, 400 S.E.2d at 435 (quoting *Gates*, 462 U.S. at 237 n.10) (brackets omitted). Guided by this Court's precedent in applying it to the recognized uniqueness of the circumstances presented in this case, I would affirm the decision of the Court of Appeals.

Justice NEWBY joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
MOLLIE ELIZABETH B. McDANIEL

No. 161A18

Filed 16 August 2019

Possession of Stolen Property—doctrine of recent possession—possession two weeks after items stolen

The evidence presented of defendant's possession of stolen goods was sufficient to support her convictions for felonious breaking and entering and felonious larceny under the doctrine of recent possession. Defendant acknowledged that she had control and possession of the stolen items, in the bed of her pickup truck, on a date two weeks after the items allegedly were stolen.

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

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 817 S.E.2d 6 (N.C. Ct. App. 2018), vacating defendant's convictions on appeal from judgments entered on 24 January 2017 by Judge J. Thomas Davis in Superior Court, McDowell County. Heard in the Supreme Court on 8 April 2019.

Joshua H. Stein, Attorney General, by Deborah M. Greene, Assistant Attorney General, and Lauren Lewis Ikpe, Assistant Attorney General, for the State-appellant.

Gilda C. Rodriguez for defendant-appellee.

MORGAN, Justice.

This appeal by the State of North Carolina, which comes to this Court on the basis of a dissenting opinion which was issued in the disposition of this case by the North Carolina Court of Appeals, requires consideration of the doctrine of recent possession and its utilization here to prove the charges of breaking and entering and the charge of larceny. In the appellate court below, the majority and the dissent disagreed on

the issue of whether the State presented sufficient evidence to establish that defendant in this case actually possessed the allegedly stolen property pursuant to the cited legal doctrine in order to survive a motion to dismiss. In light of our conclusion that the evidence presented at trial concerning defendant's possession of goods was sufficient to support defendant's conviction under the doctrine of recent possession, we reverse the Court of Appeals' decision and remand the case for consideration of defendant's arguments not addressed therein.

Factual Background and Procedural History

The charges in this matter arose from at least two apparent breakins and thefts of items from an unoccupied house located at 30 Woody Street in Marion. Daniel Patrick Sheline, Sr. had inherited the three-bedroom house and a trailer on five acres of land upon his father's death in February 2014. Sheline lived in Black Mountain and neither he nor anyone else resided at the 30 Woody Street address after his father's death. On 20 March 2014, Sheline spent time at 30 Woody Street, sorting through the personal property that had belonged to his father and to Sheline's deceased brother. Sheline had paid particular attention to the items in the house on that date, forming a "sort of . . . inventory in [his] mind" of the items inside the house, including those stored in the basement. When Sheline left the house, he engaged the lock on the knob of the front door, but did not employ the deadbolt lock. Sheline secured the basement door from the inside of the house by inserting a screwdriver through a padlock such that the door could not be opened from the outside. The only other door entering the house, which was located on the side of the building, had been nailed shut. Sheline had not given anyone permission to enter 30 Woody Street or to remove any items from the property.

On 1 April 2014, Sheline returned to 30 Woody Street, accompanied by his wife on this occasion. He discovered that someone had tampered with the front door, because its deadbolt lock was now engaged. Sheline further found that the basement door was ajar, the padlock that had secured the basement door was missing, and an adjacent window had been pried open. A number of items were missing from the house, including a monitor heater, copper tubing, an aluminum ladder, a lawnmower, and a cuckoo clock, as well as electrical wiring and various plumbing fixtures. Sheline's wife reported the theft to the McDowell County Sheriff's Office ("MCSO"). Lieutenant Detective Andy Manis of the MCSO initiated an investigation. On 2 April 2014, Manis's captain received a tip that some of the property which had been removed from 30 Woody Street could be found at a house located at 24 Ridge Street

in Marion, about a quarter of a mile from 30 Woody Street. In following up on the tip, Manis went to 24 Ridge Street and discovered outside of the house a monitor heater, some copper tubing, an aluminum ladder, a lawnmower, pipes, and wiring. Sheline subsequently identified the items as those which were taken from 30 Woody Street. When Manis knocked on the door of 24 Ridge Street, a woman who identified herself as Stephanie Rice answered and reported that two people in a white Chevrolet pickup truck with an extended cab had unloaded the items earlier that day. Following this phase of the investigation, warrants were issued for defendant Mollie Elizabeth B. McDaniel and Michael Nichols in connection with the 2 April break-in and theft at 30 Woody Street.

On 4 April 2014, MCSO Detective Jason Grindstaff received a report that an unauthorized person had again entered the house at 30 Woody Street and was seen departing that location in a white pickup truck that turned onto Ridge Street. Grindstaff drove to 24 Ridge Street and saw defendant sitting in the driver's seat of a white pickup truck which was parked in the driveway of the house located across the street from the 24 Ridge Street address. Defendant gave Grindstaff permission to search the truck, and Grindstaff discovered an Atari gaming system, glassware, china, and an antique clock radio in the bed of the vehicle. Grindstaff then arrested defendant, who was subsequently charged with one count of felonious breaking and entering and one count of felonious larceny based upon events that allegedly occurred on or about 20 March 2014, and one count of felonious breaking and entering and one count of felonious larceny based upon events that allegedly occurred on or about 4 April 2014.

The charges arising from the events of 20 March and 4 April 2014 were joined for trial. Sheline, Manis, and Grindstaff testified at trial to the facts recounted above. In addition, Grindstaff testified that defendant had admitted to him that she had taken the property which was found in the white pickup truck at the time of her arrest from a house on Woody Street, but defendant claimed that she had permission to remove the property. Grindstaff further testified that defendant told Grindstaff that Michael Nichols had asked her to help remove items from the house at 30 Woody Street after an unidentified neighbor had given Nichols permission to enter the premises.

At the close of the State's evidence, defendant entered a general motion to dismiss all of the charges which arose from the alleged 20 March 2014 and 4 April 2014 occurrences. While defendant did not offer any legal argument in support of her dismissal motion, defendant emphasized her position on the dismissal of the 20 March charges. After

a brief discussion, the trial court agreed with defendant and allowed the motion to dismiss the 20 March charges, reasoning as follows:

> I don't see any connection between being across the street except in the proximity of it.
>
> As to the file number 14 CRS 50512, which is the indictment from March 20, 2014, which based on the evidence is the first breaking and entering and larceny, the Court is going to allow your motion. As to the other one on April 4, 2014, which is file 14 CRS 50509, the Court is going to deny your motion there. You basically got an admission that she went to the house and got that stuff out of that house. You have problems with that one.

After a recess for lunch, the trial court expressed confusion about its previous decision regarding defendant's motion to dismiss:

> THE COURT: Let's go back to this motion for directed verdict. Let me go back and revisit that a little bit. The way I see the evidence is [that] we have got evidence of one breaking and entering, then we have this defendant with the property at a particular time with an admission that she went in there and took some of that property. I'm not sure—I may have dismissed the wrong one because basically what it comes down to is you have one breaking and entering. The one I dismissed was alleged on April 4.
>
> [DEFENSE COUNSEL]: I thought you dismissed the other one.
>
> THE COURT: I did dismiss the other one, but what I am telling you is I may have gotten them backwards. I should have dismissed the April 4 one and left the March 20 one in place based on this evidence. I want to make sure I have time to correct that since nothing has happened at this point in time.
>
> I want to revisit that, but I want to see—I understand your continuing evidence of two breaking and enterings. The way I see it is the only testimony as to opening the window, the door, all the situations are from one incidence. We don't have any testimony there was any sort of entry that second time, and that admission that she makes was not peculiar to [when].

> The evidence that you brought out about somebody reported seeing the car, I think all that does is goes to the state of mind of this officer. I think it's only offered for that purpose. If it's offered for any other purpose I think it would violate the hearsay rule. I think that's the only reason it comes in; therefore, it cannot be used as substantive evidence of any particular crime.
>
> As a result thereof, I may have dismissed—by dismissing the April 4 allegation, I am basically—I may have committed error to the State because that's the later one, and it would be hard for you to relate the original breaking and entering that was testified to today to that indictment because it was the wrong date.
>
> I may have [dis]missed the wrong one. I want to hear from you, at least from that analysis, what your position is. I can correct it right now without any prejudice to the defendant. I was thinking it over through lunch and I may have dismissed the wrong one.

After an extended exchange with the prosecutor and defense counsel, the trial court resolved the motions to dismiss as follows:

> So that dismissal is stricken. So the indictment in 14 CRS 50512 as to the allegations of the March 20, 2014, on or about that date, is still in place both as to the breaking and entering and as to the larceny.
>
> Now, as to the other file, which is file number 50509, the Court believes the only evidence that's been produced by the State—that there has not been substantial evidence shown of two breaking and enterings. There has only been substantial evidence as to one breaking and entering. I am relating that to the March 20, 2014 indictment.
>
> Therefore, the breaking and entering charge in the indictment in File No. 14 CRS 50509 is dismissed. But the second count, larceny after breaking and entering, there is evidence to show that that stuff was acquired as a result of the original breaking and entering, that there was evidence to show, so the Court is not dismissing that larceny charge. The jury will just have to consider these two larcenies separately. If the jury comes back and finds her guilty of both larcenies, the Court would have to entertain

> whether or not arrested judgment would be appropriate to combine those larcenies into that single larceny, but that may depend on some of the evidence that comes out here in the second part of this case.

After this reconsideration by the trial court of its decision to grant defendant's motion to dismiss the 20 March 2014 charges of one count of felonious breaking and entering and one count of felonious larceny and its denial of defendant's motion to dismiss the 4 April 2014 charges of one count of felonious breaking and entering and one count of felonious larceny, the trial court changed its rulings. At this stage in the proceedings, the trial court struck its previous dismissals and restored both of the 20 March 2014 charges, hence denying defendant's motion to dismiss those charges; however, with regard to the 4 April 2014 charges, the trial court allowed defendant's motion to dismiss the felonious breaking and entering charge and denied defendant's motion to dismiss the felonious larceny charge.

Defendant testified that in October 2013 she was doing salvage work at an old abandoned house at 50 Woody Street with her friend Michael Nichols and that she and Nichols had visited the house next door at 30 Woody Street. Defendant stated that "an elderly gentleman" answered the door at 30 Woody Street and allowed defendant and Nichols to remove scrap metal and a plow from the home's basement. Defendant explained that she had stopped working at 50 Woody Street in November or December 2013 because she felt that Nichols was "shirking" and leaving most of the work to her. Defendant testified that after her unemployment benefits which she had been collecting from the termination of a previous job ran out, she contacted Nichols to work with him again.

Defendant further testified that on 2 April 2014, at Nichols' request, defendant drove Nichols to the house at 50 Woody Street, where the two "loaded some stuff on [defendant's] truck." Defendant stated that Nichols told her that the items stored outside and underneath the house at 50 Woody Street belonged to a friend of Nichols. Defendant explained that she performed salvage work at 50 Woody Street alone on 3 April, and that she returned to the house on 4 April after Nichols told her that she could "look around and see if there [was] anything [defendant] might be interested in." Defendant stated that she took various items from the attic of 50 Woody Street and put them in the bed of her pickup truck. Defendant said she then drove to Nichols' home at 24 Ridge Street and parked across the street, only to see Nichols and another man driving away after loading aluminum cans into the vehicle. At this point, Detective Grindstaff arrived on the scene.

Defendant testified that when Grindstaff asked her, "You have been up there at that house, haven't you? I said, Yes." Defendant explained that she later realized that the detective misunderstood her admission to be a reference to the house at 30 Woody Street, while defendant had been referring to the house next door at 50 Woody Street. Defendant insisted in her testimony that she had not been to 30 Woody Street since October 2013 and had believed that, on that occasion, she and Nichols had permission to remove the plow and other items from 30 Woody Street at that time. Defendant further testified that she believed that she had permission to remove the various items of property from 50 Woody Street in April 2014, including the goods that Grindstaff discovered in the bed of her pickup truck.

At the close of all of the evidence, defendant moved to dismiss the remaining charges of one count of felonious breaking and entering and two counts of felonious larceny. The trial court denied the motion. Following the arguments of counsel, the trial court instructed the jury, *inter alia*, on the doctrine of recent possession as follows:

> For this doctrine to apply the State must prove three things beyond a reasonable doubt:
>
> First, that the property was stolen.
>
> Second, that the defendant had possession of this property. A person possesses property when that person is aware of its presence and has, either alone or together with others, both the power and intent to control its disposition or use.
>
> And third, that the defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that the defendant obtained possession honestly.
>
> If you find these things from the evidence beyond a reasonable doubt, you may consider them together with all other facts and circumstances in deciding whether or not the defendant is guilty of breaking or entering and larceny.

The jury returned verdicts finding defendant guilty of felonious breaking and entering and felonious larceny in file number 14 CRS 50512 (the 20 March 2014 charges) and felonious larceny in file number 14 CRS 50509 (the remaining 4 April 2014 charge). With the agreement of the prosecutor and defense counsel, the trial court then arrested judgment on the felonious larceny offense in 14 CRS 50509. The trial court imposed

consecutive terms of incarceration of six to seventeen months on each of the two convictions arising from the events of 20 March 2014, suspended the active sentences, imposed sixty months of supervised probation, and required defendant to serve an active sentence of four months as a condition of probation. The trial court also ordered payment of restitution and attorney fees. Defendant appealed.

At the North Carolina Court of Appeals, defendant raised two issues, asserting that the trial court erred in (1) denying her motion to dismiss on the basis of insufficiency of the evidence that she was the perpetrator of the 20 March 2014 breaking and entering and the subsequent larceny and (2) placing her on supervised probation for sixty months without making a statutorily required finding that such extended term of probation was necessary. With regard to the sufficiency of the evidence, defendant noted that the State did not present any direct evidence linking defendant either to breaking and entering or to larceny after breaking and entering, instead relying upon the doctrine of recent possession. On appeal, defendant contended that the evidence at trial was insufficient to send the charges to the jury for consideration as to both her culpable possession of the items allegedly stolen on 20 March 2014 and the recency of her possession of said items.

The Court of Appeals was divided in its decision. The majority agreed with defendant's position regarding the imputation to her of possession of the property at issue and vacated the judgments entered upon her convictions. *See State v. McDaniel*, 817 S.E.2d 6 (N.C. Ct. App. 2018). The majority began by observing that

> Defendant was not convicted of breaking and entering, or sentenced for larceny, in connection with the stolen property *actually found in her possession* on 4 April 2014. Defendant was convicted on charges stemming from a breaking and entering and larceny that, according to the relevant indictment, occurred "on or about" 20 March 2014. That indictment specifically described the property stolen on that date as "a Sears pushmower, aluminum ladder, monitor heater, 100 gallons of kerosene, electrical wiring, flooring[,] and a German [cuckoo] clock." These items were discovered by Lt. Det. Manis at 24 Ridge Street on 2 April 2014, outside Defendant's presence, although Defendant admitted she drove a short distance with the property in her truck earlier that day. Thus, the State's own evidence suggested that up to two weeks may have passed between the alleged breaking and entering and larceny, on

> or around 20 March 2014, and the discovery of the stolen property, on 2 April 2014, and the property was not actually found in Defendant's possession.

Id. at 12 (alterations in original). The majority went on to note that the only evidence that defendant actually possessed the items alleged to have been stolen on 20 March 2014 was her own testimony that "she was briefly in possession of the stolen property on 2 April 2014, when she transported it a few blocks from a building at 50 Woody Street, where the property was being stored, to the residence at 24 Ridge Street." *Id.* at 13.

The majority cited precedent from this Court including *State v. Maines*, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981) ("[T]he stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods . . . ."), and *State v. Wilson*, 313 N.C. 516, 536, 330 S.E.2d 450, 464 (1985) ("It is not always necessary that the stolen property be actually in the hands of the defendant in order to trigger the inference that he is the thief. The doctrine [of recent possession] is equally applicable where the stolen property is under the defendant's personal control [in the form of the defendant's girlfriend wearing the stolen watch several weeks after the alleged theft]."). Ultimately, the Court of Appeals majority in the instant case opined:

> The State contends that, because Defendant "ha[d] the power and intent to control the access to and use of [her truck][,] [she] ha[d] possession of the [vehicle's] known contents[ ]" when, by her own admission, she transported the stolen property on 2 April 2014. According to the State, Defendant was "the driver and only authorized user of the truck[,]" and "there [was] no evidence that [ ] Nichols was present in the truck at the time [Defendant] had possession of the stolen items." Even taking these statements as true, they do not establish exclusive possession.

Id. at 15 (alterations in original) (footnote omitted). In light of this determination regarding exclusive possession, the majority did not consider defendant's arguments concerning the temporal proximity component of the doctrine of recent possession based on the passage of time between the alleged theft on 20 March 2014 and defendant's admitted transfer of the items from one location to another via her pickup truck on 2 April 2014.[1]

1. Neither the majority nor the dissent addressed defendant's contentions of error concerning the length of her supervised probation.

Judge Tyson dissented because, in his view,

> Defendant admitted she alone had transported the items that had been stolen on or about 20 March 2014 in her truck and she had unloaded them at the Ridge Street address. Her possession of the recently stolen goods was exclusive and 100% within her control at that time. Whether the two weeks, which may have passed between the breaking and entering and larceny and the discovery of the property being stolen, and Defendant's admitted possession, is too remote to apply the doctrine of recent possession was a proper question for the jury and does not support vacating Defendant's conviction as a matter of law.

Id. at 17 (Tyson, J., dissenting) (*citing Wilson*, 313 N.C. at 536–37, 330 S.E.2d at 464).

On 1 June 2018, the State filed a motion for temporary stay and a petition for writ of supersedeas in this Court. On the same date, the Court allowed the motion for temporary stay. The State filed its notice of appeal on 19 June 2018 based upon the dissenting opinion in the Court of Appeals. The Court allowed the State's petition for writ of supersedeas on 25 June 2018.

Analysis

We consider a trial court's ruling on a motion to dismiss de novo. *See State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

Id. at 98, 261 S.E.2d at 117 (citations omitted). In challenges to the sufficiency of evidence, this Court reviews the evidence in the light most favorable to the State. *E.g.*, *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). Contradictions and discrepancies are for the fact-finder to resolve. *Id.* at 544, 417 S.E.2d at 761. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial, or

both. *E.g.*, *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citation omitted). If "a reasonable inference of defendant's guilt may be drawn from the circumstances," then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (emphasis omitted) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)). "Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citations omitted).

The doctrine of recent possession is

> a rule of law that, upon an indictment for larceny, possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property. The presumption is strong or weak depending upon the circumstances of the case and the length of time intervening between the larceny of the goods and the discovery of them in defendant's possession. Furthermore, when there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering.

Maines, 301 N.C. at 673–74, 273 S.E.2d at 293 (citations omitted). Applying the doctrine in that case, the Court stated that

> the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods . . . .
>
> The "exclusive" possession [may include] . . . . joint possession of co-conspirators or persons acting in concert in which case the possession of one criminal accomplice would be the possession of all. . . .

Id. at 674–75, 273 S.E.2d at 293–94 (citation omitted). In sum, the Court in *Maines* concluded that "the evidence must show the person accused

of the theft had complete dominion, which might be shared with others, over the property . . . which sufficiently connects the accused person to the crime. *Id.* at 675, 273 S.E.2d at 294.

In the present case, defendant was convicted by a jury on the charges of felonious breaking and entering and felonious larceny in case file 14 CRS 50512. These convictions arose from an indictment which listed the property stolen on the offense date of 20 March 2014 as "a Sears pushmower, aluminum ladder, monitor heater, 100 gallons of kerosene, electrical wiring, flooring and a German cuckoo clock." The evidence at trial, taken in the light most favorable to the State, tended to show that: (1) items listed in the indictment which charged defendant with commission of the alleged 20 March offenses were discovered at 24 Ridge Street on 2 April 2014; (2) two unnamed individuals reportedly had unloaded those items listed in the indictment from a white pickup truck and left them at 24 Ridge Street; (3) an individual operating a white pickup truck was seen entering 30 Woody Street on 4 April 2014, removing items from the house, driving away from the address, and then turning onto Ridge Street; (4) on that same date, MCSO Detective Grindstaff discovered items which were reported as stolen from 30 Woody Street earlier that day in the bed of a pickup truck with defendant seated in the driver's seat; (5) defendant admitted that she had loaded the items listed in the indictment as stolen from 30 Woody Street on 4 April 2014 into the bed of her truck on that date; (6) defendant admitted that at some point in April, she had "load[ed] up" into her pickup truck "the ladder you have spoken of, and the monitor heater, and various other things that were all under" the house at 50 Woody Street and delivered these items to Ridge Street; and (7) defendant acknowledged that she had previously visited the house at 30 Woody Street in October 2013 and participated in the removal of various items from the residence.

In sum, defendant acknowledged that she was in control of, and in possession of, the aluminum ladder, monitor heater, and other items identified in the 20 March indictment as of 2 April 2014, which was two weeks after the alleged 20 March offenses involving these items. Even under defendant's self-serving testimony, her possession of the property at issue is deemed to be exclusive despite her effort to minimize her criminal culpability by couching her possession and transportation of the stolen items as the responsibility of Nichols, who also was charged in connection with the 20 March 2014 offenses. Defendant's position is unpersuasive because the extent and strength of her ownership interest in the property is inconsequential in evaluating the existence of the determinative factors undergirding the doctrine of recent possession in

the face of defendant's motion to dismiss. " '[E]xclusive' possession" may include "joint possession of co-conspirators or persons acting in concert in which case the possession of one criminal accomplice would be the possession of all." *Maines*, 301 N.C. at 675, 273 S.E.2d at 294. Taken in the light most favorable to the State and giving the State the benefit of every reasonable inference, the evidence presented at trial constituted substantial evidence of the second prong under the doctrine of recent possession—exclusive possession. Defendant was aware of the presence of the property which was situated in the bed of her white pickup truck and had, either by herself or together with her co-worker and joint actor Nichols, both the power and intent to control the disposition or use of the items. *See Wilson*, 313 N.C. at 536, 330 S.E.2d at 464. Thus, the Court of Appeals majority erred in vacating defendant's convictions.

We therefore reverse the decision of the Court of Appeals and remand this case to that appellate court for consideration of defendant's argument regarding the third prong of the doctrine of recent possession—the sufficiency of the recency of defendant's possession of the property at issue—as well as consideration of defendant's argument that the trial court erred in imposing upon her an extended term of probation.

REVERSED AND REMANDED.

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

Justice EARLS dissenting.

The evidence to support Ms. McDaniel's conviction for breaking and entering, and larceny after breaking and entering, based on her alleged possession of items stolen from the uninhabited residence at 30 Woody Street on 20 March 2014 is insufficient. McDaniel's conviction is not based on the items found in her possession on 4 April 2014, but instead is based on the items *not found* in her possession from a breaking and entering that occurred on or about 20 March 2014. *State v. McDaniel*, 817 S.E.2d 6, 8–9 (N.C. Ct. App. 2018). The doctrine of recent possession requires the State to show beyond a reasonable doubt that:

> (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to

> control the goods; . . . and (3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt.

State v. Maines, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981) (citations omitted). At issue in this case is whether, taking all the evidence in the light most favorable to the State, there is substantial evidence of the second element above. *See State v. Barnes*, 345 N.C. 146, 148, 478 S.E.2d 188, 189–90 (1996). The stolen items, namely a monitor heater, copper tubing, aluminum ladder, lawnmower, pipes, and wiring, were never found in McDaniel's possession. McDaniel instead admitted to briefly transporting the items for her employer Nichols on 2 April 2014. The State offered no evidence that McDaniel had the "power and intent to control the goods" to the exclusion of others, between the date of the breaking and entering that occurred on or about 20 March 2014 and the date McDaniel admitted to transporting the items on 2 April 2014. Furthermore, there was no evidence that McDaniel even knew the items had been stolen from 30 Woody Street at the time she was transporting them for her employer. "Proof of a defendant's recent possession of stolen property, standing alone, does not shift the burden of proof to the defendant. That burden remains on the State to demonstrate defendant's guilt beyond a reasonable doubt." *Maines*, 301 N.C. at 674, 273 S.E.2d at 293 (citation omitted).

At the time of the breaking and entering, McDaniel was working for Nichols by collecting items for transportation to the scrapyard. The two often worked at 50 Woody Street searching for items in and around the house to sell to the scrapyard and frequently used McDaniel's truck to transport the items. McDaniel testified at trial that while at the home located at 50 Woody Street, Nichols asked her to load the property at issue onto her truck, drive it down the hill, and unload it outside his residence because he was storing it for a friend. McDaniel had no knowledge the property was stolen. Taking the evidence in the light most favorable to the State, the State only showed McDaniel briefly possessed the stolen property up to two weeks after the breaking and entering occurred. McDaniel's conviction therefore rested only upon her brief possession of the stolen property that she was instructed to transport for another, specifically her employer Nichols.

This Court has warned that "[t]he applicability of the doctrine of the inference of guilt derived from the recent possession of stolen goods depends upon the circumstance and character of the possession." *State v. Weinstein*, 224 N.C. 645, 650, 31 S.E.2d 920, 924 (1944). Although McDaniel admitted to temporarily possessing the stolen property, the

possession was under a unique circumstance and character due to McDaniel's employment status. "It is not sufficient to charge [the stolen property] to be the property of one who is a mere servant, although he may have had actual possession at the time of the larceny." *State v. Greene*, 289 N.C. 578, 584, 223 S.E.2d 365, 369 (1976) (quoting *State v. Jenkins*, 78 N.C. 478, 479 (1878)); *see also State v. Campbell*, 810 S.E.2d 803, 819 (N.C. Ct. App. 2018) ("[A]n employee in possession of property on behalf of the employer does not have a sufficient ownership interest in the property."). It is essential to understand the legal implications of the fact that McDaniel was an employee of Nichols', and that she was acting under his direction when she transported the property.[1] Here, because McDaniel was a mere employee of Nichols' and acting under his directive when she transported the property, her possession was not that of herself but of her employer. *See Greene*, 289 N.C. at 584, 223 S.E.2d at 369 ("his possession is the possession of his master.") (quoting *Jenkins*, 78 N.C. at 479).

In addition to possessing stolen property, the second element of the doctrine requires that the defendant have "the power and *intent* to control the goods." *Maines*, 301 N.C. at 674, 273 S.E.2d at 293 (citations omitted) (emphasis added). Contrary to the majority's view, McDaniel lacked the intent to control the stolen property. Instead, evidence showed that subsequent to Nichols' orders, McDaniel transported the items from 50 Woody street to 24 Ridge Street, a house a short distance away. Proof of McDaniel's lack of intent to possess the property was present after she unloaded the property because she failed to return to the residence to take possession and control of the items. Evidence further showed that McDaniel had no affiliation to the residence where she unloaded the property and was not present when the items were discovered. The State failed to offer any evidence to contradict McDaniel's version of events and McDaniel never gave conflicting stories concerning the property to law enforcement. *Cf. State v. May*, 292 N.C. 644, 659–60, 235 S.E.2d 178, 188 (1977) (judgment of nonsuit properly denied where "[t]he State's evidence is sufficient to contradict and rebut defendant's exculpatory statement, and casts great doubt upon the credibility of defendant's statement.").

The majority today holds that in this case, defendant's recent possession of stolen property *alone* is sufficient to support a conviction for breaking and entering and larceny after breaking and entering. However,

1. Similarly, a pawn shop owner is not guilty of larceny through the doctrine of recent possession if she has possession of stolen goods that were pawned. Instead, the State places regulations on pawn shop owners "to prevent unlawful property transactions [ ] in stolen property." N.C.G.S. § 66-386(1) (2012).

"[p]roof of a defendant's recent possession of stolen property, standing alone, does not shift the burden of proof to the defendant." *Maines* at 674, 273 S.E.2d at 293. Because the State failed to come forward with substantial evidence that McDaniel had exclusive possession over the stolen property with the power and intent to control the items, the Court of Appeals' decision should be affirmed.

STATE OF NORTH CAROLINA
v.
BILLY DEAN MORGAN

No. 150A18

Filed 16 August 2019

Probation and Parole—revocation—after expiration—no finding of good cause

The trial court erred by revoking defendant's probation without a finding that good cause for doing so existed. The trial court's judgment contained no findings referencing the existence of good cause, and the record was devoid of any indication that the trial court was aware that defendant's probationary term had expired when it entered its judgments. The case was remanded for a determination of good cause because the Supreme Court was unable to determine from the record that no evidence existed that would allow a determination of good cause.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 814 S.E.2d 843 (N.C. Ct. App. 2018), affirming in part and vacating and remanding in part judgments entered on 9 September 2016 by Judge Jeffrey P. Hunt in Superior Court, McDowell County. Heard in the Supreme Court on 8 April 2019.

Joshua H. Stein, Attorney General, by Brenda Eaddy, Assistant Attorney General, for the State.

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

DAVIS, Justice.

The issue before us in this case is whether a trial court is permitted to revoke a defendant's probation after his probationary period has expired without making a finding of fact that good cause exists to do so under the circumstances. Because we conclude that such a finding is statutorily required, we reverse the decision of the Court of Appeals and remand this matter for further proceedings.

Factual and Procedural Background

On 20 May 2013, defendant Billy Dean Morgan was indicted by a McDowell County Grand Jury on two counts of assault with a deadly weapon inflicting serious injury. A hearing was held in Superior Court, McDowell County on 28 August 2013 before the Honorable J. Thomas Davis at which defendant pled no contest to those charges. The court sentenced him to consecutive terms of twenty-nine to forty-seven months of imprisonment, suspended the sentences, and placed him on supervised probation for thirty-six months.

Defendant's probation officer, Christopher Poteat, filed violation reports on 12 May 2016 alleging that defendant had willfully violated the terms of his probation by (1) failing to report to Officer Poteat; (2) failing to pay money owed to the clerk of superior court; (3) failing to pay probation supervision fees; and (4) committing a new criminal offense. A warrant for defendant's arrest for felony probation violations was issued on that same date. On 23 May 2016, Officer Poteat filed an additional violation report in which he asserted that defendant had absconded his probation. Defendant was subsequently arrested for violating terms of his probation.

Defendant's probationary term expired on 28 August 2016. Twelve days later, a hearing was held in Superior Court, McDowell County before the Honorable Jeffrey P. Hunt. At the hearing, defendant's counsel admitted that defendant had "violated probation by failing to report, failing to pay money and supervision fees, and being convicted of a new crime while on probation and absconding." Officer Poteat testified that defendant had missed two consecutive appointments with him in May 2015. He further stated that defendant "started going downhill" in October 2015 and "missed appointments on November 10, February 3, and February 29 that all had to be rescheduled."

In addition, Officer Poteat testified that defendant had been admitted to Grace Hospital on 29 March 2016 and remained in that facility's mental health ward until 19 April. According to Officer Poteat, defendant did not contact him until 1 May, which was twelve days after his

release from the hospital. On that date, Officer Poteat instructed defendant to report to him the following Wednesday. When defendant failed to show up for that appointment, Officer Poteat filed the 23 May probation violation report alleging that he had absconded.

Defendant did not testify on his own behalf at the 9 September 2016 hearing, but his counsel informed the trial court that his mental health problems had worsened in May 2015 when his ten-year-old son was removed from his custody. Defense counsel further stated that defendant was able to comply with the terms of his probation when he was taking his medication. Defense counsel asked the court to grant a continuance to give defendant, who was then employed, a chance to pay his outstanding probation fees. In response, the trial court stated: "No, I am going to revoke his probation for absconding and for the conviction. He will do the sentences that were imposed by the original judgments."

On that same date, the trial court entered judgments using AOC Form CR-607 revoking defendant's probation and activating his suspended sentences. The judgments contained the following pertinent findings:

> The defendant is charged with having violated specific conditions of the defendant's probation as alleged in the . . . Violation Report(s) on file herein, which is incorporated by reference.
>
> . . . .
>
> The condition(s) violated and the facts of each violation are as set forth . . . in Paragraph(s) 1 of the Violation Report or Notice dated 05/23/2016 [and] in Paragraph(s) 1-4 of the Violation Report or Notice dated 05/12/2016.
>
> . . . .
>
> The Court may revoke defendant's probation . . . for the willful violation of the condition(s) that he/she not commit any criminal offense . . . or abscond from supervision[.]

The judgments concluded as follows:

> Based upon the Findings of Fact set out on the reverse side, the Court concludes that the defendant has violated a valid condition of probation upon which the execution of the active sentence was suspended, and that continuation, modification or special probation or criminal contempt is not appropriate, and the Court ORDERS that the

> defendant's probation be revoked, that the suspended sentence be activated, and the defendant be imprisoned[.]

On 16 September 2016, defendant filed a handwritten pro se "Inmate Grievance/Request Form" with the McDowell County Jail indicating his intention to appeal from the 9 September judgments. Defendant's filing, however, failed to specifically identify both the rulings from which his appeal was being taken and the court to which he intended to appeal. Defendant's appellate counsel filed a petition for writ of certiorari with the Court of Appeals on 30 May 2017 requesting "review of the judgments and orders of the McDowell County Superior Court." The Court of Appeals determined that defendant had failed to file a legally valid notice of appeal but allowed his petition for certiorari.

In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the court erred by revoking his probation after the expiration of his thirty-six-month probationary period by failing to make a specific finding that it was doing so for "good cause shown and stated" as required by N.C.G.S. § 15A-1344(f)(3). *State v. Morgan*, 814 S.E.2d 843, 847 (N.C. Ct. App. 2018). The majority in the Court of Appeals rejected this contention, citing that court's earlier decision in *State v. Regan*, 253 N.C. App. 351, 800 S.E.2d 436 (2017), in which it concluded that N.C.G.S. § 15A-1344(f)(3) does not require trial courts to make any specific findings of good cause shown in order to properly revoke a defendant's probation after the expiration of his probationary term. *Id.* at 357, 800 S.E.2d at 440. In *Regan*, the Court of Appeals determined that a finding of good cause could be inferred from the transcript of the defendant's probation violation hearing and the judgments entered by the court. *See id.* at 358, 800 S.E.2d at 440–41 ("Both the transcript of the probation violation hearing and the judgments entered reflect that the trial court considered the evidence and found good cause to revoke Defendant's probation.").

Noting that it was bound by its prior decision in *Regan*, *Morgan*, 814 S.E.2d at 847, the Court of Appeals majority held that the trial court did not err by revoking defendant's probation after the expiration of his probationary term, concluding that:

> [A]t the hearing, defendant admitted all of the State's allegations. After hearing from Officer Poteat and defendant's attorney, the trial court announced its decision to "revoke his probation for absconding and for the conviction." Consequently, "[b]oth the transcript of the probation violation hearing and the judgments entered reflect that the

> trial court considered the evidence and found good cause to revoke" defendant's probation.

Id. at 848 (quoting *Regan*, 253 N.C. App. at 358, 800 S.E.2d at 440–41).[1]

In a dissenting opinion, Chief Judge McGee asserted that *Regan* was both in conflict with this Court's decision in *State v. Bryant*, 361 N.C. 100, 637 S.E.2d 532 (2006), and inconsistent with the text of N.C.G.S. § 15A-1344(f). *Morgan*, 814 S.E.2d at 851–53. (McGee, C.J., dissenting). For these reasons, Chief Judge McGee would have held that "the trial court was required to make a finding of fact that the State demonstrated 'for good cause shown and stated that [Defendant's] probation should be . . . revoked.' " *Id.* at 853 (alterations in original) (quoting N.C.G.S. § 15A-1344(f)(3)). Defendant appealed as of right to this Court based upon the dissent.

Analysis

The issue for resolution in this appeal is whether the Court of Appeals erred by affirming the trial court's revocation of defendant's probation without making a specific finding that good cause existed to do so despite the expiration of his probationary period. For the reasons set out below, we conclude that the trial court's order failed to comply with N.C.G.S. § 15A-1344(f)(3).

This Court has made clear that a trial court "may, at any time during the period of probation, require defendant to appear before it, inquire into alleged violations of the conditions, and, if found to be true, place the suspended sentence into effect." *State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980) (citations and emphasis omitted). But the trial court "may not do so after the expiration of the period of probation except as provided in G.S. 15A-1344(f)." *Id.* at 527, 263 S.E.2d at 594 (citations and emphasis omitted).

Section 15A-1344(f) provides, in pertinent part:

> (f) Extension, Modification, or Revocation after Period of Probation. — The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

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1. The Court of Appeals also vacated a civil judgment for costs and attorneys' fees that had been entered against defendant by the trial court based on its determination that defendant was not provided notice and an opportunity to be heard on the final amount of attorneys' fees awarded. *Morgan*, 814 S.E.2d at 849. This portion of the Court of Appeals' opinion, however, is not currently before us.

(1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

(2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.

(3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

N.C.G.S. § 15A-1344(f) (2017).

It is axiomatic that "[w]hen construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself." *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010) (citation omitted). "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) (citation omitted); *see also State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) ("If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." (citation omitted)).

We are further guided in our decision by the canon of statutory construction that a statute may not be interpreted "in a manner which would render any of its words superfluous." *State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994) (citations omitted). This Court has repeatedly held that "a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage." *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) (citations omitted).

In *State v. Bryant*, this Court construed language in a prior version of N.C.G.S. § 15A-1344(f) in connection with the revocation of a defendant's probation following the expiration of her probationary period. At the time *Bryant* was decided, N.C.G.S. § 15A-1344(f) provided, in relevant part:

> (f) Revocation after Period of Probation. — The court may revoke probation after the expiration of the period of probation if:
>
> (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
>
> (2) *The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.*

N.C.G.S. § 15A-1344(f) (2005) (emphasis added) (amended 2008).

In *Bryant*, the trial court activated the defendant's suspended sentence seventy days after the expiration of her period of probation "without making a finding that the State had exerted reasonable efforts to conduct a hearing before the expiration of the probationary period." 361 N.C. at 104–05, 637 S.E.2d at 536. On appeal to this Court, the State argued that, despite the absence of an express finding of fact on that issue, the record contained evidence that would have supported such a finding and that, as a result, the order was in compliance with N.C.G.S. § 15A-1344(f). *Id.* at 103, 637 S.E.2d at 535.

We rejected the State's argument and held that the statutory language "[t]he court finds" contained in N.C.G.S. § 15A-1344(f)(2) required the trial court to make a specific finding of fact. *Id.* at 104–05, 637 S.E.2d at 536. We further held that this requirement was not satisfied simply because evidence existed in the record that *could* have supported such a finding. *Id.* at 103–04, 637 S.E.2d at 534–35. We explained our reasoning as follows:

> In analyzing this statute, we use accepted principles of statutory construction by applying the plain and definite meaning of the words therein, as the language of the statute is clear and unambiguous. The statute unambiguously requires the trial court to make a judicial finding that the State has made a reasonable effort to conduct the probation revocation hearing during the period of probation set out in the judgment and commitment.
>
> . . . .
>
> The State argues that the unsworn remarks of defendant's counsel, along with the scheduled hearing date

> noticed on defendant's probation violation report, satisfy the statutory requirement. . . . Although this argument is creative, it is contrary to the explicit statutory requirement that "the court find . . . the State has made reasonable effort to notify the probationer and to conduct the hearing earlier." The statute makes no exception to this finding of fact requirement based upon the strength of the evidence in the record.

Id. at 102–03, 637 S.E.2d at 534–35 (footnote and internal citations omitted).

We addressed a similar issue in *State v. Coltrane*, 307 N.C. 511, 299 S.E.2d 199 (1983), in which the trial court revoked the defendant's probation without affording her the opportunity to confront adverse witnesses at the probation revocation hearing. *Id.* at 513, 299 S.E.2d at 201. The controlling statute stated that a defendant at a probation revocation hearing is entitled to "confront and cross-examine adverse witnesses *unless the court finds good cause for not allowing confrontation*." *Id.* at 513, 299 S.E.2d at 201 (emphasis added). Because "[n]o findings were made [by the trial court] that there was good cause for not allowing confrontation," we held that the trial court failed to comply with this statutory requirement and therefore reversed the decision of the Court of Appeals affirming the trial court's revocation order. *Id.* at 516, 299 S.E.2d at 202.

In the present case, it is undisputed that the trial court's 9 September 2016 judgments contained no findings referencing the existence of good cause to revoke defendant's probation despite the expiration of his probationary term. Indeed, the record is devoid of any indication that the trial court was even aware that defendant's probationary term had already expired when it entered its judgments.

We conclude that both the plain language of N.C.G.S. § 15A-1344(f)(3) and our prior decisions in *Bryant* and *Coltrane* compel the conclusion that the trial court erred by activating defendant's sentences without first making such a finding. While *Bryant* and *Coltrane* concerned different statutory provisions than the one at issue here, both cases support the proposition that when the General Assembly has inserted the phrase "the court finds" in a statute setting out the exclusive circumstances under which a defendant's probation may be revoked, the specific finding described in the statute must actually be made by the trial court and such a finding cannot simply be inferred from the record. *See Bryant*, 361 N.C. at 102–03, 637 S.E.2d at 534–35; *Coltrane*, 307 N.C. at 516, 299 S.E.2d at 202.

Our conclusion fully comports with the principles of statutory construction set out above. Were we to hold, as the State argues, that N.C.G.S. § 15A-1344(f)(3) does not require a specific finding of good cause to revoke a defendant's probation after his probationary period has ended as long as the court has found that the defendant violated a condition of probation, subsection (f)(3) would be rendered superfluous. Subsection (f)(2) of N.C.G.S. § 15A-1344 makes clear that in order to revoke a defendant's probation following the expiration of his probationary term, the trial court must first make a finding that the defendant did violate a condition of his probation. After making such a finding, trial courts are then required by subsection (f)(3) to make an *additional* finding of "good cause shown and stated" to justify the revocation of probation even though the defendant's probationary term has expired.

Thus, by contending the trial court's determination that defendant did, in fact, violate conditions of his probation simultaneously satisfied subsections (f)(2) and (f)(3), the State incorrectly conflates two separate and distinct findings that must be made by the trial court under these circumstances. As such, the State's argument is inconsistent with well-settled rules for interpreting statutes. *See*, *e.g.*, *Lunsford v. Mills*, 367 N.C. 618, 628, 766 S.E.2d 297, 304 (2014) ("[I]t is a fundamental principle of statutory interpretation that courts should 'evaluate [a] statute as a whole and . . . not construe an individual section in a manner that renders another provision of the same statute meaningless.' " (alterations in original) (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098 (1999), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 548 S.E.2d 513 (2001)); *Coffey*, 336 N.C. at 418, 444 S.E.2d at 434 ("We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because '[i]t is always presumed that the legislature acted with care and deliberation . . . .' " (alterations in original) (quoting *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970)). To the extent *Regan* holds that an express finding of good cause shown and stated is not required by N.C.G.S. § 15A-1344(f)(3), that portion of *Regan* is overruled.

Having determined that the Court of Appeals erred in affirming the trial court's 9 September 2016 judgments, the only remaining question is whether remand to the trial court is appropriate for it to determine whether good cause exists to revoke defendant's probation despite the expiration of his probationary period and, if so, to make an appropriate finding of fact as required by subsection (f)(3). We stated in *Bryant* that "[i]n the absence of statutorily mandated factual findings, the trial

court's jurisdiction to revoke probation after expiration of the probationary period is not preserved." *Bryant*, 361 N.C. at 103, 637 S.E.2d at 534. We further noted, however, that "[o]rdinarily[ ] when [there is a failure] to make a material finding of fact . . ., the case must be remanded . . . for a proper finding." *Id.* at 104, 637 S.E.2d at 535 (first, third, fourth, and fifth alterations in original) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 674, 599 S.E.2d 888, 904 (2004)).

In *Bryant*, after determining that the trial court had failed to comply with the requirements of N.C.G.S. § 15A-1344(f), we proceeded to determine whether the record contained sufficient evidence to permit the necessary finding of "reasonable efforts" by the State to have conducted the probation revocation hearing earlier. *Id.* at 104, 637 S.E.2d at 535–36. Noting that the record was "devoid of any persuasive evidence as to why there was more than a two-month delay in conducting [the] probation revocation hearing," we concluded that "remand is not a proper remedy . . . because the record lacks sufficient evidence to support such a finding." *Id.* at 104, 637 S.E.2d at 535–36.

In the present case, conversely, we are unable to say from our review of the record that no evidence exists that would allow the trial court on remand to make a finding of "good cause shown and stated" under subsection (f)(3). Accordingly, we remand this matter to the Court of Appeals for further remand to the trial court for a finding of whether good cause exists to revoke defendant's probation despite the expiration of his probationary period and—assuming good cause exists—to make a finding in conformity with N.C.G.S. § 15A-1344(f)(3).

Conclusion

For the reasons stated above, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the superior court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE v. OSBORNE

[372 N.C. 619 (2019)]

STATE OF NORTH CAROLINA
v.
SHELLEY ANNE OSBORNE

No. 355PA18

Filed 16 August 2019

1. Criminal Law—sufficiency of evidence—all evidence considered—clarification of prior case law

The Supreme Court clarified that its opinion in *State v. Ward*, 364 N.C. 133 (2010), involved the issue of admissibility rather than sufficiency of evidence. When considering the sufficiency of the evidence to support a criminal conviction, it does not matter whether any (even all) of the record evidence should not have been admitted. In other words, all of the evidence—regardless of its admissibility—must be considered when determining whether there was sufficient evidence to support a criminal conviction. In addition, the Supreme Court disapproved of the portion of the Court of Appeals dissenting opinion adopted by the Supreme Court in *State v. Llamas-Hernandez*, 363 N.C. 8 (2009), that suggested that the lack of expert testimony identifying the substance in this case as heroin means that the trial court erred by denying defendant's motion to dismiss for insufficient evidence.

2. Drugs—sufficiency of evidence—possession of heroin—all admitted evidence considered

The trial court did not err by denying defendant's motion to dismiss a charge of possession of heroin for insufficiency of the evidence where the evidence admitted at trial showed that defendant told an investigating officer that she had ingested heroin, that several investigating officers identified the substance seized in defendant's hotel room as heroin, and that the substance field-tested positive for heroin twice. This and all other record evidence, when considered in its entirety and without regard to the admissibility of any evidence, was sufficient to show that the substance at issue was heroin.

Justice EARLS concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 821 S.E.2d 268 (N.C. Ct. App. 2018), vacating in part and finding no error in part in judgments entered

on 21 February 2017 by Judge Edwin G. Wilson, Jr. in Superior Court, Randolph County. Heard in the Supreme Court on 29 May 2019 in session in the State Capitol Building in the City of Raleigh.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant.

Meghan Adelle Jones for defendant-appellee.

ERVIN, Justice.

The issue before the Court in this case is whether the Court of Appeals erroneously determined that the trial court erred by denying defendant Shelley Anne Osborne's motion to dismiss a charge of possession of heroin for insufficiency of the evidence. After careful consideration of the record in light of the applicable law, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgment.

I. Factual Background

A. Substantive Facts

On 17 November 2014, officers of the Archdale Police Department responded to a call emanating from a local Days Inn hotel, in which they found defendant; a second woman; and defendant's two children, who appeared to be approximately four and five years old. According to Officer Jeffrey Harold Allred, the Archdale Days Inn is a place where "it's easier for people that want to do those types of things – prostitution, drugs – to – to get a room" given the hotel's cheap rates. Officer Jeremy Paul Flinchum testified that he had seen heroin, which he described as a grayish-tan or white rock, in the past and that he had responded to eight to ten heroin overdose calls during his law enforcement career.

After arriving at the Days Inn, Officer Flinchum found defendant, who was "unresponsive," "turning blue" around her face and lips, and having difficulty breathing, in a hotel room bathroom. Upon regaining consciousness, defendant "confirm[ed] to [Officer Flinchum] that she had ingested heroin." According to Officer Flinchum, investigating officers found "a syringe that had been thrown over the balcony into the parking lot"; syringes in the hotel room's refrigerator; two spoons, which are objects "used in part of the process of making the rock into a fluid substance to introduce to the body," one of which had a "residue"; and

"some heroin," which took a "rock form," had "a white, grayish color," and reacted positively when field-tested for the presence of heroin. Similarly, Officer Allred testified, without objection, that the substance seized from defendant's hotel room appeared to be heroin and that paraphernalia like that discovered in defendant's hotel room was typically used to ingest heroin. Officer Phillip Patton Love also testified, without objection, that, following his entry into defendant's hotel room, he collected "the rock heroin" that was found at the scene and that syringes and burnt spoons are "normal stuff you see when we . . . show up at overdoses that are dealing with heroin." Officer Flinchum conducted a second field test of the substance found in defendant's hotel room in the presence of the jury and testified, without objection, that the test was positive for the presence of heroin.

B. Procedural History

On 14 September 2015, the Randolph County grand jury returned bills of indictment charging defendant with possession of heroin and two counts of misdemeanor child abuse. The charges against defendant came on for trial before the trial court and a jury at the 20 February 2017 criminal session of the Superior Court, Randolph County.

At the close of the State's case, defendant unsuccessfully moved to dismiss the heroin possession charge for insufficiency of the evidence, arguing, in part, that the State was required, in accordance with this Court's decision in *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010), to establish the identity of the substance that defendant allegedly possessed using a chemical test and that "a visual inspection is not enough" to support a determination that the substance in question was heroin. After resting without presenting any evidence, defendant renewed her dismissal motion, which the trial court again denied.

On 21 February 2017, the jury returned verdicts finding defendant guilty as charged. Based upon the jury's verdicts, the trial court entered a judgment sentencing defendant to a term of six to seventeen months imprisonment based upon her conviction for possessing heroin and a second judgment sentencing defendant to a consecutive term of sixty days imprisonment based upon her consolidated convictions for misdemeanor child abuse. However, the trial court suspended defendant's sentences for a period of twenty-four months and placed defendant on supervised probation subject to the usual terms and conditions of probation and the special condition that defendant participate in drug treatment. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

In seeking relief from the trial court's judgments before the Court of Appeals, defendant contended, among other things, that the trial court had erred by denying her motion to dismiss the heroin possession charge on the grounds that the State had failed to present sufficient evidence to show that the substance that defendant allegedly possessed was heroin.[1] *State v. Osborne*, 821 S.E.2d 268, 270 (N.C. Ct. App. 2018). In determining that "the State's evidence did not establish beyond a reasonable doubt that the seized substance was heroin," *id.* at 272 (citing *Ward*, 364 N.C. at 147, 694 S.E.2d at 747), the Court of Appeals held that the State was required under *Ward* to establish the identity of controlled substances using "some form of scientifically valid chemical analysis" and that defendant could not be properly convicted of heroin possession in the absence of such evidence, *id.* at 269-70 (quoting *Ward*, 364 N.C. at 147, 694 S.E.2d at 747). Because defendant "did not identify the seized substance as heroin" and, instead, "told the officers that she had ingested heroin," the Court of Appeals held that this case was distinguishable from cases upholding controlled substance-related convictions based upon the defendant's admission to or presentation of evidence concerning the identity of the substance in question. *Id.* at 271 (describing *State v. Nabors*, 365 N.C. 306, 718 S.E.2d 623 (2011), and *State v. Williams*, 367 N.C. 64, 744 S.E.2d 125 (2013), as holding "that a defense witness's in-court testimony identifying a substance as cocaine was sufficient to overcome a motion to dismiss even in the absence of forensic analysis," and describing *State v. Ortiz-Zape*, 367 N.C. 1, 743 S.E.2d 156 (2013), as holding "that an officer's testimony concerning the defendant's out-of-court identification of the substance as cocaine, combined with the officer's own testimony that the substance appeared to be cocaine, was sufficient to survive a motion to dismiss"). The Court of Appeals observed that it had attempted "to synthesize this line of cases into a coherent rule of law" in *State v. Bridges*, 810 S.E.2d 365 (N.C. Ct. App.), *disc. rev. denied*, 371 N.C. 339, 813 S.E.2d 856 (2018), in which a police officer's unobjected to testimony that the defendant had made an extrajudicial admission that she had "a bagg[ie] of meth hidden in her bra" and that he had located such a baggie in her bra sufficed to support the denial of a motion to dismiss for insufficiency of the evidence. For this reason, the Court of Appeals expressed its "reluctan[ce] to further expand the *Bridges* holding to apply in cases where the defendant did not actually identify the seized substance" given the likelihood that

1. In addition, defendant argued that the trial court had plainly erred by admitting certain evidence identifying the substance located in the hotel room as heroin. As a result of its decision to vacate defendant's conviction on sufficiency of the evidence grounds, the Court of Appeals did not reach defendant's evidentiary claim.

such a holding would "eliminate the need for scientifically valid chemical analysis in many — perhaps most — drug cases" and undermine this Court's decision in *Ward*. *Osborne*, 821 S.E.2d at 271. Employing this logic,[2] the Court of Appeals held that, given the State's concession that it had failed to present evidence of a "scientifically valid chemical analysis identifying the seized substance as heroin," the State had not "establish[ed] beyond a reasonable doubt that the seized substance was heroin" and that the trial court had erred by denying defendant's motion to dismiss for insufficiency of the evidence. *Id.* at 272 (citing *Ward*, 364 N.C. at 147, 694 S.E.2d at 747). As a result, the Court of Appeals vacated the trial court's judgment stemming from defendant's heroin possession conviction. *Id.* This Court granted the State's petition seeking discretionary review of the Court of Appeals' decision.

II. Substantive Legal Analysis

In seeking to persuade us to reverse the Court of Appeals' decision, the State argues that, had the Court of Appeals viewed the admitted evidence in the light most favorable to the State, as decisions such as *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002), and *State v. Robbins*, 309 N.C. 771, 774–75, 309 S.E.2d 188, 190 (1983), require, it would have determined that the field "tests correctly and chemically confirmed the substance's identity as heroin." In the State's view, the Court of Appeals "ignore[d] the field tests" and violated a "long standing maxim," articulated by this Court in *State v. Vestal*, 278 N.C. 561, 567, 180 S.E.2d 755, 760 (1971), that courts consider "incompetent evidence which has been admitted . . . as if it were competent" in determining the sufficiency of the evidence to support a defendant's conviction. Relying upon *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011), and *State v. McCraw*, 300 N.C. 610, 618-19, 268 S.E.2d 173, 178 (1980), the State contends that defendant's failure to object to the admission of the field tests at trial rendered the results of those tests "properly considered by the jury" and relieved the State of any need to show that the tests were "a sufficiently valid or reliable method of identifying heroin." According to the State, it "did not dispute whether — let alone concede that — a chemical field test for the presence of heroin was not a scientifically valid chemical analysis," as it "had no need to do so."

In addition, the State contends that, even if the field tests did not, standing alone, suffice to identify the substance that defendant allegedly possessed, the evidence, when viewed in its entirety, "was nevertheless

2. The Court of Appeals noted that "this issue is unsettled and may merit further review in our Supreme Court." *Osborne*, 821 S.E.2d at 270.

sufficient to establish the substance's identity as heroin." In support of this assertion, the State notes that *Ward* addressed the issue of the admissibility of evidence concerning the identity of a controlled substance rather than the sufficiency of the evidence to support a conviction and is not, for that reason, relevant to the issue that is before the Court in this case. On the contrary, the State asserts that the sufficiency of the evidence to establish the identity of the substance that defendant allegedly possessed should be decided based upon our decision in *Nabors*, 365 N.C. at 313, 718 S.E.2d at 627, in which the testimony of one of the defendant's witnesses identifying the substance that the defendant allegedly possessed with the intent to sell or deliver as cocaine sufficed to preclude allowance of a motion to dismiss for insufficiency of the evidence. In the State's view, defendant's admission to the investigating officers that she had ingested heroin, like the testimony at issue in *Nabors*, was sufficient to support defendant's heroin possession conviction. According to the State, "[s]o long as an oral admission works as a proper method of identification," "it should do so here" as well.

In seeking to persuade us to affirm the Court of Appeals' decision, defendant argues that, in order to convict a person of possessing a controlled substance, the State must prove the identity of the substance in question by adducing evidence of a scientifically valid chemical analysis performed by a person with expertise in interpreting the results of such an analysis. In support of this argument, defendant relies upon the fact that heroin is defined in N.C.G.S. § 90-89(2)(j) "in terms of its chemical composition." In defendant's view, the use of a definition like that set out in N.C.G.S. § 90-89(2)(j) implies, given the logic utilized in *Ward*, 364 N.C. at 143–44, 694 S.E.2d at 744, "the necessity of performing a chemical analysis to accurately identify controlled substances before the criminal penalties in [Section] 90-95 are imposed." Similarly, defendant contends that *State v. Llamas-Hernandez*, 189 N.C. App. 640, 652, 659 S.E.2d 79, 86 (2008) (Steelman, J., concurring, in part, and dissenting, in part), *rev'd per curiam for reasons stated in dissent*, 363 N.C. 8, 673 S.E.2d 658 (2009), clearly indicates that expert testimony is required to establish that the substance that the defendant had been charged with possessing is, in fact, a controlled substance.

In addition, defendant directs our attention to *State v. McKinney*, 288 N.C. 113, 118–19, 215 S.E.2d 578, 582 (1975), and *State v. Board*, 296 N.C. 652, 658–59, 252 S.E.2d 803, 807 (1979), in which we reversed Court of Appeals decisions affirming convictions for distributing THC and possessing and distributing MDA, respectively, on the grounds that the State had failed to adduce sufficient evidence to establish the identity of

the substances in question. In defendant's view, *McKinney* and *Board* stand for the proposition that a chemical analysis is necessary in order to establish the identity of a particular controlled substance. Similarly, defendant argues that our decision in *Nabors* does not control the outcome in this case given that the defendant in that case, who elicited evidence from one of his own witnesses that the substance that he allegedly both possessed and sold and delivered was cocaine, invited the error about which he sought to complain on appeal. In the same vein, defendant argues that in *Williams*, 367 N.C. at 69, 744 S.E.2d at 125, and *Ortiz-Zape*, 367 N.C. at 13–14, 743 S.E.2d 156, both of which relied upon *Nabors* in upholding controlled substance convictions on harmless error grounds, the record contained evidence tending to show that the defendant had identified the relevant substance as cocaine. In this case, on the other hand, defendant did not present any evidence identifying the substance that she was charged with possessing as heroin.

In defendant's view, the field tests performed by Officer Flinchum do not constitute acceptable methods for proving the identity of a controlled substance. In advancing this argument, defendant deduces that the tests in question were "color test reagents for the preliminary identification of drugs" and directs our attention to a law review article and news reports stating that "[s]uch drug tests are subject to no regulation by a central agency" and "routinely produce false positives." In addition, defendant notes that the General Assembly has determined that evidence concerning the "actual alcohol concentration result" derived from the performance of a portable breath test cannot be utilized in determining whether reasonable grounds exist for believing that an implied consent offense had been committed and argues that the enactment of the relevant statutory provision indicates that the field tests utilized in this case should not be deemed sufficient to support the denial of a motion to dismiss for insufficiency of the evidence.

Finally, defendant argues that the other evidence upon which the State relied in order to identify the substance that defendant allegedly possessed as heroin, such as the testimony of Officers Flinchum, Allred, and Love that, in their opinion, the substance in question appeared to them to be heroin on the basis of a visual examination and defendant's admission that she "had ingested heroin," should not suffice to identify the substance that defendant was charged with possessing as heroin given that the testimony of the investigating officers did not rest upon scientifically reliable chemical tests admitted using expert testimony and that, unlike the situations at issue in *Nabors* and *Williams*, witnesses presented by defendant did not identify the substance that was

located in the hotel room and that formed the basis of the drug possession charge as heroin. As a result, defendant urges us to affirm the Court of Appeals' decision to overturn her heroin possession conviction.

"Felonious possession of a controlled substance has two essential elements. The substance must be possessed and the substance must be knowingly possessed." *State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015) (quoting *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985)). Put another way, in order "[t]o obtain a conviction for possession of a controlled substance, the State bears the burden of proving two elements beyond a reasonable doubt: (1) defendant possessed the substance; and (2) the substance was a controlled substance." *State v. Harris*, 361 N.C. 400, 403, 646 S.E.2d 526, 528 (2007) (citing N.C.G.S. § 90–95(a) (2005)).

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (quoting *Mann*, 355 N.C. at 301, 560 S.E.2d at 781). Substantial evidence is the amount "necessary to persuade a rational juror to accept a conclusion." *Id.* at 574, 780 S.E.2d at 826 (quoting *Mann*, 355 N.C. at 301, 560 S.E.2d at 781). In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* at 574, 780 S.E.2d at 826 (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). In other words, if the record developed before the trial court contains "substantial evidence, whether direct or circumstantial, or a combination, '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.' " *Id.* at 575, 780 S.E.2d at 826 (quoting *State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229 (2000)). "Moreover, both competent and incompetent evidence that is favorable to the State must be considered by the trial court in ruling on a defendant's motion to dismiss." *State v. Nabors*, 365 N.C. at 312, 718 S.E.2d at 627 (citing *State v. Israel*, 353 N.C. 211, 216, 539 S.E.2d 633, 637 (2000)).

In determining whether the evidence presented for the jury's consideration was sufficient to identify the substance located in defendant's hotel room as heroin, the Court of Appeals stated that "the question is not whether the State's evidence was strong, but whether that evidence 'establish[ed] the identity of the controlled substance beyond a reasonable doubt,' " *Osborne*, 821 S.E.2d at 271 (alteration in original)

(quoting *Ward*, 364 N.C. at 147, 694 S.E.2d at 747), and concluded that, "[a]pplying *Ward* here, the State's evidence did not establish beyond a reasonable doubt that the seized substance was heroin,"[3] *id.* at 272 (citing *Ward*, 364 N.C. at 147, 694 S.E.2d at 747)). In essence, the Court of Appeals accepted the validity of defendant's argument that, according to *Ward*, the only evidence that can suffice to identify the substance that a defendant is charged with possessing, manufacturing, selling, or delivering as a controlled substance for sufficiency of the evidence purposes is a scientifically valid chemical analysis performed by a person with expertise in interpreting the results produced by such an

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3. The statement from the Court of Appeals' decision quoted in the text can be read as suggesting, perhaps inadvertently, that an appellate court reviewing a sufficiency of the evidence claim is required to determine both that the record contains evidence tending to show the existence of each element of the charged offense and that the jury could reasonably find the existence of each element of the offense charged beyond a reasonable doubt based upon the evidence in question. Our sufficiency of the evidence jurisprudence does not call for such a two-step inquiry, which tends to suggest the appropriateness of some sort of appellate credibility determination rather than leaving all such credibility determinations to the jury. *See*, *e.g.*, *State v. Hyatt*, 355 N.C. 642, 665–66, 566 S.E.2d 61, 76–77 (2002) (rejecting the defendant's argument that the testimony of witnesses who "were felons with significant criminal histories," whose "respective accounts of the events at trial [both] conflicted with earlier statements to police" and "were self-serving," did not constitute sufficient evidence to support defendant's convictions for first-degree murder, robbery with a dangerous weapon, and first-degree kidnapping on the grounds that the "[d]efendant's proposition would occasion the fall of a long-standing principle in our jurisprudence that we are unprepared to abandon: that it is the province of the jury, not the court, to assess and determine witness credibility" (first citing *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001); then citing *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991); then citing *State v. Orr*, 260 N.C. 177, 179, 132 S.E.2d 334, 336 (1963); then citing *State v. Wood*, 235 N.C. 636, 637-38, 70 S.E.2d 665, 667 (1952); then citing *State v. Bowman*, 232 N.C. 374, 376, 61 S.E.2d 107, 108–09 (1950); and then citing S*tate v. McLeod*, 196 N.C. 542, 544–45, 146 S.E. 409, 410 (1929))); *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255–56 (2002) (stating that, in ruling upon a motion to dismiss for insufficiency of the evidence "[t]he trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility") (quoting *Parker*, 354 N.C. at 278, 553 S.E.2d at 894)); *State v. Barnes*, 334 N.C. 67, 75-76, 430 S.E.2d 914, 919 (1993) (stating that, "[o]nce the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then ' "it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty" ' " (second alteration in original) (emphasis omitted) (quoting *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978))); *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493–94 (1992) (stating that, "[i]f there is substantial evidence of each element of the offense charged, or any lesser included offenses, the trial court must deny the motion to dismiss as to those charges supported by substantial evidence and submit them to the jury for its consideration; the weight and credibility of such evidence is a question reserved for the jury" (citing *State v. Vause*, 328 N.C. 231, 236–37, 400 S.E.2d 57, 61 (1991))). Instead, as long as the record contains evidence which tends to show the existence of each element of the charged offense, a defendant's dismissal motion should be denied.

analysis. The State, on the other hand, argues that the Court of Appeals and defendant have misapprehended the nature of our decision in *Ward* given that it "only involved admissibility not sufficiency." As a result, it is necessary for us to analyze the meaning and reach of our decision in *Ward* to properly decide this case.

[1] The sole issue addressed in *Ward* was "whether the trial court abused its discretion by permitting [an analyst] to give expert opinion testimony identifying certain pills based solely on a visual inspection methodology." 364 N.C. at 139, 694 S.E.2d at 742. In determining that the trial court had abused its discretion by permitting the expert to identify the controlled substance using such a methodology, *id.* at 148, 694 S.E.2d at 747–48, the Court relied upon its decision in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004), which "established three steps 'for evaluating the admissibility of expert testimony' " pursuant to N.C.G.S. § 8C-1, Rule 702, with those steps including whether "the expert's proffered method of proof [is] sufficiently reliable as an area for expert testimony," *Ward*, 364 N.C. at 140, 694 S.E.2d at 742 (quoting *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686). In determining that the visual identification evidence at issue in *Ward* should not have been admitted for the jury's consideration, 364 N.C. at 142, 694 S.E.2d at 743, we noted that "[t]he proponent of the expert witness, in this case the State, has 'the burden of tendering the qualifications of the expert' and demonstrating the propriety of the testimony under this three-step approach," *id.* at 140, 694 S.E.2d at 742 (quoting *Crocker v. Roethling*, 363 N.C. 140, 144, 675 S.E.2d 625, 629 (2009) (plurality opinion)). The Court determined that the challenged evidence should not have been admitted on the grounds that "the visual inspection methodology . . . proffered as an area for expert testimony is not sufficiently reliable to identify the substances at issue," *id.* at 142, 694 S.E.2d at 743, given (1) the absence of significant evidence "either implying that identification of controlled substances by mere visual inspection is scientifically reliable or suggesting that [the analyst's] particular methodology was uniquely reliable" and (2) the failure of the State's expert witness to provide "any scientific data or demonstration of the reliability of his methodology," *id.* at 144, 694 S.E.2d at 745. As we noted in stating that "[t]his holding is limited to North Carolina Rule of Evidence 702," *id.* at 147, 694 S.E.2d at 747, our decision in *Ward* focused solely upon the admissibility of the challenged evidence and did not address the sufficiency of the evidence to support the defendant's convictions in that case.

We recognize that, even though *Ward* did not address the sufficiency of the challenged evidence to establish the identity of the substances

at issue in that case, the opinion in *Ward* has been deemed to be relevant to such inquiry in a number of decisions, including the Court of Appeals' decision in this case. *See, e.g.*, *Bridges*, 810 S.E.2d at 366, 367, 370 (holding that the trial court did not err by denying a motion to dismiss a charge of possession of methamphetamine on the grounds that the testimony of a law enforcement officer that the defendant had told the officer that "she had a baggy of meth hidden in her bra" coupled with evidence of the "crystal-like substance found in [d]efendant's bra," taken together, constituted "proof sufficient to establish the presence of the first element" of the possession charge pursuant to *Ward*); *State v. James*, 240 N.C. App. 456, 459, 770 S.E.2d 736, 738–39 (2015) (determining, after noting that the defendant did not make "the sufficiency of the sample size a basis for [his] motion to dismiss," that, had the issue been properly preserved for purposes of appellate review, a chemical analysis of one pill along with visual examination of the remaining pills sufficed to permit a jury "to conclude that defendant possessed and transported 28 grams or more of a Schedule II controlled substance"); *see also State v. Blackwell*, 207 N.C. App. 255, 259, 699 S.E.2d 474, 476–77 (2010) (noting, in determining whether the admission of a laboratory report constituted plain error, that, "[w]ithout the erroneous admission of the laboratory reports," "the case against defendant would have been subject to dismissal at the close of the State's evidence" given that "the identification of the substance as cocaine was a fundamental part of the State's case" according to *Ward*). The confusion reflected in these decisions concerning the proper manner in which *Ward* should be understood may have arisen from our statement that:

> We acknowledge that controlled substances come in many forms and that we are unable to foresee every possible scenario that may arise during a criminal prosecution. Nevertheless, the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution. Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required. This holding is limited to North Carolina Rule of Evidence 702.

Ward, 364 N.C. at 147, 694 S.E.2d at 747; *see Osborne*, 821 S.E.2d at 270. Although the quoted language has been cited in addressing sufficiency of the evidence issues in a number of cases, including those referenced above, the passage in question explicitly states that the sole issue before

the Court in *Ward* involved the issue of admissibility rather than the issue of sufficiency. Thus, for purposes of examining the sufficiency of the evidence to support a criminal conviction, it simply does not matter whether some or all of the evidence contained in the record should not have been admitted; instead, when evaluating the sufficiency of the evidence, all of the evidence, regardless of its admissibility, must be considered in determining the validity of the conviction in question. *State v. Vestal*, 278 N.C. at 567, 180 S.E.2d at 760 (stating that, "[i]n determining such motion, incompetent evidence which has been admitted must be considered as if it were competent" (first citing *State v. Cutler*, 271 N.C. 379, 382-83, 156 S.E.2d 679, 681 (1967) (stating that "[a]ll of the evidence actually admitted, whether competent or incompetent, including that offered by the defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon the motion [for nonsuit in a criminal action]"); and then citing *State v. Virgil*, 263 N.C. 73, 75, 138 S.E.2d 777, 778 (1964) (same)). For that reason, a reviewing court errs to the extent that it determines whether the evidence suffices to support a defendant's criminal conviction by ascertaining whether the evidence relevant to the issue of the defendant's guilt should or should not have been admitted and then evaluating whether the admissible evidence, examined without reference to the allegedly inadmissible evidence that the trial court allowed the jury to hear, sufficed to support the defendant's conviction.

Additional confusion about the relevance of the principles enunciated in *Ward* to sufficiency of the evidence issues may stem from our decision in *Llamas-Hernandez*, 363 N.C. at 8, 673 S.E.2d at 658, in which this Court, in a per curiam opinion, reversed the Court of Appeals' decision "[f]or the reasons stated in the dissenting opinion." According to the dissenting opinion that this Court adopted in *Llamas-Hernandez*, the trial court erred by admitting lay opinion testimony concerning the identity of the controlled substance in which the defendant allegedly trafficked. After making this determination, the dissenting judge stated that "expert testimony [is] required to establish that a substance is in fact a controlled substance," 189 N.C. App. at 652, 659 S.E.2d at 86 (Steelman, J., concurring, in part, and dissenting, in part), and that, "[w]ithout [the lay opinion] testimony, there was no evidence before the jury as to the nature of the white powder," so that "[t]he trial court erred in denying defendant's motion to dismiss the Class G trafficking offense," *id.* at 654–55, 659 S.E.2d at 88. Aside from the fact that the dissenting judge did not explain in detail why the appropriate remedy for the erroneous admission of the visual identification testimony would be a determination that the evidence did not suffice to support the defendant's

conviction rather than a new trial and the fact that the issue actually in dispute between the parties related to admissibility rather than sufficiency, the remedial result reached in *Llamas-Hernandez* is inconsistent with numerous decisions of this Court, such as *Nabors*, *Vestal*, *Cutler*, and *Virgil*.[4] As a result, to the extent that *Llamas-Hernandez* suggests that the result reached by the Court of Appeals in this case was the correct one, that portion of our decision in *Llamas-Hernandez* is disapproved.

[2] In view of the fact that the absence of an admissible chemical analysis of the substance that defendant allegedly possessed does not necessitate a determination that the record evidence failed to support the jury's decision to convict defendant of possessing heroin, the only thing that remains for us to do in order to decide this case is to determine whether, when analyzed in accordance with the applicable legal standard, the evidence adduced at defendant's trial sufficed to support her conviction. A careful review of the evidence admitted at defendant's trial establishes that defendant told an investigating officer that she had ingested heroin, that several investigating officers identified the substance seized in the defendant's hotel room as heroin, and that the substance that defendant was charged with possessing field-tested positive for heroin on two different occasions. Assuming, without in any way deciding, that some of this evidence might have been subject to exclusion if defendant had objected to its admission, no such objection was lodged. Thus, the record, when considered in its entirety and without regard to whether specific items of evidence found in the record were or were not admissible, contains ample evidence tending to show that the substance that defendant allegedly possessed was heroin.[5] As a result, the Court of

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4. To be absolutely clear, the appropriate remedy for prejudicial error resulting from the admission of evidence that should not have been admitted has traditionally been for the defendant to receive a new trial rather than for the charges that had been lodged against that defendant to be dismissed for insufficiency of the evidence. *See*, *e.g.*, *State v. Craven*, 367 N.C. 51, 58, 744 S.E.2d 458, 462 (2013) (determining that the Court of Appeals, by vacating a conviction on the grounds that evidence had been erroneously admitted and the error was prejudicial, had ordered a remedy that was "erroneous as a matter of law" and that the Court of Appeals should, instead, "have ordered a new trial" (citing *State v. Littlejohn*, 264 N.C. 571, 574, 142 S.E.2d 132, 134–35 (1965))). For that reason, the sole remedy available to a criminal defendant faced with an attempt on the part of the State to elicit evidence identifying a controlled substance that fails to satisfy the principles enunciated in *Ward* is to object to the admission of that evidence and to challenge any decision on the part of the trial court to admit that evidence as part of a bid for a new trial on appeal.

5. The Court of Appeals and defendant have both emphasized that in this case, unlike *Nabors*, *Williams*, and *Ortiz-Zape*, the evidence upon which the State relied in arguing that the record contained adequate support for the jury's finding of defendant's guilt did not

Appeals erred by holding that the trial court erroneously denied defendant's motion to dismiss the heroin possession charge for insufficiency of the evidence.

III. Conclusion

Thus, for the reasons set forth above, we hold that the Court of Appeals erred by determining that the trial court had erroneously denied defendant's motion to dismiss the possession of heroin charge that had been lodged against her for insufficiency of the evidence. As a result, the Court of Appeals' decision in this case is reversed and this case is remanded to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgment.

REVERSED AND REMANDED.

Justice EARLS concurring.

I concur with the analysis in the majority opinion, but write separately to note a threshold matter of immunity and jurisdiction which I would have considered *sua sponte*. On 9 April 2013 Governor Pat McCrory signed into law Session Law 2013-23, titled, in part, "An Act to Provide Limited Immunity From Prosecution for (1) Certain Drug-Related Offenses Committed by an Individual Who Seeks Medical Assistance for a Person Experiencing a Drug-Related Overdose and (2) Certain Drug-Related Offenses Committed by an Individual Experiencing a Drug-Related Overdose and In Need of Medical Assistance." 2013 N.C. Sess. Laws 72, 72–73 (codified as amended at N.C.G.S. §§ 90-96.2 & 90-106.2) (2019). Passed with overwhelming majorities in the state House and Senate, *see* https://www.ncleg.gov/BillLookUp/2013/S20, the

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consist of either an admission by defendant or testimony elicited by defendant. However, that fact has no bearing upon the proper resolution of the sufficiency of the evidence issue in this case. Although an admission by defendant or one of her witnesses might be given greater weight than other evidence during the course of a jury's deliberations, the source from which a particular item of evidence originates is irrelevant to a proper sufficiency of the evidence determination, which focuses upon whether there is any evidence of any kind tending to support a finding of a defendant's guilt rather than upon the form that the evidence takes. *See, e.g.*, *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983) (stating that "[t]he trial court in considering a motion to dismiss is concerned only with the sufficiency of the evidence to carry the case to the jury; it is not concerned with the weight of the evidence" (citing *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971))). Similarly, the existence of questions about the reliability of the field test results that the jury was allowed, without objection, to hear in this case goes to the admissibility of that evidence rather than to whether that evidence is relevant in determining whether the evidence sufficed to support defendant's conviction.

bill was referred to as the "Good Samaritan Law/Naloxone Access Law" and went into effect immediately. S.L. 2013-23, § 4, 2013 N.C. Sess. Laws at 73.

In Section 1, the law amended Article 5 of Chapter 90 of the General Statutes to add a new section titled "Drug-related overdose treatment; limited immunity." S.L. 2013-23, § 1, 2013 N.C. Sess. Laws at 72. The statute provided that:

> A person who experiences a drug-related overdose and is in need of medical assistance shall not be prosecuted for . . . (iii) a felony violation of G.S. 90-95(a)(3) possession of less than one gram of heroin . . . if the evidence for prosecution under those sections was obtained as a result of the drug-related overdose and need for medical assistance.

Id.

This law was in effect on 17 November 2014 when police received a 911 call that there was an overdose at a Days Inn in Archdale. Under the terms of that statute,[1] neither Shelley Osborne nor anyone who, in good faith, was seeking medical assistance for her that day could be prosecuted for possession of less than one gram of heroin. I concur that, to the extent we are only examining the sufficiency of the evidence here, without regard to the question of the admissibility of any of the evidence, all of the evidence contained in the record taken in the light most favorable to the State was sufficient to prove that the substance possessed by Shelley Osborne was heroin. And I concur that the case should be remanded to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgment, which was the argument that, "[i]n the alternative, the trial court plainly erred by admitting testimony identifying the substance as heroin, by allowing an officer to conduct a field test in front of the jury, and by admitting testimony that the result of the field test indicated heroin." The Court of Appeals should also address on remand the question of the application of N.C.G.S. § 90-96.2 to this case.

North Carolina's Good Samaritan/Naloxone Access Law was passed at a time when state public health officials had reported a 300 percent increase in the number of overdose deaths in North Carolina in just over a decade, from 297 in 1999 to 1,140 in 2011. *See* Injury and

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1. N.C.G.S. § 90-96.2 was further amended in 2015; the new version applies to offenses committed on or after 1 August 2015. Act of June 10, 2015, S.L. 2015-94, §§ 1, 4, 2015 N.C. Sess. Laws 191, 191-92, 194.

Violence Prevention Branch, North Carolina Division of Public Health, *Prescription & Drug Overdoses*, (2013), http://injuryfreenc.ncdhhs.gov/About/PoisoningOverdoseFactSheet2013.pdf. The General Assembly made the decision that encouraging individuals suffering from an overdose, and those Good Samaritans who might be with them, to seek medical help to save lives was more important than prosecuting those individuals for possession of less than one gram of heroin.[2]

Ultimately, the question I would start with in deciding this case is whether the Good Samaritan/Naloxone Access Law's immunity is waived if not affirmatively asserted, or whether, like subject matter jurisdiction, it can be raised at any time. *Cf. State v. Sturdivant*, 304 N.C. 293, 307–08, 283 S.E.2d 719, 729–30 (1981) (noting that an argument that the trial court lacked subject matter jurisdiction may be raised at any time after a verdict); *Willowmere Cmty. Ass'n v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558, 563–64 (2018) (holding that since standing is a necessary prerequisite to a court's subject matter jurisdiction, it can be challenged at "any stage of the proceedings, even after judgment" (quoting *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006))). The court always has the obligation to inquire into and be certain of its jurisdiction. *See generally Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85–86 (1986) ("Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction." (quoting *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964))); *see also* N.C.G.S. § 1A-1, Rule 12(h)(3) ("Whenever it appears by suggestion of the parties or *otherwise* that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." (emphasis added)); *Catawba Cty. v. Loggins*, 370 N.C. 83, 100, 804 S.E.2d 474, 486 (2017) (Martin, C.J., concurring in the result only) ("Courts always have jurisdiction to determine subject-matter jurisdiction, but they do not always have—in fact, they usually do not have—the power to determine other matters unless asked to do so by a party."). In *Loggins*, the Court explained that where the legislature has established the court's jurisdiction by state statute, subject

2. The original statute also provided that "[n]othing in this section shall be construed to bar the admissibility of any evidence obtained in connection with the investigation and prosecution of other crimes committed by a person who otherwise qualified for limited immunity under this section." S.L. 2013-23, § 1 (d), 2013 N.C. Sess. Laws at 72. In this case, defendant was also convicted of two counts of misdemeanor child abuse based on the fact that her two children under the age of sixteen were in the hotel room at the time she overdosed. The statute does not provide immunity from prosecution for those offenses and they are not at issue here.

to certain limitations, the court has no jurisdiction to exceed those limits, stating:

> Jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." The court must have personal jurisdiction and, relevant here, subject matter jurisdiction "or '[j]urisdiction over the nature of the case and the type of relief sought,' in order to decide a case." "The legislature, within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State." "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction."

370 N.C. at 88, 804 S.E.2d at 478 (alterations in original) (first quoting *T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 789–90; then quoting *T.R.P.* at 590, 636 S.E.2d at 790; then quoting *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941); then quoting *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 457–58, 290 S.E.2d 653, 661 (1982)). In an analogous situation, where the issue was whether the court had jurisdiction to prosecute the defendant because of a factual dispute over where the crime occurred, this Court acknowledged that when a defendant challenges the jurisdiction of the court,

> the defendant is contesting the very power of this State to try him. We are of the view that a question as basic as jurisdiction is not an "independent, distinct, substantive matter of exemption, immunity or defense" and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, *when contested*, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment.

State v. Batdorf, 293 N.C. 486, 493, 238 S.E.2d 497, 502 (1977) (quoting *State v. Davis*, 214 N.C. 787, 793, 1 S.E.2d 104, 108 (1939)); *see also State v. Covington*, 267 N.C. 292, 295–96, 148 S.E.2d 138, 141–42 (1966) (holding that where lack of jurisdiction appears on the face of the record, this Court, *ex mero motu*, arrests the judgement).

Thus, it is appropriate for the Court of Appeals on remand to address whether the Good Samaritan/Naloxone Law is a limit on the court's jurisdiction to prosecute defendant in this case, by directing that a person who experiences a drug-related overdose and is in need of medical assistance "shall not be prosecuted" for possession of less than one gram of cocaine, or, more generally, if not purely jurisdictional, whether it is an issue that can be waived.

Certainly the first place to begin is the language of the statute itself. If unambiguous, "there is no room for judicial construction." *Lee v. Gore*, 365 N.C. 227, 230, 717 S.E.2d 356, 358 (2011) (citing *Walker v. Bd. of Trs. Of N.C. Local Gov'tal Emps.' Ret. Sys.*, 348 N.C. 63, 65–66, 499 S.E.2d 429, 430–31 (1998)); *see also State v. Ellison*, 366 N.C. 439, 443, 738 S.E.2d 161, 164 (2013) (applying opium trafficking statute's clear and unambiguous language that prohibits trafficking in mixtures containing opium derivatives); *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (noting that legislative purpose is first determined from the plain words of the statute). The law uses the term "shall not" which is mandatory, not permissive. *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979) (citing Black's Law Dictionary 1541 (4th rev. ed. 1968)) ("As used in statutes, the word 'shall' is generally imperative or mandatory."). If a person in defendant's circumstances "shall not" be prosecuted, there is no room for discretion to prosecute them.

It is also instructive that the statute does not say "it shall be a defense to the crime of possession of less than one gram of heroin that . . . ." The legislature is aware of the various defenses available in criminal law, and, indeed, has passed statutes requiring a defendant to give notice before trial if they intend to assert certain defenses. *See* N.C.G.S. § 15A-905(c); *see also State v. Rankin*, 371 N.C. 885, 893, 821 S.E.2d 787, 794 (2018) ("If the General Assembly wanted to enable a trash collector to be criminally charged for doing his or her job and forced to demonstrate his or her innocence by proving an affirmative defense at trial, it could have indicated as much in the statute."). "It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970) (citations omitted). The fact that the statute at issue in this case is not framed as a defense to a criminal prosecution but rather a grant of immunity is apparent from the plain language of the statute.

The goal of statutory construction is to ensure that the purpose of the legislature is accomplished. *State ex rel. Hunt v. N.C. Reinsurance Facil.*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981) (citing

In re Dillingham, 257 N.C. 684, 694, 127 S.E.2d 584, 591 (1962)). This Court has observed that "[c]ourts also ascertain legislative intent from the policy objectives behind a statute's passage 'and the consequences which would follow from a construction one way or another.' " *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (quoting *Campbell v. Church*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979)). The legislature's intent in passing N.C.G.S. § 90-96.2 was to ensure that victims of drug overdoses, and those who may be with them or come across them, do not refrain from seeking medical attention out of fear of criminal prosecution. In light of the opioid overdose epidemic in this state, the legislature enacted a policy to sacrifice prosecutions for possession of small amounts of drugs in order to save lives. Treating section N.C.G.S. 90-96.2(c) as anything other than a jurisdictional requirement that must be established by the State would severely undercut that policy.

As a Pennsylvania intermediate appellate court addressing that state's version of an overdose immunity statute noted:

> Moreover, the Legislature intended for prosecutors and police to refrain from filing charges when sorting through the aftermath of the unfortunately all-too-common overdose. The statute discourages the authorities from commencing the criminal justice process, *i.e.* by placing a limitation upon the charging power, to provide more incentive for reporters to call. . . . It would significantly undercut the statute's goal to conclude, as the Commonwealth urges, that the Act merely provides a defense, thereby requiring an overdose victim or a reporter to litigate the issue of immunity. We find that the statute clearly contemplates that a large number of these cases will never reach the courtroom halls; hence, the prohibition against charging a person.

Commonwealth v. Markun, 185 A.3d 1026, 1035–36 (Pa. Super. Ct. 2018). Pennsylvania's statute contains conspicuous differences from the original N.C.G.S. § 90-96.2 and explicitly places a burden on the defendant to establish certain criteria in order to receive its particular protections, nevertheless the Pennsylvania court concluded that the statute confers immunity, similar to sovereign immunity, that is not waived if raised for the first time on appeal, and creates a duty of the prosecution not to bring charges if the Act applies to the defendant's circumstances. *Id.* at 1031–40. The application of this immunity in North Carolina's Good Samaritan/Naloxone Access law is not something that was tacitly

waived by defendant here, but rather the State was required to prove that the immunity did not apply in order to proceed with prosecution for this particular offense.

Beyond the question of whether the limited immunity conferred by this statute is intended to be immunity from prosecution or a defense to a prosecution, there further remains the question of whether the law actually applies to Ms. Osborne. There is no dispute in the record that law enforcement personnel were called to provide aid to an overdose victim. Arriving first, Officer Flinchem found defendant unconscious, unresponsive, and turning blue, apparently from a heroin overdose. After Officer Flinchem insured that it was safe for EMS to enter, EMS entered the room and was able to revive defendant, who confirmed that she had ingested heroin. Officer Flinchem and two other officers who also responded to the call found drug paraphernalia and a "little piece of heroin."

The evidence for prosecution was obtained as a result of the need for medical assistance. Defendant was indicted, tried and convicted of a felony violation of N.C.G.S. § 90-95(a)(3), one of the statutes referenced in the Good Samaritan/Naloxone Access Law. What arguably is unclear is whether the amount of heroin at issue was less than one gram, as the only evidence in the record concerning the amount is that it was a "little piece of heroin." Given the language and intent behind N.C.G.S. § 90-96.2(c), the State in these circumstances bears the burden of establishing that the amount was one gram or more. Although the weight of the substance is not an element of the offense of possession, the immunity statute means that the weight of the substance needs to be known where all the other elements of immunity are present. That is the only way to effectuate the intent of the legislature that people who call police or medical personnel for treatment because they are experiencing a drug-related overdose shall not be prosecuted for possessing less than one gram of the drug.

STATE OF NORTH CAROLINA
v.
JEFFREY ROBERT PARISI

No. 65A17-2

Filed 16 August 2019

Arrest—driving while impaired—probable cause for arrest—de novo review

The unchallenged evidence found by the district and superior courts was sufficient as a matter of law to support defendant's arrest for impaired driving. Defendant admitted that he had consumed three beers before driving; there was a moderate odor of alcohol about him; his eyes were red and glassy; and defendant passed but performed imperfectly on the field sobriety tests. Whether an officer had probable cause to arrest a defendant for impaired driving contains a factual component, and the proper resolution of the issue requires the application of legal principles and constitutes a conclusion of law subject to de novo review.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 817 S.E.2d 228 (N.C. Ct. App. 2018), reversing and remanding orders entered on 13 January 2016 by Judge Michael D. Duncan in Superior Court, Wilkes County, and on 11 March 2016 by Judge Robert J. Crumpton in District Court, Wilkes County. Heard in the Supreme Court on 4 April 2019.

Joshua H. Stein, *Attorney General*, *by John W. Congleton*, *Assistant Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by Michele A. Goldman*, *Assistant Appellate Defender*, *for defendant-appellant.*

ERVIN, Justice.

The issue before the Court in this case is whether the trial courts properly determined that a motion to suppress filed by defendant Jeffrey Robert Parisi should be allowed on the grounds that the investigating officer lacked probable cause to place defendant under arrest for driving while impaired. After careful consideration of the record in light of the applicable law, we hold that the trial courts' findings of fact failed to support their legal conclusion that the investigating officer lacked the

probable cause needed to place defendant under arrest for impaired driving. As a result, we affirm the Court of Appeals' decision to reverse the trial courts' suppression orders and remand this case to the trial courts for further proceedings.

At approximately 11:30 p.m. on 1 April 2014, Officer Greg Anderson of the Wilkesboro Police Department was operating a checkpoint on Old 421 Road. At that time, Officer Anderson observed defendant drive up to the checkpoint and heard what he believed to be an argument among the vehicle's occupants. Upon approaching the driver's side window and shining his flashlight into the vehicle, Officer Anderson observed an open box of beer on the passenger's side floorboard. However, Officer Anderson did not observe any open container of alcohol in the vehicle. In addition, Officer Anderson detected an odor of alcohol and noticed that defendant's eyes were glassy and watery. At that point, Officer Anderson asked defendant to pull to the side of the road and step out of the vehicle. After defendant complied with this instruction, Officer Anderson confirmed that a moderate odor of alcohol emanated from defendant's person rather than from the interior of the vehicle. When Officer Anderson asked defendant if he had consumed any alcohol, defendant replied that he had drunk three beers earlier in the evening.

At that point, Officer Anderson requested that defendant submit to several field sobriety tests. First, Officer Anderson administered the horizontal gaze nystagmus test to defendant. In the course of administering the horizontal gaze nystagmus test, Officer Anderson observed that defendant exhibited six clues indicating impairment. Secondly, Officer Anderson had defendant perform a walk and turn test, during which defendant was required to take nine heel-to-toe steps down a line, turn around, and take nine similar steps in the opposite direction. In performing the walk and turn test, defendant missed the fourth and fifth steps while walking in the first direction and the third and fourth steps while returning. In Officer Anderson's view, these missed steps, taken collectively, constituted an additional clue indicating impairment. Finally, Officer Anderson administered the one leg stand test to defendant. As defendant performed this test, Officer Anderson noticed that he used his arms for balance and swayed, which Officer Anderson treated as tantamount to two clues indicating impairment. At that point, Officer Anderson formed an opinion that defendant had consumed a sufficient amount of alcohol to appreciably impair his mental and physical faculties.

Subsequently, Officer Anderson issued a citation charging defendant with driving while subject to an impairing substance in violation of N.C.G.S. § 20-138.1. The charge against defendant came on for trial

before Judge Robert J. Crumpton at the 17 June 2015 criminal session of the District Court, Wilkes County. Prior to trial, defendant made a motion to suppress the evidence obtained as a result of his arrest on the grounds that Officer Anderson lacked the necessary probable cause to take him into custody. On 23 September 2015, Judge Crumpton entered a Preliminary Order of Dismissal in which he determined that defendant's suppression motion should be granted.[1] On 23 September 2015, the State noted an appeal from Judge Crumpton's preliminary order to the Superior Court, Wilkes County.

The State's appeal came on for hearing before Judge Michael D. Duncan at the 9 November 2015 criminal session of the Superior Court, Wilkes County. On 13 January 2016, Judge Duncan entered an Order Granting Motion to Suppress and Motion to Dismiss in which he granted defendant's suppression motion and ordered that the charge that had been lodged against defendant be dismissed. On 11 March 2016, Judge Crumpton entered a Final Order Granting Motion to Suppress and Motion to Dismiss[2] in which he granted defendant's motion to suppress the evidence obtained as a result of his arrest and ordered "that the charge against [d]efendant be dismissed." On the same date, the State noted an appeal from Judge Crumpton's final order to the Superior Court, Wilkes County. On 6 April 2016, Judge Duncan entered an Order of Dismissal Affirmation affirming Judge Crumpton's "final order suppressing the arrest of the defendant and dismissing the charge of driving while impaired." The State noted an appeal to the Court of Appeals from Judge Duncan's order affirming Judge Crumpton's final order granting defendant's suppression motion and dismissing the driving while impaired charge that had been lodged against defendant.

In seeking relief from the orders entered by Judge Crumpton and Judge Duncan before the Court of Appeals, the State argued that the trial courts had erred by finding that Officer Anderson lacked probable cause to arrest defendant for driving while impaired and ordering that the driving while impaired charge that had been lodged against defendant be dismissed. On 7 February 2017, the Court of Appeals filed an opinion dismissing the State's appeal from Judge Crumpton's order granting defendant's suppression motion on the grounds that the State

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1. Judge Crumpton's preliminary order did not dismiss the driving while impaired charge that had been lodged against defendant.

2. Judge Duncan "[g]rant[ed defendant's m]otion to [s]uppress and [m]otion to [d]ismiss" even though defendant had never moved that the case be dismissed and even though Judge Crumpton did not order that the driving while impaired charge that had been lodged against defendant be dismissed.

had no right to appeal the final order granting defendant's suppression motion, vacating the trial court orders requiring that the driving while impaired charge that had been lodged against defendant be dismissed, and remanding this case to the Superior Court for further remand to the District Court for further proceedings. *State v. Parisi*, 796 S.E.2d 524, 529 (N.C. Ct. App. 2017), *disc. review denied*, 369 N.C. 751, 799 S.E.2d 873 (2017).

On 28 July 2017, the State filed a petition requesting the Court of Appeals to issue a writ of certiorari authorizing review of Judge Duncan's Order Granting Motion to Suppress and Motion to Dismiss and Judge Crumpton's Final Order Granting Motion to Suppress and Motion to Dismiss. *State v. Parisi*, 817 S.E.2d 228, 229 (N.C. Ct. App. 2018). On 16 August 2017, the Court of Appeals granted the State's certiorari petition. *Id.*, 817 S.E.2d at 229. In seeking relief from the trial courts' orders before the Court of Appeals on this occasion, the State argued that Judge Crumpton and Judge Duncan had erred by granting defendant's suppression motion on the grounds that, in the State's view, Officer Anderson had probable cause to arrest defendant for impaired driving.

In a divided opinion reversing the trial courts' orders and remanding this case to the trial courts for further proceedings, the Court of Appeals majority determined that the facts at issue in this case resembled those at issue in *State v. Townsend*, 236 N.C. App. 456, 762 S.E.2d 898 (2014), in which the Court of Appeals had held that an officer had probable cause to arrest a defendant for impaired driving given that the defendant, who had been stopped at a checkpoint, "had bloodshot eyes and a moderate odor of alcohol about his breath," exhibited multiple clues indicating impairment during the performance of three field sobriety tests, and produced positive results on two alco-sensor tests. *Parisi*, 817 S.E.2d at 230 (citing *Townsend*, 236 N.C. App. at 465, 762 S.E.2d at 905. Although the Court of Appeals noted that "no alco-sensor test [had been] administered in the instant case, defendant himself volunteered the statement that he had been drinking earlier in the evening." *Parisi*, 817 S.E.2d at 230. In addition, the Court of Appeals pointed out that, "while the odor of alcohol, standing alone, is not evidence of impairment, the '[f]act that a motorist has been drinking, when considered in connection with . . . other conduct indicating an impairment of physical or mental faculties, is sufficient prima facie to show a violation of [N.C.]G.S. [§] 20-138.1.' " *Parisi*, 817 S.E.2d at 230–31 (quoting *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 794 (1970)). On the other hand, the Court of Appeals was not persuaded by the trial courts' reliance upon the Court of Appeals' own unpublished opinion in *State v. Sewell*, 239 N.C. App. 132, 768 S.E.2d

650 (2015), given that "it is not binding upon the courts of this State" and is "easily distinguished from the instant case." *Id.*, 817 S.E.2d at 231 (citing *Sewell*, 239 N.C. App. 132, 768 S.E.2d 650). As a result, the Court of Appeals concluded that "the facts, as supported by the evidence and as found by the district and superior courts, supported a conclusion that Officer Anderson had probable cause to stop and cite defendant for driving while impaired," so that "the trial court erred in granting defendant's motion to suppress the stop." *Id.*, 817 S.E.2d at 231.

In dissenting from the Court of Appeals' decision, Judge Robert N. Hunter, Jr., expressed the belief that the uncontested facts supported the legal conclusion that Officer Anderson lacked the probable cause necessary to support his decision to place defendant under arrest. *Id.*, 817 S.E.2d at 231–32. More specifically, the dissenting judge asserted that the trial courts' findings in this case, while "analogous to *some* of the findings of fact in *Townsend*," differed from those findings in certain critical ways. *Id.*, 817 S.E.2d at 231. For example, the dissenting judge pointed out that, in this case, Officer Anderson "did not administer an alco-sensor test" and that the trial courts made no "findings [about] *exactly when* [d]efendant drank in the night." *Id.*, 817 S.E.2d at 232. In addition, unlike the situation at issue in *Townsend*, "the trial courts found no facts about Officer Anderson's experience" and merely stated that Officer Anderson "found clues of impairment" rather than making specific findings concerning the number of clues indicating impairment that the officer detected in administering the horizontal gaze nystagmus test. *Id.*, 817 S.E.2d at 232. The dissenting judge further noted that the "trial courts found that [d]efendant did not slur his speech, did not drive unlawfully or 'bad[ly,]' or appear 'unsteady' on his feet." *Id.*, 817 S.E.2d at 232. As a result, the dissenting judge concluded that the "uncontested findings of fact support the trial court's conclusions that Officer Anderson lacked probable cause to arrest [d]efendant" for driving while impaired. *Id.*, 817 S.E.2d at 232. Defendant noted an appeal to this Court based upon the dissenting judge's opinion.

In seeking to persuade us to overturn the Court of Appeals' decision, defendant begins by asserting that the Court of Appeals had erroneously "reweighed the evidence" instead of "determining whether the competent, unchallenged factual findings supported the trial courts' legal conclusions." According to defendant, the Court of Appeals' "misapplication of the standard of review" led it to reach a different conclusion than the trial courts despite the fact that "the trial courts' competent factual findings supported their legal conclusions" and even though "there was no identified error of law committed by the trial courts in reaching

their conclusions." According to defendant, this Court's decision in *State v. Nicholson* establishes that "the *de novo* portion of an appellate court's review of an order granting or denying a motion to suppress relates to the assessment of whether the trial court's factual findings support its legal conclusions and whether the trial court employed the correct legal standard," citing *State v. Nicholson*, 371 N.C. 284, 288, 813 S.E.2d 840, 843 (2018). Although the Court of Appeals "acknowledged the correct standard of review," defendant contends that it "applied a non-deferential sufficiency test," with this alleged error being reflected in its statement that, "[w]here the State presented sufficient evidence that a law enforcement officer had probable cause to stop defendant, the trial court erred in granting defendant's motion to suppress the stop," citing *Parisi*, 817 S.E.2d at 299.

In addition, defendant contends that the Court of Appeals erroneously relied upon *Atkins*, 277 N.C. at 184, 176 S.E.2d at 793, and *State v. Hewitt*, 263 N.C. 759, 140 S.E.2d 241 (1965), in addressing the validity of the State's challenge to the trial courts' suppression orders. Although "*Atkins* and *Hewitt* assessed whether evidence, viewed in a light most favorable to the proponent, warranted an issue being put to the jury," defendant points out that a trial judge is required "to make credibility determinations and to weigh evidence" in determining whether to grant or deny a suppression motion and that an appellate court is obligated "to address . . . whether the trial court's competent factual findings supported its legal conclusions." The dissenting judge, in defendant's view, correctly applied the applicable standard of review by focusing upon the issue of whether trial courts' findings of fact supported its conclusions. (citing *Parisi*, 817 S.E.2d at 232).

Moreover, defendant claims that the Court of Appeals erred by overturning the trial courts' "unchallenged and supported factual determination" concerning whether defendant's performance during the administration of the field sobriety tests indicated impairment. In defendant's view, "[t]he trial courts implicitly found that [defendant's] imperfect but passing performance on the field sobriety tests alone did not indicate impairment," effectively rejecting Officer Anderson's testimony to the contrary. In support of this assertion, defendant relies upon our decision in *State v. Bartlett*, 368 N.C. 309, 311–12, 776 S.E.2d 672, 673–74 (2015), in which the testimony of the defendant's expert witness directly contradicted the testimony of the arresting officer's testimony that the defendant's performance on a variety of field sobriety tests indicated that the defendant was appreciably impaired. In addressing the validity of the State's challenge to the validity of a suppression order entered by

one Superior Court judge following a hearing held before another, this Court stated that

> Expert opinion testimony is evidence, and the two expert opinions in this case differed from one another on a fact that is essential to the probable cause determination—defendant's apparent degree of impairment. Thus, a finding of fact, whether written or oral, was required to resolve this conflict.

Id. at 312, 776 S.E.2d at 674. According to defendant, Officer Anderson's testimony that defendant's performance on the field sobriety tests indicated impairment was not binding upon the trial court, which "was charged with deciding the credibility of and weight to be given to [Officer] Anderson's opinion testimony." Defendant asserts that, rather than finding that defendant was appreciably impaired, the trial court concluded that Officer Anderson lacked probable cause and that this determination "implicitly incorporat[es] a factual finding that [Officer] Anderson's opinion was not supported by his observations and testing of [defendant]."

In defendant's view, the trial courts both determined that

> [t]he fact[s] and circumstances known to [Officer] Anderson as a result of his observations and testing of [d]efendant are insufficient, under the totality of the circumstances, to form an opinion in the mind of a reasonable and prudent man/officer that there was probable cause to believe [d]efendant had committed the offense of driving while impaired.[3]

After acknowledging that the trial courts had labeled their respective assessments of Officer Anderson's testimony as conclusions of law rather than as findings of fact, defendant contends that these conclusions were, "in effect," factual findings "and should be treated accordingly," citing *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987). In view of the fact that Officer Anderson merely testified that, in his opinion, defendant was appreciably impaired rather than expressing an opinion concerning the "ultimate issue of whether probable cause existed" and the fact that the issue of whether defendant was driving was not contested, defendant argues that the trial

3. This language, which appears in the District Court's 23 September 2015 "Preliminary Order of Dismissal," is virtually identical to the corresponding language in the Superior Court's 13 January 2016 order.

court "necessarily rejected" Officer Anderson's testimony concerning the extent to which defendant was appreciably impaired, quoting *Bartlett* at 312, 776 S.E.2d at 674 (stating that defendant's apparent impairment "is essential to the probable cause determination"). In reversing the trial courts, defendant argues that "the Court of Appeals majority necessarily gave weight and credit to [Officer] Anderson's opinion testimony on impairment that both of the trial courts had rejected."

Furthermore, defendant contends that the Court of Appeals erred by referencing Officer Anderson's testimony that defendant "demonstrated six 'clues' indicating impairment" in light of the fact that neither trial court made a finding concerning the number of clues indicating impairment that Officer Anderson observed in their findings of fact. In defendant's view, the Court of Appeals "adopted without question [Officer] Anderson's testimony about the number and significance of [Horizontal Gaze Nystagmus] clues," erroneously "engaging in its own fact finding," and "rejecting the trial courts' unchallenged and amply supported factual findings as to whether [defendant] appeared appreciably impaired."

Finally, defendant contends that "[t]he trial courts' unchallenged and supported findings amply supported the courts' legal conclusion that [Officer] Anderson lacked probable cause to arrest [defendant] for driving while impaired." In support of this contention, defendant points to the trial courts' findings that defendant was steady on his feet, cooperative, respectful, able to listen, able to follow instructions and answer questions, and exhibited no signs of bad driving or slurred speech. According to defendant, his own "slightly imperfect, but passing performance on the walk-and-turn and one-leg-stand field sobriety tests," in conjunction with the clues indicating impairment that Officer Anderson had noted while administering the horizontal gaze nystagmus test, provided the only evidence of defendant's impairment. According to defendant, this "minimal evidence" of impairment, when compared to the "substantial evidence" contained in the record tending to show that defendant was not impaired, establishes that the State had failed to show that the challenged suppression orders were not supported by the trial courts' "competent and unchallenged factual findings."

Defendant notes that "[p]robable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty," quoting *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973). According to defendant, "mere alcohol consumption and minimal impairment" did not suffice to establish defendant's guilt of driving while impaired, quoting *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985).

According to defendant, the Court of Appeals' reliance upon its own opinion in *Townsend* was misplaced given "the limited role that precedent plays in a totality-of-the-circumstances test," citing *State v. Williams*, 366 N.C. 110, 118, 726 S.E.2d 161, 168, 201 (2012), and that *Townsend* involved an appeal from the denial, rather than the allowance, of a motion to suppress. On the contrary, defendant insists that other recent Court of Appeals' opinions are more factually and procedurally instructive for purposes of deciding this case, citing *State v. Overocker*, 236 N.C. App. 423, 762 S.E.2d 921 (2014); and then, *State v. Lindsey*, 249 N.C. App. 416, 791 S.E.2d 496 (2016); and then, *State v. Sewell*, 239 N.C. App. 132, 768 S.E.2d 650 (2015)). In defendant's view, *Overocker* should guide our analysis in this case given the "deference" that the Court of Appeals afforded to the trial court's suppression order by declining to "weigh the evidence and assess its credibility in a manner different from that of the trial court," quoting *Overocker*, 236 N.C. App. at 433–34, 762 S.E.2d at 928. As a result, since "the Court of Appeals abandoned the restraint required by the standard of review and demonstrated in its decisions in *Townsend*, *Overocker*, *Lindsey*, and *Sewell*," its decision in this case should be reversed.

In urging us to uphold the Court of Appeals' decision in this case, the State argues that the Court of Appeals' determination that the probable cause necessary to support defendant's arrest was present in this case did not rest solely upon the trial courts' findings that Officer Anderson detected an odor of alcohol emanating from defendant. Instead, the State contends that the Court of Appeals' decision rested upon findings of fact about

> [d]efendant driving the vehicle, a disturbance inside the vehicle as it approached the checkpoint, an odor of alcohol coming from the vehicle, an open box of alcoholic beverages in the vehicle, a moderate odor of alcohol coming from defendant's person, an admission by defendant of drinking three [ ] beers previously in the evening, defendant missing steps on the walk and turn test, defendant swaying and using his arms for balance on the one leg stand test and Officer Anderson observing multiple additional clues of impairment during the Horizontal Gaze Nystagmus test.

Although the State acknowledges that this Court has held that an odor of alcohol, "standing alone, is not evidence that [a driver] is under the influence of an intoxicant," citing *Atkins*, 277 N.C. at 185, 176 S.E.2d at 793, the State also notes that "the '[f]act that a motorist has been

drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient prima facie to show a violation of [N.C.]G.S. § 20–138.1,' " quoting *Atkins*, at 185, 176 S.E.2d at 794. In addition to the presence of a moderate odor of alcohol, the trial courts found the existence of multiple signs of impairment in this case, including the fact that defendant admitted to having consumed three beers, that defendant missed steps on the walk and turn test, that defendant swayed during the one leg stand test, and that defendant displayed multiple clues indicating impairment while performing the horizontal gaze nystagmus test.

The State contends that the Court of Appeals properly applied this Court's decisions in *Atkins* and *Hewitt* in conducting a *de novo* review of the trial courts' conclusions of law. In the State's view, the Court of Appeals' reliance upon *Townsend* was appropriate given that, "in this case[,] there existed almost all of the same facts and circumstances that the Court of Appeals found sufficient to support a finding of probable cause in *Townsend*," citing *Townsend*, 236 N.C. App. 456, 762 S.E.2d 898. On the other hand, the State asserts that the trial courts' reliance upon the Court of Appeals' unpublished decision in *Sewell* was "misplaced" given that opinion's unpublished status and the existence of material factual distinctions between the two cases, citing *Sewell*, 239 N.C. App. 132, 768 S.E.2d 650.

The State challenges the validity of defendant's assertion that the trial courts failed to find Officer Anderson's testimony credible. According to the State, the trial courts' findings of fact were "completely consistent with Officer Anderson's testimony and observations." For that reason, the State contends that the Court of Appeals correctly held that the trial courts' uncontested findings of fact failed to support their legal conclusion that Officer Anderson lacked probable cause to arrest defendant for impaired driving.

Finally, the State argues that the Court of Appeals applied the correct standard of review in overturning the trial courts' orders. Instead of utilizing a sufficiency of the evidence standard, the State asserts that the Court of Appeals "expressly cited the correct standard of review in its opinion." According to the State, the Court of Appeals properly cited *Atkins* and *Hewitt* in determining whether the trial courts' legal conclusions were both supported by the findings of fact and legally correct. The State argues that, in conducting *de novo* review, an appellate court must analyze a trial court's probable cause determination in light of the totality of the circumstances and that determining whether the trial court had applied the proper legal principles to the relevant facts would

be impossible if appellate courts were precluded from considering all of the circumstances upon which the trial court relied in coming to its legal conclusion. For that reason, the State contends that the Court of Appeals correctly analyzed the validity of the trial courts' probable cause determination using a *de novo* standard of review that considered the totality of the circumstances reflected in the trial courts' findings of fact. As a result, the State urges this Court to affirm the Court of Appeals' decision.

As we have stated on many occasions, this Court reviews a trial court's order granting or denying a defendant's suppression motion by determining "whether the trial court's 'underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law.' " *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (alterations in original) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also*, *e.g.*, *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994)). In accordance with the applicable standard of review, the trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994); *see also Cooke*, 306 N.C. at 134, 291 S.E.2d at 619; *State v. Saldierna*, 371 N.C. 407. 421, 817 S.E.2d 174, 183 (N.C. 2018), *cert. denied*, 139 S. Ct. 1279, 203 L. Ed. 2d 290 (2019). On the other hand, however, "[c]onclusions of law are reviewed de novo and are subject to full review," *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (citing *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted)), with an appellate court being allowed to "consider[ ] the matter anew and freely substitute[ ] its own judgment' for that of the lower tribunal." *Id.* at 168, 712 S.E.2d at 878 (quoting *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008)). After carefully reviewing the trial courts' suppression orders, we hold that the trial courts' factual findings fail to support their legal conclusion that Officer Anderson lacked probable cause to arrest defendant for driving while impaired in violation of N.C.G.S. § 20-138.1.

As the parties agree, the ultimate issue raised by defendant's suppression motion is whether Officer Anderson had probable cause to place defendant under arrest for driving while subject to an impairing substance in violation of N.C.G.S. § 20-38.1. Section 20-138.1 provides, in pertinent part, that "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance." N.C.G.S. § 20-138.1(a)(1). "[A] person is under

the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of the statute, when he has drunk a sufficient quantity of intoxicating beverages or taken a sufficient amount of narcotic drugs to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of those faculties." *State v. Carroll*, 226 N.C. 237, 241, 37 S.E.2d 688, 691 (1946). According to well-established federal and state law, probable cause is defined as "those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985) (citing, first, *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); then, *State v. Zuniga*, 312 N.C. 251, 322 S.E.2d 140 (1984)). "Whether probable cause exists to justify an arrest depends on the 'totality of the circumstances' present in each case." *State v. Sanders*, 327 N.C. 319, 339, 395 S.E.2d 412, 425 (1990) (citations omitted). Thus, Officer Anderson had probable cause to arrest defendant for impaired driving in the event that a prudent officer in his position would reasonably have believed defendant's mental or physical faculties to have been appreciably impaired as the result of the consumption of an intoxicant.

"The fact that a motorist has been drinking, when considered in connection with faulty driving such as following an irregular course on the highway or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show [the offense of impaired driving]." *Hewitt*, 263 N.C. at 764, 140 S.E.2d at 244 (citing *State v. Gurley*, 257 N.C. 270, 125 S.E.2d 445 (1962)). In *Atkins*, for example, we held that evidence tending to show that a broken pint container had been found in the driver's vehicle, that an odor of alcohol could be detected on both the driver's breath and in his vehicle, and that the driver had failed to take any action to avoid a collision with another vehicle sufficed to support a conclusion that plaintiff's faculties had been appreciably impaired by the consumption of an alcoholic beverage. *Atkins*, 365 N.C. at 185, 176 S.E.2d at 794; *see State v. Rich*, 351 N.C. 386, 399, 527 S.E.2d 299, 306 (2000). The Court of Appeals has reached similar results in numerous decisions, including *Townsend*, 236 N.C. App. at 465, 762 S.E.2d at 905 (upholding the denial of a defendant's suppression motion based upon the fact that the defendant had bloodshot eyes, emitted an odor of alcohol, exhibited clues indicating intoxication on three field sobriety tests, and produced positive results on two alco-sensor tests); *Steinkrause v. Tatum*, 201 N.C. App. 289, 295, 689 S.E.2d 379, 383 (2009), (holding that probable cause to believe that a driver was guilty of impaired

driving existed in light of fact that an odor of alcohol was detected on the driver's person and the driver was involved in a one-vehicle accident), *aff'd per curiam*, 364 N.C. 419, 700 S.E.2d 222 (2010); *State v. Tappe*, 139 N.C. App. 33, 38, 533 S.E.2d 262, 265 (2000) (holding that the probable cause needed to support the defendant's arrest existed when an officer detected a strong odor of alcohol on the defendant's breath, when the defendant's eyes were glassy and watery, and when the vehicle being operated by the defendant crossed the center line of the street or highway upon which it was travelling); and *Rock v. Hiatt*, 103 N.C. App. 578, 584–85, 406 S.E.2d 638, 642–43 (1991) (holding that an officer had reasonable grounds to believe that an individual was guilty of impaired driving based upon the fact that the officer observed the driver's vehicle leave a hotel parking lot at an excessive rate of speed at the approximate time at which the hotel's lounge closed, detected a strong odor of an intoxicating beverage on the driver's breath after pulling him over, and noticed that the driver's speech was slurred, his eyes were glassy, and he was swaying unsteadily on his feet). As a result, Officer Anderson would have had probable cause to place defendant under arrest for driving while impaired in the event that, based upon an analysis of the totality of the circumstances, he reasonably believed that defendant had consumed alcoholic beverages and that defendant had driven in a faulty manner or provided other indicia of impairment.

In his preliminary order, Judge Crumpton found as fact that

> 1. Defendant was driving a motor vehicle in Wilkesboro on April 1, 2014, when he entered a checking station being worked by Wilkesboro Police Department.
>
> 2. [Officer] Anderson approached the driver after he entered the checkpoint.
>
> 3. [Officer] Anderson did not observe any unlawful or bad driving by the defendant.
>
> 4. [Officer] Anderson asked to see [d]efendant's driver's license and [d]efendant provided the license to him.
>
> 5. [Officer] Anderson noticed [d]efendant's eyes appeared glassy.
>
> 6. [Officer] Anderson noticed an open container of alcohol in the passenger area of the motor vehicle.
>
> 7. [Officer] Anderson asked [d]efendant to exit the vehicle, which [d]efendant did.

> 8. [Officer] Anderson inquired if [d]efendant had anything to drink, and [d]efendant stated that he had drunk three beers earlier in the evening.
>
> 9. [Officer] Anderson administered the walk-and-turn field sobriety test.
>
> 10. Defendant missed one step on the way down and one step on the way back while performing the test.
>
> 11. [Officer] Anderson administered the one-leg stand field sobriety test.
>
> 12. Defendant swayed and used his arms for balance during the performance of the test.
>
> 13. [Officer] Anderson did not observe any other indicators of impairment during his encounter with [d]efendant, including any evidence from [d]efendant's speech.
>
> 14. [Officer] Anderson formed the opinion that [d]efendant has consumed a sufficient amount of impairing substance so as to appreciably impair [d]efendant's physical and/or mental faculties.
>
> 15. [Officer] Anderson formed the opinion that the impairing substance was alcohol.
>
> 16. [Officer] Anderson placed [d]efendant under arrest.

After making many of the same factual findings, Judge Duncan made a number of additional findings on appeal that were included in Judge Crumpton's final order, including the fact that Officer Anderson observed a "disturbance" between the defendant and other occupants of the vehicle as he approached it; that, although Officer Anderson noticed an open box of alcoholic beverages in the passenger-side floorboard, he did not observe any open containers of alcoholic beverages in the vehicle; that Officer Anderson observed an odor of alcohol emanating from the vehicle and a moderate odor of alcohol emanating from defendant's person; that defendant's eyes appeared to be red; and that Officer Anderson found clues indicating impairment while administering the horizontal gaze nystagmus test.

Although the findings of fact made in the trial courts' orders have adequate evidentiary support, they do not support the trial courts' conclusions that Officer Anderson lacked the probable cause needed to

justify defendant's arrest. As the Court of Appeals correctly noted, the trial courts' findings reflect that "Officer Anderson was presented with the odor of alcohol, defendant's own admission of drinking, and multiple indicators on field sobriety tests demonstrating impairment." *Parisi*, 817 S.E.2d at 230–31. In view of the unchallenged findings that defendant had been driving, that defendant admitted having consumed three beers, that defendant's eyes were red and glassy, that a moderate odor of alcohol emanated from defendant's person, and that defendant exhibited multiple indicia of impairment while performing various sobriety tests, we have no hesitation in concluding that the Court of Appeals correctly determined that the trial courts' findings established that Officer Anderson had probable cause to arrest defendant for impaired driving. *See State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971) (citing 5 Am. Jur.2d Arrest § 44 (1962)). As a result, we hold that the Court of Appeals did not err by reversing the trial courts' suppression orders.

In seeking to persuade us to reach a different result, defendant argues that the Court of Appeals' decision to reverse the trial courts' suppression orders relied upon the erroneous use of a "non-deferential sufficiency test," with this contention resting upon the majority's statement, in the introductory portion of its opinion, that, "[w]here the State presented sufficient evidence that a law enforcement officer had probable cause to stop defendant, the trial court erred in granting defendant's motion to suppress the stop." *Parisi*, 817 S.E.2d at 229. Although the language upon which defendant relies in support of this contention could have been more artfully drafted, we do not believe that it enunciates the standard of review that the Court of Appeals utilized in reviewing the State's challenge to the trial courts' suppression orders. On the contrary, the Court Appeals correctly stated the applicable standard of review at the very beginning, *Parisi*, 817 S.E.2d at 230 (stating that "[o]ur review of a trial court's denial of a motion to suppress is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law' " (quoting *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619 (1982), and that " [t]he trial court's conclusions of law . . . are fully reviewable on appeal," (quoting *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000))), and in the conclusion of its opinion, *Parisi*, 817 S.E.2d at 231 (stating that "it seems clear that the facts, as supported by the evidence and as found by the district and superior courts, supported a conclusion that Officer Anderson had probable cause to stop and cite defendant for driving while impaired"), and

analyzed the relevant factual findings in accordance with the applicable standard of review. As a result, we are unable to agree with defendant that the Court of Appeals failed to apply the applicable statute of review.

In addition, defendant argues that the Court of Appeals misapplied the applicable standard of review as well. In defendant's view, the trial courts "implicitly found" that defendant was not appreciably impaired and that this "unchallenged and supported factual determination" should be deemed binding for purposes of appellate review, citing *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. In essence, defendant argues that, by determining that Officer Anderson lacked probable cause to place defendant under arrest, the trial courts implicitly rejected Officer Anderson's opinion that defendant was appreciably impaired; that, by making this determination, the trial courts effectively found as a fact that Officer Anderson lacked probable cause to place defendant under arrest; and that the Court of Appeals erred by failing to defer to this implicit finding given that it had the requisite evidentiary support.

As we understand it, defendant's argument rests upon the assumption that the trial courts implicitly found that defendant's mental and physical faculties were not appreciably impaired and a contention that this implicit finding is binding upon the appellate courts in the event that it has sufficient evidentiary support. To be sure, this Court has held that "only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling," *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674 (citing, first *State v. Salinas*, 366 N.C. 119, 123–24, 729 S.E.2d 63, 66 (2012); then, *State v. Ladd*, 308 N.C. 272, 278, 302 S.E.2d 164, 168 (1983)), and that, "[w]hen there is no conflict in the evidence, the trial court's findings can be inferred from its decision," *id.* at 312, 776 S.E.2d at 674 (citing *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996)). However, this principle does not justify a decision in defendant's favor in the present instance.

First, and perhaps most importantly, the record evidence in this case was not, at least in our opinion, in conflict in the manner contemplated by the Court in the decisions cited in the preceding paragraph. Instead, as we have already noted, the evidence contained in the present record, which consisted of testimony from Officer Anderson concerning his observations of defendant's condition and his performance on certain field sobriety tests, showed that defendant had a moderate odor of alcohol about his person, that defendant's eyes were red and glassy, that defendant had admitted having consumed three beers earlier that evening, and that defendant exhibited a number of clues indicating

impairment while performing the walk-and-turn test, one-leg stand test, and the horizontal gaze nystagmus test.[4] As we have already noted, these facts, all of which are reflected in the trial courts' findings, establish, as a matter of law, that defendant had consumed alcohol on the evening in question and that his faculties were appreciably impaired, albeit not completely obliterated, on the evening in question. As a result, rather than having made an implicit factual finding that defendant was not appreciably impaired, the trial courts made explicit findings of fact establishing that the appreciable impairment needed to support defendant's arrest in this case did, in fact, exist before incorrectly concluding as a matter of law that no probable cause for defendant's arrest existed.

Secondly, this Court has clearly stated that "[f]indings of fact are statements of what happened in space and time," *State ex rel. Utilities Comm'n v. Eddleman*, 320 N.C. 344, 351, 358 S.E.2d 339, 346 (1987), while conclusions of law "state[ ] the legal basis upon which [a] defendant's liability may be predicated under the applicable statutes," *Coble v. Coble*, 300 N.C. 708, 713, 268 S.E.2d 185, 189 (1980) (holding that the trial court's "finding of fact" that the plaintiff needed financial assistance for the support of her children and that the defendant was capable of providing such assistance was, in actuality, a conclusion of law). *See also State v. McFarland*, 234 N.C. App. 274, 284, 758 S.E.2d 457, 465 (2014) (holding that "a conclusion of law requires 'the exercise of judgment' in making a determination, 'or the application of legal principles' to the facts found") (quoting *Sheffer v. Rardin*, 208 N.C. App. 620, 624, 704 S.E.2d 32, 35 (2010)); *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (noting that "a determination which requires the exercise of judgment or the application of legal principles is more appropriately a conclusion of law"). Although the issue of whether an officer had probable cause to support a defendant's arrest for impaired driving exists certainly contains a factual component, the proper resolution of that issue inherently "requires the exercise of judgment or the application of legal principles," *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675, and constitutes a conclusion of law subject to *de novo* review rather than a finding of fact which cannot be disturbed on appeal without a determination that none of the evidence contained in the record supports that decision.

According to defendant, we are precluded from reaching exactly this result by our decision in *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674.

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4. Interestingly, the trial courts, in finding that Officer Anderson had not "observe[d] any other indicators of impairment" aside from these sobriety test results, essentially acknowledged that these test results constituted "indications of impairment."

Defendant's argument, however, rests upon a misreading of that decision. To be sure, we held in *Bartlett* that a material evidentiary conflict "must be resolved by explicit factual findings that show the basis for the trial court's ruling." *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. However, the material evidentiary conflict that existed in *Bartlett*, which involved differing expert opinions concerning the extent, if any, to which a defendant's performance on certain field sobriety tests indicated impairment, simply does not exist in this case. *Id.* at 312, 776 S.E.2d at 674. Although *Bartlett* does make reference to "a fact that is essential to the probable cause determination—defendant's apparent degree of impairment," *id.* at 312, 776 S.E.2d at 674, the language in question refers to necessity for the trial court to resolve the factual conflict that existed between the testimony of the two witnesses rather than to a determination that the extent to which probable cause exists to support the arrest of a particular person is a factual, rather than a legal, question. As a result, while the actual observations made by arresting officers and the extent to which a person suspected of driving while impaired exhibits indicia of impairment involve questions of fact that must be resolved by findings that are subject to a sufficiency of the evidence review on appeal, the extent, if any, to which these factual determinations do or do not support a finding that an officer had the probable cause needed to make a particular arrest is a conclusion of law subject to *de novo* review.

Thus, for the reasons set forth above, we hold that the unchallenged facts found by the trial courts, including those relating to defendant's red and glassy eyes, the presence of a moderate odor of alcohol emanating from defendant's person, defendant's admission to having consumed three beers prior to driving, and defendant's performance on the field sobriety tests that were administered to him by Officer Anderson suffice, as a matter of law, to support Officer Anderson's decision to place defendant under arrest for impaired driving. As a result, we affirm the decision of the Court of Appeals.

AFFIRMED.

STATE v. TERRELL

[372 N.C. 657 (2019)]

STATE OF NORTH CAROLINA
v.
JAMES HOWARD TERRELL, JR.

No. 55A18

Filed 16 August 2019

Search and Seizure—thumb drive—multiple files—one opened—expectation of privacy in remaining files

A detective's search of a thumb drive was not authorized under the private-search doctrine in a prosecution for multiple counts of sexual exploitation of a minor. Defendant's girlfriend found an image of her granddaughter on defendant's thumb drive while looking for something else. She took the thumb drive to the sheriff's department, and a detective, while looking for the image the grandmother had reported, found other images that he believed might be child pornography. He then applied for a search warrant for the thumb drive and other property of defendant. The mere opening of a thumb drive and the viewing of one file does not automatically remove Fourth Amendment protections from the entirety of the contents. Digital storage devices organize information essentially by means of containers within containers. The detective here did not have a virtual certainty that nothing else of significance was in the thumb drive and that its contents would not tell him anything more that he had already been told.

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

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, 810 S.E.2d 719 (N.C. Ct. App. 2018), reversing in part an order on defendant's motion to suppress and remanding for additional proceedings following an appeal from judgments entered on 17 November 2016 by Judge Beecher R. Gray in Superior Court, Onslow County. On 20 September 2018, the Supreme Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court on 5 March 2019.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, *Appellate Defender*, *by Michele A. Goldman*, *Assistant Appellate Defender*, *for defendant-appellee.*

EARLS, Justice.

Here we are asked to decide whether a law enforcement officer's warrantless search of defendant's USB drive, following a prior search of the USB drive by a private individual, was permissible under the "private-search doctrine." The Court of Appeals concluded that the warrantless search violated defendant's Fourth Amendment rights and remanded to the trial court for a determination of whether there was probable cause for the issuance of a search warrant without the evidence obtained from the unlawful search. *State v. Terrell*, 810 S.E.2d 719 (N.C. Ct. App. 2018). We affirm.

Background

In February 2013, defendant, James H. Terrell, Jr., returned from overseas work as a contractor in the Philippines and resumed living with his long-time girlfriend, Jessica Jones, in her home.[1] Defendant and Ms. Jones had been in a relationship for over ten years and had two children together. Ms. Jones also had an older daughter from an earlier relationship, Cindy, who had a daughter, Sandy.

On 13 January 2014, while defendant was at work, Ms. Jones began searching for a photograph of defendant's housekeeper in the Philippines in order "to put a face to the person[ ]" of whom defendant had spoken. Ms. Jones located and opened defendant's briefcase, in which she found paperwork and three USB "thumb drives," one of which was purple. After plugging the purple USB thumb drive (the thumb drive) into a shared computer, Ms. Jones "opened it" and began clicking through "folders and sub-folders." Ms. Jones later stated at the suppression hearing that she observed "images of adult women and . . . children" that "were not inappropriate," images of the housekeeper in the Philippines, and images of a "childhood friend" of defendant's. Ms. Jones testified: "I honestly do not recall any images of [defendant] and I. And in those pictures there are no images of him. There are just pictures of women and the young ladies I just spoke of." According to Ms. Jones, "the pictures were all in one folder and then the other folders were like movies because [defendant] likes military movies," and she did not "think the

1. Like the Court of Appeals, we use pseudonyms in reference to Ms. Jones, Cindy, and Sandy.

folders had a title. It was just a thumb -- it's the title of the thumbdrive, purple rain." As Ms. Jones "got past" the images of defendant's childhood friend, she saw an image of her granddaughter, Sandy, who was nine years old at the time, sleeping in a bed "and . . . exposed from the waist up." Upon seeing the image of Sandy, Ms. Jones became upset and ceased her search of the thumb drive.

That evening, after Ms. Jones had spoken with her daughter, Cindy, and "let[ ] her know what [she] had discovered," together they took the thumb drive to the Onslow County Sheriff's Department. Ms. Jones and Cindy met with Detective Lucinda Hernandez, reported what Ms. Jones had discovered on the thumb drive, and left the thumb drive with Detective Hernandez. Detective Hernandez "did not view the purple flash drive," but "accepted [it] and logged it into the Crime Scene Investigation (CSI) Unit of the Onslow County Sheriff's Department."

On the following day, Ms. Jones and Cindy met with Detective Eric Bailey at the Sheriff's Department and explained what they had discovered on the thumb drive. After meeting with Ms. Jones and Cindy, Detective Bailey "went down to the CSI department . . . to verify the information." Detective Bailey, with the assistance of a member of the CSI Unit, plugged in the thumb drive and went "through checking it to try to find the image that [Ms. Jones] stated that was on there"—"a nude or partially nude photograph of her granddaughter." Detective Bailey stated: "As I was scrolling through, of course, there was a lot of photos in there so I'm clicking trying to find exactly where this image is located at. I observed several -- multiple images of adult females and also [defendant] together clothed, nude, partially nude." As he was trying to locate the image of Sandy, Detective Bailey discovered what he believed might be child pornography; specifically, he "observed other young females, prepubescent females, unclothed, also some that were clothed." Eventually, Detective Bailey "[s]tarted to observe other photographs of women overseas, and then finally happened upon the photograph with the granddaughter." At that point, Detective Bailey ceased his search of the thumb drive and left it with the CSI Unit.

Detective Bailey applied for a search warrant on 5 February 2014 to search the thumb drive and other property of defendant "for contraband images of child pornography and evidence of additional victims and crimes committed in this case." In his affidavit attached to this initial search warrant application, Bailey did not state that he had already searched the thumb drive or include any information he obtained from that search. Bailey instead relied on information from Ms. Jones, including her allegation that she had discovered the image of Sandy on

defendant's thumb drive, as well as allegations that Ms. Jones's other daughter had at some point previously told Ms. Jones that defendant "touched me down there" and that later a floppy disk containing child pornography had been discovered in defendant's truck. A magistrate issued the warrant but, according to Bailey, he had to apply for another search warrant because he "received a call from the [State Bureau of Investigation] stating that they wanted additional information on the search warrant." Accordingly, Detective Bailey applied for another search warrant on 5 May 2014, which was issued by a magistrate on the same day. In the affidavit supporting this second warrant application, Bailey included information from his search of the thumb drive, stating that he saw "several partially nude photographs of" Sandy and "severally fully nude photographs of an unknown child standing beside and [sic] adult female in various sexual positions."

Pursuant to the second warrant, an SBI agent conducted a thorough "forensic examination" of the thumb drive, which was titled "purple rain" and contained various folders and subfolders. The SBI agent discovered the image of Sandy in a folder named "red bone" and he uncovered twelve additional incriminating images located in a different folder named "Cabaniia." Ten of those twelve images had been deleted and archived and would not have been ordinarily viewable without a "forensic tool." Defendant was indicted for four counts of second-degree sexual exploitation of a minor, one count of possessing a photographic image from peeping, and twelve counts of third-degree sexual exploitation of a minor.

Defendant filed a pretrial motion to suppress "any and all evidence obtained as a result of" Detective Bailey's search of his thumb drive, arguing that Bailey "conducted a warrantless search of property in which the Defendant had a ligitimate [sic] expectation of privacy," that the 5 May 2014 search warrant was based on evidence unlawfully obtained from that search, and that in the absence of that tainted evidence the search warrant was unsupported by probable cause. At the suppression hearing, after receiving testimony from Ms. Jones and Detective Bailey and considering the arguments of the parties, the trial court orally denied defendant's motion. In a written order dated on 29 November 2016, the trial court found, in pertinent part:

> 2. . . . [Ms. Jones's] stated purpose for looking in defendant's briefcase was to put a face to someone that defendant had talked about. Ms. [Jones's] entry into defendant's briefcase and the contents therein were

solely at her own volition and not connected with or at the suggestion of any law enforcement person or organization.

3. [Ms. Jones] inserted the purple flash drive into a shared Apple computer and discovered, among other visual representations, a picture of her granddaughter, [Sandy], who appeared to be asleep and who was nude from the waist up with breasts displayed. After consulting with her daughter, the mother of [Sandy], Ms. [Jones] and her daughter, on January 13, 2014, took the purple flash drive to the Onslow County Sheriff's Department.

. . . .

5. On January 14, 2014, [Ms. Jones] again appeared at the Onslow County Sheriff's Department to meet with Detective Eric Bailey concerning the purple flash drive and the contents that she had seen on that flash drive. Detective Bailey discussed with Ms. [Jones] the visual representations she had discovered on the purple flash drive.

6. Following his discussion with [Ms. Jones], Detective Bailey went to the CSI Unit to confirm on the purple flash drive what he had been told by [Ms. Jones]. . . . The CSI technician placed the purple flash drive into CSI's computer and selected the folder that had been identified by [Ms. Jones] as containing the picture of her granddaughter [Sandy]. This viewing in the CSI Unit confirmed what [Ms. Jones] had told Detective Bailey that she had discovered on the flash drive. In addition to the picture of [Sandy] Detective Bailey saw photographs of other nude or partially nude prepubescent females posing in sexual positions.

7. The images observed by Detective Bailey corroborated the information provided to him by [Ms. Jones]. Based upon that corroboration and [Ms. Jones's] statements, Detective Bailey then obtained a search warrant in order to conduct a complete and thorough forensic examination of the purple flash drive.

8. Detective Bailey's initial search and examination of the purple flash drive in the CSI Unit did not exceed

> the scope of the private, prior search done by [Ms. Jones], but could have been more thorough.

Based on these findings, the trial court concluded, in relevant part:

> 2. [Ms. Jones's] viewing of the purple flash drive did not violate the Fourth Amendment because she was a private party not acting under the authority of the State of North Carolina. Her viewing of the purple flash drive effectively frustrated Defendant's expectation of privacy as to the contents of the purple flash drive, and thus the later viewing by Detective Bailey at her request and upon presentation of the flash drive to [law enforcement] did not violate Defendant's rights under the Fourth Amendment.
>
> 3. None of the Defendant's rights under the Constitution or laws of the United States of America or of the Constitution or laws of the State of North Carolina were violated during the seizure and search of the purple flash drive in this case.

Accordingly, the trial court denied defendant's motion to suppress.

At trial, at the close of all evidence, the State elected not to proceed on three charges of second-degree sexual exploitation of a minor and dismissed those counts. The jury convicted defendant of the remaining fourteen counts and the trial court sentenced him to twelve consecutive terms of five to fifteen months each, plus a concurrent term of twenty to eighty-four months for the second-degree sexual exploitation charge. The court imposed a suspended sentence for the secret peeping conviction. Defendant appealed the trial court's denial of his motion to suppress.

At the Court of Appeals, defendant first argued that the trial court erred in concluding that Jones's viewing of the thumb drive effectively frustrated his expectation of privacy in the device's entire contents, thereby permitting Detective Bailey to subsequently conduct a warrantless search of all the thumb drive's digital data. *State v. Terrell*, 810 S.E.2d at 727. The Court of Appeals majority agreed, noting that North Carolina courts had not previously considered the "private-search doctrine" in the context of electronic storage devices. *Id.* at 728; *see also id.* at 727 (explaining that under the "private-search doctrine," "[o]nce an individual's privacy interest in particular information has been frustrated by a private actor, who then reveals that information to police,

the police may use that information, even if obtained without a warrant" (citing *United States v. Jacobsen*, 466 U.S. 109, 117 (1984))).

The majority distinguished the Court of Appeals' prior decision in *State v. Robinson*, in which the court concluded that police could permissibly view an entire videotape after a private searcher viewed only portions of that videotape because "the police do not exceed the scope of a prior private search when they examine the same materials . . . [ ] more thoroughly than did the private parties." *Id.* at 728 (first alteration in original) (quoting *State v. Robinson*, 187 N.C. App. 795, 798, 653 S.E.2d 889, 892 (2007)). The majority rejected the State's contention that the thumb drive was a similar "container" that, once opened, frustrated any expectation of privacy in the device's entire contents. *Id.* at 728–29. According to the majority, "electronic storage devices are unlike videotapes, and a search of digital data on a thumb drive is unlike viewing one continuous stream of video footage on a videotape. . . . One thumb drive may store thousands of videos, and it may store vastly more and different types of private information than one videotape." *Id.* at 728. In reaching this conclusion, the majority noted that it was "guided by the substantial privacy concerns implicated in searches of digital data that the United States Supreme Court expressed in *Riley v. California*." *Id.* at 729 (citing *Riley*, 134 S. Ct. 2473, 2485 (2014)).

Turning to the search at issue, the majority stated that under the private-search doctrine as set forth in *United States v. Jacobsen*, "a follow-up police search must be tested by the degree to which that officer had 'virtual certainty' the privately searched item contained 'nothing else of significance' other than the now non-private information, and that his inspection of that item 'would not tell him anything more than' what the private searcher already told him." *Id.* at 731 (quoting *Jacobsen*, 466 U.S. at 119). The majority concluded that while "the trial court should have made detailed findings on the exact scope of both Jones's and Detective Bailey's searches of the thumb drive's contents," the "findings on the precise scope of both searches are immaterial in this particular case, in light of the other findings establishing that *Jacobsen*'s virtual-certainty requirement was not satisfied and, therefore, Detective Bailey's search was unauthorized under the private-search doctrine." *Id.* at 731–32 (citation omitted). Accordingly, the majority held that "Detective Bailey's warrantless thumb drive search [was not] authorized under the private-search doctrine, nor was he able to use the evidence he obtained during that search to support his warrant application." *Id.* at 734.

Next, defendant argued that without the information Detective Bailey acquired from the warrantless search, the warrant application

failed to establish probable cause. *Id.* at 734. The majority noted that "because the trial court determined that the evidence acquired by Detective Bailey's warrantless search was lawful under the private-search doctrine, the trial court never determined whether striking that information from his application would still supply probable cause to issue the search warrant." *Id.* at 735. The majority determined that under *State v. McKinney*, "remand to the trial court [is] more appropriate than unilateral appellate court determination of the warrant's validity[.]" *Id.* at 735 (alterations in original) (quoting *McKinney*, 361 N.C. 53, 64, 637 S.E.2d 868, 875 (2006)). Accordingly, the majority reversed the trial court's denial of defendant's motion to suppress and remanded "to the trial court to determine, in the first instance, whether probable cause existed to issue the search warrant after excising from Detective Bailey's warrant application the tainted evidence arising from his unlawful search." *Id.* at 735.

In a separate opinion, one member of the panel dissented in part. *Id.* at 736 (Stroud, J., concurring in part and dissenting in part). The dissenting judge "generally agree[d] with the majority's analysis of the private search doctrine and determination that a thumb drive is not a single container" but opined that "the majority's analysis overlooks the fact that Detective Bailey attempted to limit his initial search to find the image reported by Ms. Jones." *Id.* at 738. According to the dissenting judge, "Detective Bailey was 'substantially certain' the drive would contain the 'granddaughter image,' " and he "sought to replicate Ms. Jones's private search but since she did not understand the organization of the drive, he could not go directly to the particular image he was seeking." *Id.* at 739–40. The dissenting judge would have found no error in the convictions stemming from "[t]he granddaughter image and two seen photos Detective Bailey found while searching for the granddaughter image" because they "fall within the scope of the private search doctrine, and they too were properly not suppressed by the trial court." *Id.* at 740. Additionally, the dissenting judge determined that "the granddaughter image and the two seen images would support probable cause for the other ten deleted images" but "concur[red] with the majority to remand to the trial court to determine probable cause for issuance of the search warrant for the ten deleted images." *Id.* at 740.

The State appealed on the basis of the dissent pursuant to N.C.G.S. § 7A-30(2). The State also filed a petition for discretionary review of additional issues on 13 March 2018, which we allowed in part on 20 September 2018.

Standard of Review

We review a trial court's ruling on a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994)). We review the trial court's conclusions of law de novo. *Id.* at 168, 712 S.E.2d at 878 (citing *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993), *cert. denied*, 512 U.S. 1254 (1994), *convictions vacated and case dismissed with prejudice*, *State v. McCollum*, No. 83CRS15506-07, 2014 WL 4345428 (N.C. Super. Ct. Robeson County, Sept. 2, 2014)). We review decisions of the Court of Appeals for errors of law. *State v. Romano*, 369 N.C. 678, 685, 800 S.E.2d 644, 649 (2017) (citing *Brooks*, 337 N.C. at 149, 446 S.E.2d at 590).

Analysis

The State argues that the Court of Appeals, in concluding that Detective Bailey's search of the thumb drive constituted an unreasonable search under the Fourth Amendment, erred by applying an unnecessarily restrictive rule that is inconsistent with the private-search doctrine as set forth in *Jacobsen*. We disagree.

"The United States and North Carolina Constitutions both protect against unreasonable searches and seizures of private property." *State v. Lowe*, 369 N.C. 360, 364, 794 S.E.2d 282, 285 (2016) (first citing U.S. Const. amend. IV; and then citing N.C. Const. art. I, § 20). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Jacobsen*, 466 U.S. at 113. Because the Fourth Amendment "proscrib[es] only governmental action[,] it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' " *Id.* (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)). Searches conducted by governmental officials in the absence of a judicial warrant "are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule." *United States v. Karo*, 468 U.S. 705, 717 (1984) (citations omitted). When seeking "to admit evidence discovered by way of a warrantless search in a criminal prosecution," the State bears the burden of establishing that the search falls under an exception to the warrant requirement. *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982) (first citing *Chimel v. California*, 395 U.S. 752, 762 (1969); and then citing *United States v. Jeffers*, 342

U.S. 48, 51 (1951)). The Supreme Court set forth one such exception in *Jacobsen* involving circumstances in which a warrantless search by government officials may be permissible when conducted in reliance upon an antecedent search by a private individual.

In *Jacobsen* employees at an airport FedEx office opened a damaged package—"an ordinary cardboard box wrapped in brown paper"—to examine the package's contents in compliance with a company policy concerning insurance claims. 466 U.S. at 111. Inside the box employees found "five or six pieces of crumpled newspaper" covering a tube, which was "about 10 inches long" and made of duct tape. *Id.* After cutting open the tube, the employees discovered "a series of four zip-lock plastic bags, the outermost enclosing the other three and the innermost containing about six and a half ounces of white powder." *Id.* Upon finding the white powder, the employees notified the Drug Enforcement Administration (DEA), replaced the plastic bags in the tube, and placed the tube and newspapers back into the box. *Id.* The first DEA agent who arrived "saw that one end of the tube had been slit open; he removed the four plastic bags from the tube and saw the white powder." *Id.* He proceeded to open the series of plastic bags and, using a knife blade, "removed a trace of the white substance," which "[a] field test made on the spot identified . . . as cocaine." *Id.* at 111–12. DEA agents then obtained a warrant to search the location to which the package was addressed and ultimately arrested the recipients. *Id.* at 112. The Supreme Court granted certiorari to address the recipients' arguments "that the warrant was the product of an illegal search and seizure." *Id.* at 112–13.

The Court noted that "[t]he reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred." *Id.* at 115. Central to that inquiry in *Jacobsen*, the Court noted, were "[t]he initial invasions of respondents' package," which "did not violate the Fourth Amendment because of their private character." *Id.* The Court stated, "The additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search." *Id.* According to the Court, "[t]his standard follows from the analysis applicable when private parties reveal other kinds of private information to the authorities," specifically—"[o]nce frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information." *Id.* at 117. Rather, "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated," in which case "the authorities have

not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant." *Id.* at 117–18.

In *Jacobsen*, the federal agent who first arrived at the scene knew when he saw the package that "it contained nothing of significance" other than a tube with "plastic bags and, ultimately, white powder." *Id.* at 118. According to the Court:

> [T]here was a virtual certainty that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell him anything more than he already had been told. . . . Respondents could have no privacy interest in the contents of the package, since it remained unsealed and since the Federal Express employees had just examined the package and had, of their own accord, invited the federal agent to their offices for the express purpose of viewing its contents.

Id. at 119. "Similarly," the Court continued, "the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search. It infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment." *Id.* at 120 (footnote omitted). Notably, in responding to the concurring Justice's suggestion that the Court was "sanction[ing] warrantless searches of closed or covered containers or packages whenever probable cause exists as a result of a prior private search," *id.* at 129 (White, J., concurring), the Court stressed that the visibility of the white powder was "far less significant than the facts that the container could no longer support any expectation of privacy, and that it was virtually certain that it contained nothing but contraband. . . . A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant." *Id.* at 120 n.17 (majority opinion) (citations omitted).

Here we consider a private search made of a container of a different sort, though one equally protected by the Fourth Amendment. *See United States v. Ross*, 456 U.S. 798, 822–23 (1982) ("[T]he Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." (citing *Robbins v. California*, 453 U.S. 420, 427 (1981) (plurality opinion))). Indeed, the State does not dispute that defendant's thumb drive and its digital contents were his "effects" and that he possessed a legitimate expectation of privacy

in these effects prior to the search by the grandmother. At issue here is the extent of defendant's expectation of privacy in those effects following that search, specifically—whether the thumb drive, or any part of it, could continue to support a legitimate expectation of privacy.

The State contends that the nature of the thumb drive as a container is such that Ms. Jones's mere "opening" of the thumb drive frustrated defendant's reasonable expectation of privacy in the entirety of its contents, thereby permitting Detective Bailey to conduct a follow-up search of any information stored on the device. According to the State, this position is consistent with a "broader view" of the private search doctrine's permissible scope, referred to by the State as the "container approach." *See*, *e.g.*, *United States v. Runyan*, 275 F.3d 449, 463–65 (5th Cir. 2001) (holding that while police could not permissibly search the defendant's floppy disks, CDs, and ZIP disks previously unopened by private searchers without having substantial certainty of the disks' contents, the private searchers' opening of other disks compromised the defendant's expectation of privacy in those closed containers and police were free to examine their contents, including any files not previously viewed by private searchers); *see also Rann v. Atchison*, 689 F.3d 832, 836–38 (7th Cir. 2012) (adopting *Runyan*'s rationale "that a search of any material on a computer disk is valid if the private party who conducted the initial search had viewed at least one file on the disk" and if police are "substantially certain" that the disk contains contraband (citing *Runyan*, 275 F.3d at 463–65)), *cert. denied*, 568 U.S. 1030 (2012). *But see United States v. Lichtenberger*, 786 F.3d 478, 480, 488 (6th Cir. 2015) (holding that where the private searcher had "clicked on different folders" in the defendant's laptop and was unsure which files she had opened, the follow-up search was not permissible because the officer could not "proceed with 'virtual certainty' that the 'inspection of the [laptop] and its contents would not tell [him] anything more than he already had been told' " (alterations in original) (quoting *Jacobsen*, 466 U.S. at 119)). *See also United States v. Sparks*, 806 F.3d 1323, 1335–36 (11th Cir. 2015) (holding that where a private searcher viewed all of the images and one video contained in an album on the defendant's cell phone, the officer could subsequently view those images and that video, but the officer exceeded the scope of the prior search by viewing a second video in that album that had not previously been watched), *cert. denied*, 136 S. Ct. 2009, *and cert. denied*, 137 S. Ct. 34 (2016); *cf. United States v. Ackerman*, 831 F.3d 1292, 1305–06 (10th Cir. 2016) (holding that where AOL's "hash value matching" screening algorithm identified one of the attachments to the defendant's e-mail as a match for child pornography but AOL never opened the e-mail itself, a government analyst exceeded

the private search by opening the e-mail and viewing the attachments because doing so "could have revealed virtually any kind of noncontraband information to the prying eye"). We conclude that the categorical approach proffered by the State is inconsistent with *Jacobsen*, which contemplates that a follow-up search will "enable[ ] [an officer] to learn nothing that had not previously been learned during the private search," 466 U.S. at 120, and which requires that a "container . . . no longer support any expectation of privacy," *id.* at 120 n.17 (emphasis added).

We cannot agree that the mere opening of a thumb drive and the viewing of as little as one file automatically renders the entirety of the device's contents "now nonprivate information" no longer afforded any protection by the Fourth Amendment. *Id.* at 117. An individual's privacy interest in his or her effects is not a liquid that, taking the shape of its container, wholly evaporates merely upon the container's opening, with no regard for the nature of the effects concealed therein. This is particularly true in the context of digital storage devices, which can retain massive amounts[2] of various types of information and which organize this information essentially by means of containers within containers. *See, e.g.*, Orin S. Kerr, *Searches and Seizures in A Digital World*, 119 Harv. L. Rev. 531, 555 (2005) (stating that "[a] computer is like a container that stores thousands of individual containers"). Unlike rifling through the contents of a cardboard box, a foray into one folder of a digital storage device will often expose nothing about the nature or the amount of digital information that is, or may be, stored elsewhere in the device. As the Court of Appeals majority recognized, "[d]ata stored on a thumb drive may be concealed among an unpredictable number of closed digital file folders, which may be further concealed within unpredictable layers of nested subfolders. A thumb drive search . . . may require navigating through numerous closed file folders and subfolders." *Terrell*, 810 S.E.2d at 728 (majority opinion).[3] Following the mere opening of a thumb drive

2. For instance, Detective Bailey stated in his sworn affidavit for the search warrant that the thumb drive here had a capacity of two gigabytes and that "[o]ne gigabyte, or approximately one thousand (1,000) megabytes, is the approximate equivalent of five hundred thousand (500,000) double spaced pages of text and is estimated to be approximately two hundred and twelve (212) feet thick of paper." We mention this by way of illustration. The trial court did not make a finding on the capacity of the thumb drive, and its actual capacity is not relevant to our analysis of whether Bailey's follow-up search was permissible, which focuses on what Bailey knew (or, in this case, did not know) about the nature and extent of the private search before conducting his follow-up search.

3. The State argues that the Court of Appeals majority reached its decision in erroneous reliance on *Riley v. California*, a case addressing the "search incident to arrest" exception to the warrant requirement, as opposed to the private-search doctrine. 134 S. Ct. 2473. We conclude that the Court of Appeals recognized the different exceptions to the warrant

by a private individual, an officer cannot proceed with "virtual certainty that nothing else of significance" is in the device "and that a manual inspection of the [thumb drive] and its contents would not tell him anything more than he already had been told." *Jacobsen*, 466 U.S. at 119. Rather, there remains the potential for officers to learn any number and all manner of things "that had not previously been learned during the private search." *Id.* at 120. Accordingly, the extent to which an individual's expectation of privacy in the contents of an electronic storage device is frustrated depends upon the extent of the private search and the nature of the device and its contents.

In that regard, the trial court erred in concluding that Jones's "viewing of the purple flash drive effectively frustrated Defendant's expectation of privacy as to the contents of the purple flash drive," because this conclusion is not supported by its findings of fact. The trial court's findings do not establish the precise scope of Ms. Jones's search of the thumb drive and whether Detective Bailey possessed "virtual certainty that nothing else of significance was in the [thumb drive] and that a manual inspection of the [thumb drive] and its contents would not tell him anything more than he already had been told." *Id.* at 119. Nor could the trial court have made such findings, as it is clear that the State failed to carry its burden of presenting competent evidence establishing that Bailey's warrantless search was permissible under the private-search doctrine.

At the suppression hearing, neither Ms. Jones nor Detective Bailey "testified to the exact folder pathway they followed to arrive at the" image of Sandy, "identified which folders or subfolders they opened or reviewed, [or] identified which subfolder of images they scrolled through to arrive at the" image of Sandy. *Terrell*, 810 S.E.2d at 725. Further, Ms. Jones's search of the thumb drive for images of defendant's housekeeper was far from exhaustive. While Ms. Jones clicked through "folders and sub-folders" before finding the image of Sandy, she was not aware that any of "the folders had a title. It was just a thumb -- it's the title of the thumbdrive, purple rain." Ms. Jones thought that "the pictures were all in one folder and then the other folders were like movies." After viewing several non-incriminating images, Ms. Jones ceased her search upon finding the image of Sandy. Ms. Jones did not view any of the incriminating photos that were later discovered by Detective Bailey in an entirely

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requirement at issue in *Riley* and in this case and did not err in looking for guidance to the Court's discussion of electronic data in *Riley*. *See Terrell*, 810 S.E.2d at 729 ("While this is a private-search exception case, not a search-incident-to-arrest exception case, *Riley*'s guidance that the nature of an electronic device greatly increases privacy implications holds just as true . . . .").

separate folder.[4] Had Bailey possessed virtual certainty of the device's contents, presumably he would not have been "scrolling through . . . a lot of photos" in different folders before, according to him, he "finally happened upon the photograph with the granddaughter." It is clear that Ms. Jones's limited search did not frustrate defendant's legitimate expectation of privacy in the *entire* contents of his thumb drive and that Detective Bailey's follow-up search to locate the image of Sandy was not permissible under *Jacobsen* because he did not possess "a virtual certainty that nothing else of significance was in the [thumb drive] and that a manual inspection of the [thumb drive] and its contents would not tell him anything more than he already had been told" by Jones. *Jacobsen*, 466 U.S. at 119; see also id. at 120 n.17 ("A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant." (citations omitted)).

The State contends that requiring "virtual certainty" under *Jacobsen* confuses a *sufficient* condition with a *necessary* condition and that an officer can proceed with a follow-up search so long as he acts reasonably in replicating the private search based on the information conveyed to him. *See*, *e.g.*, *Terrell*, 810 S.E.2d at 739–40 (Stroud, J., concurring in part and dissenting in part) ("Detective Bailey sought to replicate Ms. Jones's private search but since she did not understand the organization of the drive, he could not go directly to the particular image he was seeking. . . . Detective Bailey limited his search to a reasonable effort to find exactly what Ms. Bailey reported . . . . [T]he majority's analysis wrongly requires perfection from a private searcher who reports finding contraband and a law enforcement officer who seeks to confirm existence of contraband as reported by a private searcher."). Yet, the requirement that an officer possess "virtual certainty that nothing else of significance" is in a container is central to *Jacobsen* because the private-search doctrine, unlike other exceptions to the Fourth Amendment's warrant requirement, is premised fundamentally on the notion that the follow-up search is not a "search" at all.[5] *Jacobsen*, 466 U.S. at 120 ("It infringed no legitimate

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4. The fact that Detective Bailey, but not Ms. Jones, observed these incriminating photos demonstrates that the record would not support any finding that Detective Bailey simply retraced the private search undertaken by Ms. Jones, particularly given that the incriminating photos other than the one of Sandy were contained in a separate folder.

5. This is true at least under the "*Katz* reasonable-expectation-of-privacy test" for a search, which the Supreme Court explained "has been added to, not substituted for, the common-law trespassory test." *United States v. Jones*, 565 U.S. 400, 409 (2012) (emphases omitted); *see id.* at 404 (stating that the government conducts a search when it "physically occupie[s] private property for the purpose of obtaining information"). The Court in

expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment."). If a container continues to support a reasonable expectation of privacy, it is a necessary corollary that an officer cannot proceed with a "search" of that container absent virtual certainty that he will not infringe upon that expectation of privacy.[6] *Id.* at 120 n.17 ("A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant." (citations omitted)).

Additionally, the State argues that this result will discourage private parties from coming forward with evidence of criminal activity and echoes the concern of the dissenting judge below of "plac[ing] law enforcement officers in a Catch 22 of being unable to confirm the private searcher's report without a search warrant because of the risk of accidental discovery of an image other than the one reported but being unable to get a search warrant without confirming the report." *Terrell*, 810 S.E.2d at 740. Assuming *arguendo* that it is true, as the State contends, that Detective Bailey possessed *virtual certainty* that the thumb drive contained contraband, it is unclear why such certainty would not translate into an affidavit sufficient to establish probable cause. *See State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) ("[P]robable cause requires only a *probability or substantial chance* of criminal activity, not an actual showing of such activity." (alteration in original) (quoting *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983)) (emphasis assed)); *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 257–58 (1984) ("The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." (quoting *Gates*, 462 U.S. at 238)).

Finally, the State argues in the alternative that the Court of Appeals changed the private-search doctrine test by declining to follow its prior decisions and erred in not remanding for additional findings on virtual certainty and the scope of the private search. We are not persuaded that the Court of Appeals majority altered the private-search doctrine in

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Jacobsen did not address the trepassory test and, given our holding, we need not address defendant's argument that the private-search doctrine cannot survive in light of *Jones*.

6. For that reason, assuming the existence of the necessary "virtual certainty," flash drives can be the subject of a warrantless search performed pursuant to the private search doctrine.

this State,[7] which is controlled by *Jacobsen*, and for the reasons stated above we agree with the Court of Appeals majority that the evidence and findings make clear "that Detective Bailey's search was not authorized under the private-search doctrine because he did not conduct his search with the requisite level of 'virtual certainty' contemplated by *Jacobsen*." *Terrell*, 810 S.E.2d at 735 (majority opinion).

For the reasons stated herein, we affirm the decision of the Court of Appeals.[8]

AFFIRMED.

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

Justice NEWBY dissenting.

In this case we apply the private-search doctrine to an electronic storage device, a thumb drive.[1] The majority holds that the private-search doctrine cannot apply to a thumb drive because, even though some of the thumb drive has been previously opened, "an officer cannot proceed with 'virtual certainty that nothing else of significance' is in the device," citing *United States v. Jacobsen*, 466 U.S. 109, 119, 104 S Ct. 1652, 1659, 80 L. Ed. 2d 85, 98 (1984). The majority argues the "virtual certainty" language in *Jacobsen* compels its holding. This rigid approach, however, is a significant misapplication of that decision. Instead of "virtual certainty" that nothing else is contained in the thumb drive, the pivotal test in *Jacobsen* requires identifying the private search and evaluating "the

7. The State contends that the decision in *Robinson*, 187 N.C. App. at 798, 653 S.E.2d at 892 (holding that police could search a single videotape "more thoroughly" than the private searcher), was controlling, stating that "[a] videotape is simply the thumb drive of an earlier time." The more obvious parallel to a videotape would be a single video file, which is not what we have before us in this case.

8. Neither party sought review of the decision of the Court of Appeals majority to "remand this matter to the trial court to determine, in the first instance, whether probable cause existed to issue the search warrant after excising from Detective Bailey's warrant application the tainted evidence arising from his unlawful search." *Terrell*, 810 S.E.2d at 735. For that reason, that decision remains undisturbed and we express no opinion concerning its correctness.

1. A thumb drive is a small, usually rectangular device used for storing electronic data. The data is typically contained in individual files (e.g., a photograph, a document, a song, etc.), and the files are usually organized in folders and subfolders. *See Merriam-Webster's Collegiate Dictionary* 485 (11th ed. 2007) (defining a "folder" as "an organizational element of a computer operating system used to group files or other folders together").

degree to which [the additional invasion of defendant's privacy by the government] exceeded the scope of the private search." *Id.* at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95. *Jacobsen* clearly states "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *Id.* at 117, 104 S. Ct. at 1658–59, 80 L. Ed. 2d at 97.

The private-search doctrine is an exception to the Fourth Amendment warrant requirement for a governmental search because a search conducted with the permission of a private person does not implicate a governmental intrusion; the private person's prior search frustrates any reasonable expectation of privacy. Here a concerned grandmother searched defendant's thumb drive in her home and found a picture of her sleeping, partially nude nine-year-old granddaughter. She then delivered the thumb drive to law enforcement, intending that they verify her finding and pursue criminal charges. Law enforcement did so. This transaction constitutes a textbook application of the private-search doctrine.

There is no dispute, as the trial court found, that the grandmother opened the thumb drive, opened the folder "Bad stuff," and saw various files. Likewise, there is no dispute that the grandmother opened the subfolder "red bone" and its file containing the image of her granddaughter. The only question should be whether the detective's opening of another subfolder, while trying to replicate the grandmother search, unlawfully exceeded the scope of that private search.

The majority holds that the private-search doctrine does not apply to an electronic storage device if the private searcher did not open all of the device's folders, subfolders, and files. It maintains the test is "whether the thumb drive, or any part of it, could continue to support a legitimate expectation of privacy." In other words, if the private searcher did not open every file, there is a possibility defendant's reasonable expectation of privacy to any unopened file has not been frustrated by the private search. Therefore, by simply opening the thumb drive, law enforcement committed an unlawful search. Even though it is indisputable that the grandmother opened the file containing the granddaughter's image, because the thumb drive contained files not searched by her, law enforcement cannot open it. In addition, to reach its result, the majority violates the standard of review by rejecting facts found by the trial court, which are supported by substantial evidence, and substitutes its own fact-finding.

The trial court took the correct approach. That court found the detective only searched the folder ("Bad stuff") identified by the grandmother.

The detective stopped his search when he found the image of the granddaughter. The trial court applied *Jacobsen* as informed by panels of the Fifth and Seventh Circuits, which analyzed facts similar to those presented here and asked the correct question: Did the governmental agent attempt to limit the scope of the search to that described by the private party? The trial court found that the search "did not exceed the scope of the private, prior search done by [the grandmother], but could have been more thorough" and ultimately denied defendant's motion to suppress. Because the trial court correctly applied the private-search doctrine, its decision should be affirmed. The majority's "virtual certainty" test needlessly eliminates the private-search doctrine for electronic storage devices, making it impossible for law enforcement to verify provided information. I respectfully dissent.

I. Facts

Jessica Jones,[2] the grandmother, located in her home and looked through a purple thumb drive (titled "Purple Rain") that belonged to her longtime boyfriend, defendant. She found an unlawful, disturbing photo of her granddaughter. She and her daughter brought the thumb drive to the Sheriff's Office and reported to Detective Hernandez that it contained, along with other images, her granddaughter's image. In laymen's terms, Jones explained her search process. Detective Hernandez completed a "Property/Evidence Status Form" that included a short summary of her conversation with Jones: "9 y/r victim's mom . . . [and Jones] Brought USB that has photographs of 9 y/r shirtless and asleep. Labeled under 'Bad stuff.' " The next morning, Detective Bailey reviewed Detective Hernandez's report and met with Jones to discuss "the visual representations she had discovered on the purple flash drive" before examining the thumb drive to verify Jones's report.[3]

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2. This name is a pseudonym used by the trial court and the Court of Appeals.

3. At the suppression hearing, Jones described her search of the purple thumb drive, saying "when I opened it and the images came up. . . . I saw images of adult women and what I presumed was children, but they were not inappropriate, meaning that they were clothed. They just looked like little young girls." She viewed images of adult females, some naked and some clothed. Jones noted that "the pictures were all in one folder, and she "scrolled down" by "go[ing] into folders and sub-folders." Jones then discovered her granddaughter's image "in bed and she was asleep and she's exposed from the waist up." Jones explained that she "got upset" because she "never in a million years expected to find anything like that" and then ended her search. Detective Bailey testified at the suppression hearing that, while retracing Jones's search, he "observed other young females, prepubescent females, unclothed, also some that were clothed," but when he was able "to verify what [Jones] told [him] she had seen on the flashdrive . . . . [he] completed [his] search." Thus, Detective Bailey discovered the two images of child pornography before finding the granddaughter's image.

In retracing Jones's search through the folder entitled "Bad stuff" and its subfolders, while looking for and before finding the granddaughter's image, Bailey discovered "fully nude photographs of an unknown child standing beside and [sic] adult female in various sexual positions" that Jones had neither observed nor reported. Detective Bailey only searched the folder identified by Jones, "Bad stuff." The "Bad stuff" subfolder titled "red bone" contained the image of the granddaughter; the "Bad stuff" subfolder titled "Cabaniia" contained the two images of the unidentified nude children viewed by Detective Bailey. Detective Bailey sought and obtained a search warrant to forensically examine the thumb drive for any hidden files. Upon executing the warrant, a SBI technician extracted ten additional images of child pornography, which had previously been deleted from the subfolder titled "Cabaniia." Defendant faced charges for the photograph of the granddaughter as well as for possessing the two images of the children as observed by Detective Bailey and the ten images discovered by the SBI technician.

Defendant moved to suppress all evidence obtained by and through Detective Bailey upon his viewing of the thumb drive Jones brought to the police. During the suppression hearing, defense counsel identified the issue as, *inter alia*, "to what extent did Detective Bailey's subsequent search without a search warrant exceed the scope of the search done by the private citizen." Counsel argued that, because Detective Bailey discovered "entirely different type images," his action "without a search warrant clearly exceeds the scope of the search done by a private individual, in this case, [Jones]." Because Detective Bailey happened upon the additional images while retracing Jones's search for the granddaughter's image, defendant argued those images could not serve as a basis for probable cause for the warrant.

Following a hearing on the motion to suppress, the trial court made its ruling:

> I've read through the case law handed up, read the case law in North Carolina, it appears to me that this -- in exercising my discretion, it appears that there was a private party who went into this flashdrive and, by doing so, I believe the Court says it frustrated the defendant's reasonable expectation of privacy as to the contents of that flashdrive.
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> Therefore, thereafter, when the police officer went into that same thumbdrive . . . to confirm what has been stated to him, he found additional matters and he did so

> in a manner that was, perhaps, more thoroughly than the initial examination by [Jones]. He ran into more images than what [Jones] ran into.
>
> Given all of this, in exercising my discretion, the motion to suppress will be denied.

The trial court's written order included findings regarding the relationship between defendant and Jones and a description of the private search conducted here:

> 2. On January 13, 2014, [Jones] was in her home; defendant was not present. [Jones] looked inside of a briefcase belonging to the defendant, which stayed in her home in a usual and customary manner. On this date, defendant's briefcase was in [Jones's] den. Inside the briefcase, [Jones] found, among other items, a USB flash drive, sometimes referred to as a thumb drive. The flash drive in issue here was purple in color. [Jones's] stated purpose for looking in defendant's briefcase was to put a face to someone that defendant had talked about. [Jones's] entry into defendant's briefcase and the contents therein were solely at her own volition and not connected with or at the suggestion of any law enforcement person or organization.
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> 3. [Jones] inserted the purple flash drive into a shared Apple computer and discovered, among other visual representations, a picture of her granddaughter, [name redacted] who appeared to be asleep and who was nude from the waist up with breasts displayed. After consulting with her daughter, the mother of [the child], [Jones] and her daughter, on January 13, 2014, took the purple flash drive to the Onslow County Sheriff's Department.

Next, the trial court made findings regarding Jones's delivery of the purple flash drive to law enforcement.

> 4. On January 13, 2014, [Jones] met with Detective Lucinda Hernandez to discuss what she had found on the purple flash drive. Detective Hernandez accepted the purple flash drive and logged it into the Crime Scene Investigation (CSI) Unit of the Onslow County Sheriff's Department. Detective Hernandez did not view the purple flash drive.

> 5. On January 14, 2014, [Jones] again appeared at the Onslow County Sheriff's Department to meet with Detective Eric Bailey concerning the purple flash drive and the contents that she had seen on that flash drive. Detective Bailey discussed with [Jones] the visual representations she had discovered on the purple flash drive.

The trial court found that law enforcement retraced Jones's private search through the folder identified by Jones as containing the granddaughter's image and saw additional incriminating and corroborating photographs. Ultimately, Detective Bailey confirmed what Jones told him about the thumb drive:

> 6. Following his discussion with [Jones], Detective Bailey went to the CSI Unit to confirm on the purple flash drive what he had been told by [Jones]. Detective Bailey did not remove the purple flash drive from the CSI Unit where it was being held securely as a matter of evidence. The CSI technician placed the purple flash drive into CSI's computer *and selected the folder* [*Bad stuff*] *that has been identified by* [*Jones*] *as containing the picture of her granddaughter* [name redacted]. This viewing in the CSI Unit confirmed what [Jones] had told Detective Bailey that she had discovered on the flash drive. In addition to the picture of [the granddaughter] Detective Bailey saw photographs of other nude or partially nude prepubescent females posing in sexual positions.
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> 7. The images observed by Detective Bailey corroborated the information provided to him by [Jones]. Based upon that corroboration and [Jones's] statements, Detective Bailey then obtained a search warrant in order to conduct a complete and thorough forensic examination of the purple flash drive.

(Emphasis added.) The trial court found as fact that "8. Detective Bailey's initial search and examination of the purple flash drive in the CSI Unit did not exceed the scope of the private, prior search done by [Jones], but could have been more thorough."

Having made the preceding findings, the trial court concluded the search was valid under the private-search doctrine:

> 2. [Jones's] viewing of the purple flash drive did not violate the Fourth Amendment because she was a private party . . . . Her viewing of the purple flash drive effectively frustrated Defendant's expectation of privacy as to the contents of the purple flash drive, and thus the later viewing by Detective Bailey at her request and upon presentation of the flash drive to [law enforcement] did not violate Defendant's rights under the Fourth Amendment.
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> 3. None of the Defendant's [constitutional] rights . . . were violated during the seizure and search of the purple flash drive in this case.

The trial court thus denied defendant's motion to suppress, and the State introduced into evidence thirteen images all retrieved from the "Bad stuff" folder. Regarding the granddaughter's image, the jury convicted defendant of one count of possessing a photographic image from peeping and one count of second-degree sexual exploitation of a minor. The jury also convicted defendant of twelve counts of third-degree sexual exploitation of a minor based on the twelve other images. Defendant appealed.

In a divided opinion, the Court of Appeals first determined that the private-search doctrine did not apply to Detective Bailey's search because the thumb drive was not a "single container" and there was not "virtual certainty" that the thumb drive contained only contraband or material reported by Jones. *State v. Terrell*, 810 S.E.2d 719, 726 (N.C. Ct. App. 2018). The Court of Appeals acknowledged that the private-search doctrine would typically require factual findings as to the specific scope of Jones's and Bailey's searches, *id.* at 734, like those made by the trial court here. But, because Jones did not report the exact file path for the granddaughter's image, Bailey could not be virtually certain that he would find nothing else of significance during his search. *Id.* After concluding that "*Jacobsen*'s virtual-certainty requirement was not satisfied," the Court of Appeals opined that "the precise scope of both searches [was] immaterial," *id.* at 732; therefore, the court did not remand for further factual findings on that issue, *id.* at 735. The Court of Appeals did, however, remand for a determination of whether the search warrant application would still supply "probable cause to issue the search warrant to forensically examine the thumb drive." *Id.* at 736.

The dissent maintained that the scope of the subsequent search was not only material but determinative of the legal issue here. *Id.* at 740 (Stroud, J., concurring in part and dissenting in part). Even though the

dissent did not view the thumb drive as a "single container" now fully opened by Jones's private search, the search did not violate the Fourth Amendment because Detective Bailey limited his search to efforts to find an image he was substantially certain was on the thumb drive and stopped his search when he found it. *Id.* at 739. Thus, "[e]ven if all of the other images are excluded from consideration, the granddaughter's image along with the other information in the warrant application and affidavit could support a finding of probable cause to issue the search warrant." *Id.* at 738.

II. Issue Presented

At this Court, the majority now affirms the Court of Appeals's "virtual certainty" approach. This unrealistic standard essentially holds the private-search doctrine cannot be applied here because, with electronic storage devices, there is never a "virtual certainty" that a government searcher will not discover other unopened material. To reach this sweeping conclusion, the majority misapplies *Jacobsen*, ignores the precise facts leading to the discovery of the different photos, blurs the distinction between electronic storage devices and electronic computer-type devices, and refuses to follow the accepted standard of review by substituting its own findings of fact. It holds that the private-search doctrine does not apply if "the thumb drive, or any part of it, could continue to support a legitimate expectation of privacy." According to the majority, whether the governmental search included a privately opened file is immaterial as long as other unopened files exist.

The correct question, however, is what files and folders were opened, not whether some remained unopened. The Court should ask to what extent Detective Bailey's subsequent search without a search warrant exceeded the scope of the private search. The trial court seems to say that, by having opened the purple thumb drive, defendant's expectation of privacy was thwarted as to all of its files. This broad application, however, is unnecessary to resolve the precise issue presented by this case. There is no evidence that Detective Bailey looked in any folder other than the one identified by Jones as labeled "Bad stuff." Thus, this case presents the issue of whether defendant's reasonable expectation of privacy was lost as to some, or all, of the files contained in the folder "Bad stuff" previously opened and reviewed by Jones. Each of the three separate groups of images, all located in the folder "Bad stuff," require an analysis under the private-search doctrine:

1) the granddaughter's image, located in the subfolder "red bone," which was clearly opened by Jones and Detective Bailey;

2) the unidentified nude children, discovered by Detective Bailey in the subfolder "Cabaniia," while attempting to retrace Jones's search, but before finding the granddaughter's image; and

3) the ten images located in the subfolder "Cabaniia" discovered by the SBI technician pursuant to the search warrant.

The correct approach of *Jacobsen* requires identifying the initial private search and evaluating "the degree to which [the additional invasion of defendant's privacy] exceeded the scope of the private search." *Jacobsen*, 466 U.S. at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95.

III. Proper Appellate Review of the Trial Court Order

"The standard of review in evaluating 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. . . . Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011) (citations omitted). Here the trial court order meets this standard. Competent evidence supports the trial court's findings of fact, and those findings of fact support its conclusions of law and its ultimate denial of defendant's motion to suppress. Most significantly, the trial court made the following findings of fact which are supported by the evidence:

> 6. . . . . The CSI technician placed the purple flash drive into CSI's computer *and selected the folder that has been identified by [Jones] as containing the picture of her granddaughter* [name redacted]. This viewing in the CSI Unit confirmed what [Jones] had told Detective Bailey that she had discovered on the flash drive. In addition to the picture of [the granddaughter] Detective Bailey saw photographs of other nude or partially nude prepubescent females posing in sexual positions.
>
> . . . .
>
> 8. Detective Bailey's initial search and examination of the purple flash drive in the CSI Unit did not exceed the scope of the private, prior search done by [Jones], but could have been more thorough.

(Emphasis added.) Based on these findings, the trial court concluded:

> 2. . . . . [Jones's] viewing of the purple flash drive effectively frustrated Defendant's expectation of privacy as to the contents of the purple flash drive, and thus the

> later viewing by Detective Bailey at her request and upon presentation of the flash drive to [law enforcement] did not violate Defendant's rights under the Fourth Amendment.

IV. Law & Analogous Cases

The Fourth Amendment, applied to the states through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. U.S. Const. amend. IV. Nonetheless,

> [l]ong-established precedent holds that the Fourth Amendment does not apply to private searches. *See Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 65 L. Ed. 1048 (1921). When a private party provides police with evidence obtained in the course of a private search, the police need not "stop her or avert their eyes." *Coolidge v. New Hampshire*, 403 U.S. 443, 489, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). Rather, the question becomes whether the police subsequently exceed the scope of the private search. *See United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).

Rann v. Atchison, 689 F.3d 832, 836 (7th Cir. 2012). "The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred." *Jacobsen*, 466 U.S. at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95.

In *Jacobsen* employees of a private shipping carrier notified federal Drug Enforcement Administration (DEA) agents that they had opened a damaged package in accord with company policy, cut open a tube inside the package, and discovered a white powdery substance in the innermost of a series of four plastic bags that had been concealed therein. *Id.* at 111, 104 S. Ct. at 1655, 80 L. Ed. 2d at 92–93. The employees of the private shipping carrier reassembled the package, replacing the plastic bags in the tube and returning the tube back to the cardboard box. *Id.* at 111, 104 S. Ct. at 1655, 80 L. Ed. 2d at 93. When the first federal agent arrived, he retraced the private search, removing the tube from the box and the plastic bags from the tube, and observed the white powdery substance. *Id.* at 111–12, 104 S. Ct. at 1655, 80 L. Ed. 2d at 93. The agent then continued the search, opening all the bags and removing a trace of the powder for chemical testing. *Id.* at 111, 104 S. Ct. at 1655, 80 L. Ed. 2d at 92. The field chemical tests revealed the substance was cocaine, and federal agents obtained and executed a warrant to search the location

to which the package was addressed. *Id.* at 111–12, 104 S. Ct. at 1655, 80 L. Ed. 2d at 93.

The Court in *Jacobsen* first set out the Fourth Amendment protections against unreasonable searches and seizures, defining an impermissible search as "occur[ring] when there is some meaningful interference with an individual's possessory interests in that property" if that interference is unreasonable and conducted by the government. *Id.* at 113, 104 S. Ct. at 1656, 80 L. Ed. 2d at 94. Thus, the protection "is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' " *Id.* at 113–14, 104 S. Ct. at 1656, 80 L. Ed. 2d at 94 (quoting *Walter v. United States*, 447 U.S. 649, 662, 100 S. Ct. 2395, 2404, 65 L. Ed. 2d 410, 421 (1980) (Blackmun, J., dissenting)).

Regardless of "[w]hether those [employees'] invasions [of respondents' package] were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character." *Id.* at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95 (footnote omitted); *see id.* at 117, 104 S. Ct. at 1658, 80 L. Ed. 2d at 96 ("[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities . . . ." (quoting *United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 1624, 48 L. Ed. 2d 71, 79 (1976))). "Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information . . . ." *Id.* at 117, 104 S. Ct. at 1658, 80 L. Ed. 2d at 96. The Court identified the standard by which to assess the subsequent government action: "The additional invasions of respondents' privacy by the [DEA] agent must be tested by the degree to which they exceeded the scope of the private search." *Id.* at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95 (citing *Walter*, 447 U.S. 649, 100 S. Ct. 2395, 65 L. Ed. 2d 410). Notably, *Jacobsen* did not involve the search of a digital storage device but rather "an ordinary cardboard box." *Id.* at 111, 104 S. Ct. at 1655, 80 L. Ed. 2d at 93. The Court noted that it was indisputable that the government could use the employees' testimony about what they observed when they opened the package.

> If that is the case, it hardly infringed respondents' privacy for the agents to reexamine the contents of the open package by brushing aside a crumpled newspaper and picking up the tube. The advantage the Government gained thereby was merely avoiding the risk of a flaw in the

> employees' recollection, rather than in further infringing respondents' privacy. Protecting the risk of misdescription hardly enhances any legitimate privacy interest, and is not protected by the Fourth Amendment.

Id. at 118–19, 104 S. Ct. at 1659, 80 L. Ed. 2d at 97–98.

The Fifth Circuit in *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001), applied *Jacobsen* in the context of a private search of digital storage devices similar to the thumb drive at issue here. In that case Runyan was convicted on child pornography charges after his former wife and several of her friends collected various digital media storage devices from his home and turned them over to the police. *Id.* at 453, 455. The Fifth Circuit analogized digital media storage devices to physical containers. That court determined that "police exceed the scope of a prior private search when they examine a closed container that was not opened by the private searchers unless the police are already substantially certain of what is inside that container based on the statements of the private searchers, their replication of the private search, and their expertise." *Id.* at 463. Thus, even an unopened container may fall within the scope of the private search if a "defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search." *Id.* at 463–64 (noting that "this rule discourages police from going on 'fishing expeditions' by opening closed containers").

Because the police could be substantially certain, based on conversations with Runyan's former wife and her friends, about the contents of the privately searched disks, police did not exceed the scope of the private search when they searched those specific disks, even if they searched the same disks more thoroughly. *Id.* at 465. The police only exceeded the scope of the private search when they searched *different* disks, those that Runyan's former wife and her friends had not previously "opened" or, in other words, viewed at least one file therein. *Id.* at 463–64.

Similarly, the Seventh Circuit in *Rann* considered the merits of "whether the police's viewing of [certain images stored on digital devices] constituted a significant expansion of a private search such that a warrant was required to permit police to view the images," *Rann*, 689 F.3d at 835, and applied *Runyan* to similar facts:

> S.R. testified that she knew [the defendant] Rann had taken pornographic pictures of her and brought the police a memory card that contained those pictures. S.R.'s

> mother also brought the police a zip drive containing pornographic pictures of her daughter. Both women brought evidence supporting S.R.'s allegations to the police; it is entirely reasonable to conclude that they knew that the digital media devices contained that evidence. The contrary conclusion—that S.R. and her mother brought digital media devices to the police that they knew had no relevance to S.R.'s allegations—defies logic.

Id. at 838; *see id.* at 837–38 (Given the lower court's assessment that, because S.R. "turned exactly one memory card over to the police, and her mother gave the police exactly one zip drive," the appellate court stated that it could not "imagine more conclusive evidence that S.R. and her mother knew exactly what the memory card and the zip drive contained."). Accordingly, "even if the police more thoroughly searched the digital media devices . . . *and viewed images that* [*the prior search*] . . . *had not viewed*," the police search did not exceed the scope of the prior search because "the police were 'substantially certain' the devices contained child pornography" as alleged by the private searchers. *Id.* at 838 (emphasis added) (applying *Runyan*, 275 F.3d at 463).

Thus, in the digital storage context, the question remains "whether the police subsequently exceed the scope of the private search." *Id.* at 836 (citing *Jacobsen*, 466 U.S. at 109, 104 S. Ct. at 1652, 80 L. Ed. 2d at 85); *accord Runyan*, 275 F.3d at 463–64. When the police are substantially certain the devices contain the contraband as alleged by the private searchers, police do not exceed the scope of the private search when they examine the same materials more thoroughly or when they search additional items within the same container previously opened by a private party. *Rann*, 689 F.3d at 838; *Runyan*, 275 F.3d at 461–63.

V. Analysis

The analysis the Fifth and Seventh Circuits apply is correct. Using the container analogy as instructed by *Runyan* and *Rann*, defendant left in Jones's home a digital "box of folders" that she could open and examine. When she did so, defendant's expectation of privacy became frustrated; she had possession of and gained access to the entire contents of the thumb drive. Its contents, specifically, various photos of defendant with adult females and the image of her nine-year-old partially nude granddaughter located in the "Bad stuff" folder, became obvious to Jones, the private searcher.

When she turned over the thumb drive to law enforcement, she did so without limitation and authorized them to look for her granddaughter's

image. Nonetheless, she gave a layman's description of her search process and identified the location of her granddaughter's image as "[l]abled under 'Bad stuff.' " Thereafter, police in good faith attempted to replicate the grandmother's search.

Detective Bailey's follow-up search to verify Jones's discovery can be a more thorough review of the same privately searched materials or can uncover more items from the same container Jones previously opened. *See Runyan*, 275 F.3d at 464–65. Like in *Runyan* and *Rann*, even if Jones did not open every picture file it contained, Detective Bailey could be substantially certain, based on conversations with her, what the privately searched thumb drive contained. As found by the trial court, he did not exceed the scope of the private search when he searched the one and only thumb drive he received and confined that search within the "Bad stuff" folder as identified by Jones, even if Detective Bailey's search was more thorough than Jones's search. *Runyan*, 275 F.3d at 465.

In addressing each group of images separately, it is clear that none should be suppressed. When Jones opened the purple thumb drive, she went to the folder labeled "Bad stuff." Though she could not recall the names of the subfolders that contained the images she saw, she found her granddaughter's image in one of these subfolders (ultimately identified as "red bone"). Clearly, Jones's search thwarted defendant's reasonable expectation of privacy as to that subfolder, and the private-search doctrine allowed the detective to enter that subfolder. Entering the "Bad stuff" folder and the "red bone" subfolder mirrored the precise scope of the private search. "The agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment." *Jacobsen*, 466 U.S. at 119–20, 104 S. Ct. at 1660, 80 L. Ed. 2d at 98 (citing *Coolidge*, 403 U.S. at 487–90, 91 S. Ct. at 2048–50, 29 L. Ed. 2d at 595–96; *Burdeau*, 256 U.S. at 475–76, 41 S. Ct. at 576, 65 L. Ed. at 1051).

As Detective Bailey tried to replicate Jones's search, he entered a subfolder in "Bad stuff" titled "Cabaniia," within which he found the photos of the unidentified nude children. It is unclear if Jones actually opened the "Cabaniia" subfolder. In evaluating Detective Bailey's search, the question is "the degree to which [he] exceeded the scope of the private search." *Jacobsen*, 466 U.S. at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95. By entering the folder "Bad stuff," Jones frustrated defendant's reasonable expectation of privacy as to any file it contained. The trial court found that in discovering the two additional photos depicting child pornography, Detective Bailey's search "did not exceed the scope of the private, prior search done by [Jones], but could have been more

thorough." A more thorough search does not remove the search from the private-search doctrine. A forensic search, authorized by a search warrant substantiated by Jones's statements to Detective Bailey, revealed the final ten photos.

The majority holds that there can be no lawful governmental search under the private search doctrine as long as "the thumb drive, or any part of it, could continue to support a legitimate expectation of privacy." Thus, it refuses to address the precise steps taken by Detective Bailey to replicate the search done by Jones or to address each category of evidence separately. It does not even mention that the search was limited to the "Bad stuff" folder. It finds this approach unnecessary as it concludes there must be "virtual certainty" the thumb drive contains nothing else besides the illegal photo. Regardless of whether Jones opened the purple thumb drive and the folder "Bad stuff," unless she also testified she opened each of the other folders and files and reviewed their contents, the majority concludes the private-search doctrine is inapplicable, even as to the precise photo identified by Jones.

The majority wrongly asks whether any folders or files in the thumb drive were unopened by Jones. By its approach, if any of the subfolders or files remained unopened, then Detective Bailey's opening of the thumb drive was an unconstitutional search because he could not be virtually certain that nothing else of significance was on the thumb drive. The majority assumes, without a factual basis, that Detective Bailey engaged in an extensive search of "the *entire* contents of" the thumb drive without any direction from Jones, opining that Detective Bailey had been " 'scrolling through . . . a lot of photos' in different folders before, according to him, he 'finally happened upon the photograph with the granddaughter.' " The trial court found facts to the contrary.

The record indicates that here the grandmother identified the one folder, within which law enforcement could locate the granddaughter's image. According to the finder of fact, Detective Bailey reported that he "selected the *folder* [*Bad stuff*] *that had been identified by* [*Jones*] as containing the picture of her granddaughter [name redacted]." (Emphasis added.) This Court does not have the thumb drive before us for inspection. Based on the facts presented to the trial court, which did have the thumb drive, however, there is no indication that Jones did not sufficiently understand the features of the thumb drive to be able to direct Detective Bailey to "the pictures [that] were all in one folder." Competent evidence presented to the trial court certainly supports the trial court's finding that Detective Bailey's efforts to verify Jones's allegations fell within the scope of her initial search. Under the majority's

circular approach, law enforcement cannot conduct a subsequent search to verify the reported image within the "Bad stuff" folder—for risk of inadvertently seeing other subfolders and files—at least not without the probable cause supplied by verifying its contents.

The analysis of the opinions of both the Court of Appeals majority and this Court are influenced by *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), in which the Supreme Court of the United States declined to extend the search-incident-to-arrest exception to police searches of digital data on cell phones. The court below determined that *Riley* "guides our decision in how best to apply a doctrine originating from the search of a container limited by physical realities to a search for digital data on an electronic storage device that is not." *Terrell*, 810 S.E.2d at 729 (majority opinion) (citations omitted). The Court of Appeals concluded that a thumb drive's "potential to hold vastly more and distinct types of private [electronic] information" renders the container analogy inapplicable for Fourth Amendment purposes. *Id.* at 728–29 (citing *Riley*, 573 U.S. at 386, 134 S. Ct. at 2485, 189 L. Ed. 2d at 442–43); *see also Riley*, 573 U.S. at 393, 134 S. Ct. at 2488–89, 189 L. Ed. 2d at 446 ("Modern cell phones . . . implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."). *Riley* simply does not apply here. The cell phone in that case was not a finite container like the thumb drive here, whose contents had been previously viewed by a third party; therefore, the owner's expectation of privacy was not frustrated as to any aspect of the cell phone.

VI. Conclusion

While computers and cell phones may conceivably open the door to seemingly unlimited mounds of information, those devices are not implicated here. The purple thumb drive was a storage device with limited space. Moreover, Detective Bailey did not engage in a "fishing expedition" but retraced Jones's search within the thumb drive's folder, "Bad stuff." Rather than remedying a constitutional violation, the majority's opinion here only frustrates concerned citizens' attempts to report criminal activity against children and prevents law enforcement from verifying the allegations.

Under our time-honored standard of review, the trial court appropriately denied the motion to suppress. It found facts supported by the evidence and correctly applied the law. Its order should be upheld. I respectfully dissent.

STATE v. ANTHONY

[372 N.C. 689 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Pitt County
	)	
ANTWAN ANTHONY	)	

No. 324A16

ORDER

Upon consideration of defendant's "Motion to Provide Full Transcript to Defendant," pursuant to N.C.G.S. § 15A-1453(b), this Court assigns the motion to Superior Court, Pitt County, for its initial consideration.

By Order of the Court in Conference, this 14th day of August, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of August, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. DUFF

[372 N.C. 690 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Guilford County
	)	
JOHN CHRISTIAN DUFF	)	

No. 134PA19

ORDER

Defendant's petition for discretionary review is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of *State v. Morgan*, ___ N.C. ___, ___ S.E.2d ___ (2019) (150A18) (holding the revocation of probation after probation term expires pursuant to N.C.G.S. § 15A-1344(f)(3) requires the court to make an express finding of "good cause shown and stated").

By Order of the Court in Conference, this 14th day of August, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of August, 2019.

AMY FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. KILLETTE

[372 N.C. 691 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Johnston County
	)	
VAN BUREN KILLETTE, SR.	)	

No. 379PA18

ORDER

Defendant's petition for discretionary review is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of *State v. Ledbetter*, 814 S.E.2d 39, 43 (N.C. 2018) (holding "the Court of Appeals ha[s] both the jurisdiction and the discretionary authority to issue" writs of certiorari "[a]bsent specific statutory language limiting the Court of Appeals' jurisdiction"), and *State v. Stubbs*, 368 N.C. 40, 42–44 (2015) (holding that the Court of Appeals had jurisdiction to issue a writ of certiorari absent any contravening statutory limiting language).

By Order of the Court in Conference, this 14th day of August, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of August, 2019.

AMY FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Rowan County
	)	
DONNA HELMS LEDBETTER	)	

No. 402PA15-3

ORDER

Upon consideration, defendant's petition for discretionary review is denied. Nonetheless, this Court disavows the language in the last paragraph of the Court of Appeals's decision in *State v. Ledbetter*, 819 S.E.2d 591, 595 (N.C. Ct. App. 2018), to the extent it may be interpreted as contrary to this Court's decision in *State v. Ledbetter*, 814 S.E.2d 39, 43 (N.C. 2018) ("Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued. Therefore, the Court of Appeals should exercise its discretion to determine whether it should grant or deny defendant's petition for writ of certiorari."). *See also State v. Stubbs*, 368 N.C. 40, 44, 770 S.E.2d 74, 76 (2015) ("[W]hile Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution.").

By Order of the Court in Conference, this 14th day of August, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of August, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. WILLIAMS

[372 N.C. 693 (2019)]

STATE OF NORTH CAROLINA	)	
v.	)	MECKLENBURG COUNTY
MONTREZ BENJAMIN WILLIAMS	)	

No. 233PA12-2

ORDER

Defendant's motion for appropriate relief in this matter is remanded to the Superior Court in Mecklenburg County for an evidentiary hearing pursuant to N.C.G.S. § 15A-1418(b)–(c). Accordingly, the time periods for perfecting or proceeding with the appeal are tolled, and the order of the trial division with regard to the motion must be transmitted to the appellate division so that the appeal can proceed or an appropriate order terminating it can be entered. Additionally, defendant's motion to hold resentencing appeal in abeyance is allowed.

By order of this Court in Conference, this 14th day of August, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of August, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

WINSTON AFFORDABLE HOUSING, L.L.C, D/B/A WINSTON SUMMIT APARTMENTS, Plaintiff	)	
v.	)	Forsyth County
DEBORAH ROBERTS, Defendant	)	

No. 267P19

ORDER

The Court, acting on its own motion and for the purpose of resolving the issues raised by the filings that the parties have made in this case on 9 July 2019, orders as follows:

1. Plaintiff's motion for clarification of the Court's order allowing defendant's motion for a temporary stay is decided as follows: The order granting plaintiff's motion for a temporary stay remains in full force and effect, with all parties being ordered to comply with it. This order should not be understood to do anything more than ensure that the status quo as it existed prior to the execution of the writ of possession that occurred on 9 July 2019, including defendant's right to remain in possession of the apartment in question subject to all of the requirements set out in prior orders concerning the payment of rent, is maintained. This order should not be understood as creating any sort of a new tenancy necessitating commencement of a new summary ejection proceeding.

2. Except as is addressed in Decretal Paragraph No. 1 of this order, plaintiff's Motion for Reconsideration, Vacation, or Modification of Order is denied.

3. Defendant's request for an award of additional relief against plaintiff is denied.

4. Contemporaneously with the entry of this order, an amended order granting defendant's motion for a temporary stay for the sole purpose of reflecting Justice Davis' recusal in this case shall be entered.

By order of the Court in conference, this the 10th day of July, 2019.

Davis, J., recused

s/Sam J. Ervin, IV
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of July, 2019.

s/Amy Funderburk

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

YIGZAW v. ASRES

[372 N.C. 696 (2019)]

ASKALEMARIAM YIGZAW	)	
	)	
v.	)	Davidson County
	)	
ALEHEGN ASRES	)	

No. 198PA19

ORDER

The petition for writ of certiorari filed by plaintiff Askalemariam Yigzaw in this case on 30 May 2019 is decided as follows: plaintiff's petition is allowed for the limited purpose of reversing the Court of Appeals' 13 May 2019 order dismissing plaintiff's appeal from Order-Child Support entered by Chief District Judge Wayne L. Michael in this case in the District Court, Davidson County, on 31 July 2018 and remanding this case to the Court of Appeals for further proceedings not inconsistent with this order.

By order of the Court in conference, this the 14th day of August, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of August, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

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

14 AUGUST 2019

010P19	State v. Brodie Lee Hamilton	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-1365) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
017P13-3	State v. Ca'Sey R. Tyler	Def's Pro Se Motion for PDR (COAP19-105)	Denied **06/13/2019** **Ervin, J. recused**
022P19-3	State v. Jennifer Jimenez/April Myers	1. Def's Pro Se Motion to Recall Order for Arrest; Failure to Appear; Strike Called and Failed; and to Set Aside Bond Forfeiture 2. Def's Pro Se Motion to Recall Order for Arrest; Failure to Appear; Strike Called and Failed; and to Set Aside Bond Forfeiture	1. Dismissed 2. Dismissed
036P19	State v. Timothy John Clark	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1356)	Denied **Ervin, J., recused**
041P19-2	Jonathan Brunson v. North Carolina Innocence Inquiry Commission and the State of North Carolina	Plt's Pro Se Motion for Petition for Rehearing of PDR Under N.C.G.S. § 7A-31 (COA18-659)	Dismissed
044P19-2	Jonathan E. Brunson v. North Carolina Department of Public Safety, North Carolina Prisoner Legal Services, Inc., and the State of North Carolina	Plt's Pro Se Motion for Petition for Rehearing of PDR	Dismissed
055P19	Ashley D. Carney v. Wake County Sheriff's Office	1. Plt's Pro Se PDR Prior to a Decision of the COA 2. Plt's Pro Se Motion for Timely Filing of PDR	1. Dismissed 2. Denied
063P19	State v. Michael Christopher Weaver	Def's PDR Under N.C.G.S. § 7A-31 (COA18-740)	Denied
065A19	In the Matter of A.R.A., P.Z.A., Z.K.A.	Respondent-Father's Motion to Withdraw Appeal	Allowed **07/01/2019**

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

14 AUGUST 2019

068P19-2	State v. Eric Christopher Orr	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA18-424)	Denied
074P98-6	State v. William T. Barnes	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Motion in the Alternative to Appoint Counsel	1. Denied **07/01/2019** 2. Dismissed as moot **07/01/2019**
075P19	State v. Adam Warren Conley	1. State's Motion for Temporary Stay (COA18-305) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S § 7A-31	1. Allowed **03/06/2019** 2. Allowed 3. Allowed
080P19	State v. Jerry Lee Adams, Jr.	Def's Pro Se Motion for PDR Under N.C.G.S § 7A-31 (COA17-601)	Denied
082A14-2	State v. Sethy Tony Seam	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-202) 2. Def's Motion to Amend PDR	1. Allowed 2. Allowed **Ervin, J., recused** **Davis, J., recused**
085P19	State v. Adam Joshua Sanders	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-476) 2. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA 3. Def's Motion in the Alternative to Remand Case for Evidentiary Hearing 4. State's Motion to Dismiss Petitions	1. Denied 2. Denied 3. Denied 4. Dismissed as moot
086P19	State v. Travis Kingsberry	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-226) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Petition for Writ of Certiorari to Review Decision of the COA 4. State's Motion to Dismiss PDR 5. State's Motion to Dismiss Appeal	1. --- 2. --- 3. Denied 4. Allowed 5. Allowed

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

14 AUGUST 2019

091P14-6	State v. Salim Abdu Gould	Def's Pro Se Motion for Habeas Corpus Arbitration-Mediation	Denied **07/24/2019** **Davis, J. recused**
094P19	State v. James A. Cox	1. State's Motion for Temporary Stay (COA18-692) 2. State's Petition for Writ of Supersedeas 3. State's PDR 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **03/22/2019** 2. Allowed 3. Allowed 4. Denied
098P19	State v. Curtis O'Neil Logan	Def's PDR Under N.C.G.S. § 7A-31 (COA18-723)	Denied
101P19	Rene Robinson, Individually, and as Administratrix of the Estate of Velvet Foote v. GGNSC Holdings, LLC d/b/a Golden Living Center, a/k/a Sava Senior Center, LLC d/b/a McGregor Downs Health and Rehabilitation Center, and Neil Kurtz	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-706)	Denied
106P19	In the Matter of P.R.T.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA18-730)	Denied
107P16-2	State v. Soyer Lewis Moll	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Onslow County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot **Ervin, J. recused**
107P19	In the Matter of the Appeal of Aaron's, Inc.	From the decision of the Sampson County Board of Equalization and Review concerning the valuation of certain personal property for tax year 2016 Taxpayer's PDR Under N.C.G.S § 7A-31 (COA18-607)	Denied

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108P19	Nanny's Korner Day Care Center, Inc. v. North Carolina Department of Health and Human Services, Division of Child Development and Early Education	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA18-679) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied **Ervin, J., recused** **Davis, J., recused**
122PA18	Zloop, Inc. v. Parker Poe Adams & Bernstein LLP, et al.	Plt's Motion to Stay All Proceedings in the Present Matter	Allowed **07/05/2019**
122PA18	Zloop, Inc. v. Parker Poe Adams & Bernstein LLP, et al.	Plt's Motion to Dismiss Appeal with Prejudice	Allowed **07/25/2019**
124P19	Donna J. Preston, Administrator of the Estate of William M. Preston v. Assadollah Movahead, M.D., Deepak Joshi, M.D., and Pitt County Memorial Hospital, Incorporated, d/b/a Vidant Medical Center	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-674)	Allowed
125PA18	In the Matter of E.D.	Def's Petition for Writ of Mandamus	Denied **06/24/2019** **Davis, J. recused**
131P01-17	State v. Anthony Dove	Def's Pro Se Motion for Evidentiary Hearing	Dismissed **Ervin, J. recused** **Davis, J. recused**
131P16-12	Somchai Noonsab v. State	1. Petitioner's Pro Se Motion for Verified Complaint 2. Petitioner's Pro Se Motion for Arrest of Judgment 3. Petitioner's Pro Se Motion to Dismiss 4. Petitioner's Pro Se Motion for Order for Release	1. Dismissed **07/11/2019** 2. Dismissed **07/11/2019** 3. Dismissed **07/11/2019** 4. Denied **07/11/2019**

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132PA18-2	Beth Desmond v. The News and Observer Publishing Company, McClatchy Newspapers, Inc., and Mandy Locke	1. Defs' (The News and Observer Publishing Company, and Mandy Locke) Notice of Appeal Based Upon a Constitutional Question (COA18-411) 2. Defs' (The News and Observer Publishing Company, and Mandy Locke) PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal 4. Professor William Van Alystyne's Motion for Leave to File Amicus Brief 5. The Reporter Committee for Freedom of Press, et al.'s Motion for Leave to File Amicus Brief 6. Def's (Mandy Locke) Motion for Additional Time for Oral Argument	1. Dismissed **03/27/2019** 2. Allowed **03/27/2019** 3. Allowed **03/27/2019** 4. Allowed **03/27/2019** 5. Allowed **03/27/2019** 6. Denied
132P19	Eric Denney, and wife Christine Denney v. Wardson Construction, Inc., and Healthy Home Insulation, LLC	Def's (Wardson Construction, Inc.) PDR Under N.C.G.S. § 7A-31 (COA18-667)	Denied **Davis, J. recused**
134A18	Regency Centers Acquisition, LLC v. Crescent Acquisitions, LLC	1. Plt's Motion to Hold Case in Advance of Settlement 2. Plt's Motion to Dismiss Appeal with Prejudice	1. Allowed **08/10/2019** 2. Allowed **08/02/2019**
134PA19	State v. John Christian Duff	1. Def's Motion for Temporary Stay (COA18-874) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/15/2019** Dissolved **08/14/2019** 2. Denied 3. Special Order
136P16-2	State v. Maurice Parker	1. Def's Pro Se Motion for Notice of Appeal (COAP19-81) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Motion for PDR 4. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed 4. Dismissed

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142PA17-2	State v. Terance Germaine Malachi	1. Def's Motion for Temporary Stay (COA16-752-2) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Denied **03/26/2019** 2. Denied 3. --- 4. Denied 5. Allowed
142PA18	DTH Media Corporation, Capital Broadcasting Company, Inc., the Charlotte Observer Publishing Company and the Durham Herald Company v. Carol L. Folt, in her official capacity as Chancellor of the University of North Carolina at Chapel Hill, and Gavin Young, in his official capacity as Senior Director of Public Records for the University of North Carolina at Chapel Hill	Motion of Amici Curiae Victim Rights Organizations for Leave to Participate in Oral Argument	Denied
142P19	State v. Radhwan Al-Hamood	Def's PDR Under N.C.G.S. § 7A-31 (COA18-682)	Denied **Davis, J. recused**

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144P19	The Estate of Robert Eugene Tipton, Jr., by and through his Ancillary Administrator, Deborah Dunklin Tipton and Deborah Dunklin Tipton, Individually v. Delta Sigma Phi Fraternity, Inc., Michael Qubein, Individually and as an Agent for Delta Sigma Phi Fraternity, Marshall Jefferson, Individually and as an Agent for Delta Sigma Phi Fraternity, High Point University, Nido Qubein, Individually and as President of High Point University	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-581)	Denied **Davis, J. recused**
145P19	In the Matter of M.F.B., L.B., III, M.W.E.B.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA18-848)	Denied **Davis, J., recused**
146P19	Trisha Wright, Administratrix of the Estate of Christopher Wright, Deceased Employee v. Alltech Wiring & Controls, Employer, Builders Mutual Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-833) Denied	
147PA18	Chambers v. Moses H. Cone Memorial Hospital, et al.	Def's Motion to File Amended Brief	Allowed **07/12/2019**
147P19	State v. Malon Kysheef Griffin	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-681) 2. State's Motion to Deem Response to PDR Timely Filed	1. Denied 2. Denied
154P19	Jonathan E. Brunson v. The Office of the Governor of North Carolina, et al.	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-836)	Denied

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155P17-4	State v. Joe Robert Reynolds	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-445) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 3. Def's Pro Se Motion to Supplement Petition with Affidavit of Facts 4. Def's Pro Se Motion to Withdraw	1. Denied 2. --- 3. Dismissed as moot 4. Allowed
155P19	Jonathan Brunson v. Office of the Twelfth Judiciary	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-838)	Denied
161P19	Elizabeth Ball, Employee v. Bayada Home Health Care, Employer, Arch Insurance Group, Inc., Carrier (Gallagher Bassett Services, Inc., Third-Party Administrator)	1. Defs' Motion for Temporary Stay (COA18-918) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **05/01/2019** Dissolved **08/14/2019** 2. Denied 3. Denied **Davis, J., recuse**d
164P15-2	State v. Charles Gilbert Gillespie	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Rowan County 3. Def's Pro Se Motion to Appoint Counsel	1. Denied **06/26/2019** 2. Denied **06/26/2019** 3. Dismissed as moot **06/26/2019** **Davis, J. recused**
168A19	Cardiorentis AG v. Iqvia Ltd. and Iqvia RDS, Inc.	1. Plt's Petition in the Alternative for Writ of Certiorari to Review Order of Business Court 2. Plt's Motion to Admit Catherine E. Stetson Pro Hac Vice 3. Plt's Motion to Admit Kyle Druding Pro Hac Vice 4. Defs' Motion to Supplement Record on Appeal	1. 2. Allowed **06/25/2019** 3. Allowed **06/25/2019** 4. Allowed

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169P19	State v. Brian Keith Hughes	1. State's Motion for Temporary Stay (COA18-967) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/03/2019** Dissolved **08/14/2019** 2. Denied 3. Denied
170A19	State v. Melvin Lamar Fields	1. State's Motion for Temporary Stay (COA18-673) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues	1. Allowed **05/06/2019** 2. Allowed 3. --- 4. Allowed
171P19	State v. Lamarquis Letron Smallwood	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-578)	Denied
172A19	In the Matter of J.H., Z.R., A.R., and D.R.	Respondent-Mother's Motion to Amend Record on Appeal	Allowed **07/08/2019**
183P19-2	State v. Coriante Pierce	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-265)	Dismissed
184P18	N.C. Department of Environmental Quality, Division of Waste Management v. TRK Development, LLC	Respondent's PDR Under N.C.G.S. § 7A-31 (COA17-882)	Denied **Davis, J. recused**
185P19	James Bryan Sluder v. Marilyn W. Sluder	Def's PDR Under N.C.G.S. § 7A-31 (COA18-920)	Denied **Davis, J. recused**
186P19	State v. Michael Caldwell Angram	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-993) 2. Def's Petition for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Denied
190P19	Flor Johnson v. Capree Ricketts	1. Def's Pro Se Motion for PDR (COA19-239) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Denied 2. Dismissed

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192P19	Betty Burden Jackson, Nancy Burden Elliott, James Burden, Rebecca Burton Bell, Darren Burton, Clarence Burton, Jr., and John Burden, Plaintiffs v. Don Johnson Forestry, Inc. and East Carolina Timber, LLC, Defendants and Nellie Burden Ward, Albert R. Burden, Levy Burden, Clarence L. Burden, and Brenda B. Miller, Other Grandchildren Defendants and East Carolina Timber, LLC, Third Party/ Counterclaim Plaintiff v. Estate of William F. Bazemore by and through its Executors, Nellie Ward and Tarsha Dudley, and Estate of Florida Bazemore by and through its Administrator, Maria Jones, Third-Party/ Counterclaim Defendants	Plts' PDR Under N.C.G.S. § 7A-31 (COA18-354-2)	Denied
193P19	Slok, LLC v. Courtside Condominium Owners Association, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-736) 2. Def's Motion to Dismiss PDR 3. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot 3. Dismissed as moot
194P19-3	State v. David Ezell Simpson	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Motion to Amend Petition for Writ of Mandamus	1. Dismissed without prejudice 2. Allowed

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195A19	State v. Chad Cameron Copley	1. State's Application for Temporary Stay (COA18-895) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **05/23/2019** 2. Allowed **06/13/2019** 3. ---
196A19	State v. David Leroy Carver	1. State's Motion for Temporary Stay (COA18-935) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **05/28/2019** 2. Allowed **06/17/2019** 3. ---
198PA19	Askalemariam Yigzaw v. Alehegn Asres	Plt's Petition for Writ of Certiorari to Review Order of the COA (COA19-12)	Special Order
199P19	State v. Bennie Lee Graham	1. Def's Pro Se Motion for En Banc Review (COA18-1) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed 2. Denied
201A19	State v. David Alan Keller	1. Def's Motion for Temporary Stay (COA17-1318) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **06/04/2019** 2. Allowed 3. ---
202P19	State v. Dwayne Rayshon Degraffenried	Def's Pro Se Motion for PDR (COAP19-256)	Dismissed
204P19	State v. Alexander DeJesus aka Alexander Sigaru-Argueta	Def's PDR Under N.C.G.S. § 7A-31 (COA18-750)	Denied
205P19	In the Matter of W.A.B., B.F.B., A.G.B., E.H.B., R.A.B., M.A.B.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA18-953)	Denied
206A19	State v. Ben Lee Capps	1. State's Motion for Temporary Stay (COA18-386) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **06/05/2019** 2. Allowed **06/26/2019** 3. ---

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207P19	State v. Mark Edwin Jones	Def's PDR Under N.C.G.S. § 7A-31 (COA18-508)	Denied
210P19	Diondra N. Pittman v. James E. Pittman, Jr. and Adrian N. Flemings	Def's (James E. Pittman, Jr.) Pro Se Motion for Notice of Appeal	Dismissed
213P19	Cumberland County ex rel. State of Alabama O.B.O. Alisha Lee v. Clifford Lee	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-754)	Denied
217P18-2	State v. Edwin Christopher Lawing	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	Dismissed
223P19	State v. James E. White	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
224P19	In re James Allen Hill	Petitioner's Pro Se Petition for Writ of Mandamus	Denied **06/27/2019**
225P10-2	State v. Jesus Espinoza-Valenzuela	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
225P19	State v. Dale Erwin Foat	Def's Pro Se Motion for Relief Upon Appeal (COAP19-294)	Dismissed
226P19	Timothy Morris McCoy v. North Carolina Department of Revenue	Petitioner's Pro Se Motion for Appeal Against Final Decision	Dismissed
227P18	State v. Carl Ray Poore, Jr.	1. State's Motion for Temporary Stay (COA17-1387) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/23/2018** Dissolved **08/14/2019** 2. Denied 3. Denied

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228P19	State v. Timothy Calvin Denton	1. State's Motion for Temporary Stay (COA18-742) 2. State's Petition for Writ of Supersedeas	1. Allowed **06/14/2019** 2.
231A19	In the Matter of K.K. A minor child	Appellant-Father's Motion to Extend the time to File the Record on Appeal	Allow extension of time up to & including 17 June 2019 **06/18/2019**
233PA12-2	State v. Montrez Benjamin Williams	1. Def's Motion for Appropriate Relief 2. Def's Motion to Hold Resentencing Appeal in Abeyance	1. Special Order 2. Special Order
234P19	Corey France v. North Carolina Department of Public Safety	1. Plt's Pro Se Motion for Leave for Joinder of Appeals (COA19-294, 295) 2. Plt's Pro Se Motion for PDR	1. Dismissed 2. Dismissed **Davis, J. recused**
235P19	State v. Hector Trevino, III	Def's PDR Under N.C.G.S. § 7A-31 (COA18-741)	Denied
238P19	State v. Matthew Garret McMahan	1. State's Motion for Temporary Stay (COA18-672) 2. State's Petition for Writ of Supersedeas	1. Allowed **06/24/2019** 2.
239P19	State v. Tyrone Churell Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1017)	Denied
240P19	State v. Daniel Yair Marino	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1135) 2. Def's Conditional Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed 2. Dismissed
244P19	In the Matter of M.T.-L.Y.	1. Petitioner's Motion for Temporary Stay (COA18-826) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's PDR Under N.C.G.S. § 7A-31 4. Guardian *Ad Litem's* PDR Under N.C.G.S. § 7A-31	1. Allowed **06/25/2019** Dissolved **08/14/2019** 2. Denied 3. Denied 4. Denied

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246P19	Walston v. Duke University	Defendant Attorney Carl Newman's Motion to Withdraw as Counsel of Record	Allowed **07/17/2019**
247P16-7	State v. Jonathan Eugene Brunson	Def's Pro Se Motion for Petition for Rehearing of PDR	Dismissed
247P19	State v. Dante Lorenzo Ross	Def's PDR Under N.C.G.S. § 7A-31 (COA18-652)	Denied
248A18	Sykes v. Blue Cross & Blue Shield of North Carolina (Sykes II)	Plt's Petition for Rehearing	Denied
248P19	State v. Tamora C. Williams	1. Def's Motion for Temporary Stay (COA18-994) 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/25/2019** 2.
250P17-2	State v. Justin Lee Perry	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-355)	Denied **07/24/2019** **Davis, J., recused**
251PA18	Sykes, et al. v. Health Network Solutions, Inc., et al.	Plts' Petition for Rehearing	Denied
251P19	D. Cameron Murchison, Jr. and Joan H. Murchison, his wife v. Regional Surgical Specialists and Christopher Edwards, M.D.	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-297)	Denied **Ervin, J. recused**
252P19	State v. Frank Thomas Bennett	Def's Pro Se Motion for Arrest of Judgment	Denied **07/02/2019**
253P19	State v. Justin Michael Tyson	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **06/27/2019**
253P19-2	State v. Justin Michael Tyson	Def's Pro Se Motion for Court to Overturn its Denial of Petition for Writ of Habeas Corpus	Denied **07/12/2019**
255P18	State v. Edward Earl Jones	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-114) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Petition for Writ of Certiorari to Review Order of the COA 4. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Dismissed 4. Allowed

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256P19	In the Matter of the Estate of Thalia Dukes, by her son, Tony C. Thomas v. Lawrence S. Craige	Plt's Pro Se Motion for North Carolina Supreme Court to Assume Jurisdiction	Dismissed
257P16-3	Federal National Mortgage Association a/k/a Fannie Mae v. William Gerald Price	Def's Pro Se Motion to Appeal (COA18-775)	Dismissed **Davis, J. recused**
260P19	State v. Brandon Leon Wilson	Def's Pro Se Motion for Judicial Review	Denied **07/17/2019**
262P19	State v. Dora Parker Bullock	1. Def's Pro Se Motion for Notice of Appeal (COA19-503) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
263PA18	State v. Cedric Theodis Hobbs, Jr.	1. Amicus Curiae's Motion to Admit Robert S. Chang Pro Hac Vice 2. Amicus Curiae's Motion to Admit Taki V. Flevaris Pro Hac Vice 3. Amicus Curiae's Amended Motion to Admit Robert S. Chang Pro Hac Vice 4. Amicus Curiae's Amended Motion to Admit Taki V. Flevaris Pro Hac Vice	1. Dismissed as moot **07/10/2019** 2. Dismissed as moot **07/10/2019** 3. Allowed **07/10/2019** 4. Allowed **07/10/2019**
263PA18	State v. Cedric Theodis Hobbs, Jr.	1. Amicus Curiae's (Coalition of State and National Criminal Justice and Civil Rights Advocates) Motion for Leave to Participate in Oral Argument 2. Amicus Curiae's (Fred T. Korematsu Center for Law and Equality) Motion for Leave to Participate in Oral Argument	1. Denied 2. Denied
263PA18	State v. Cedric Theodis Hobbs, Jr.	Def's Motion to Supplement Record on Appeal	Allowed
264P19	State v. Matthew Joseph Schmieder	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1027) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Motion in the Alternative to Treat the PDR as a Petition for Writ of Certiorari	1. Dismissed 2. Denied 3. Denied

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265P19	State v. Darrin M. Sanders	Def's Pro Se Motion for PDR (COAP19-357)	Denied
266P19	State v. Ontrel Latre Gilchrist	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-479)	Denied
267P19	Winston Affordable Housing, L.L.C. d/b/a Winston Summit Apartments v. Deborah Roberts	1. Def's Motion for Temporary Stay (COA18-553) 2. Def's Petition for Writ of Supersedeas 3. Plt's Motion for Clarification as to Effect of 9 July 2019 Order Allowing the Motion for Temporary Stay 4. Plt's Motion for Reconsideration, Vacation, or Modification of Order	1. Allowed **07/08/2019** 2. 3. Special Order **07/10/2019** 4. Special Order **07/10/2019** **Davis, J. recused**
271P19	State v. Robert B. Williams	Def's Pro Se Motion for Notice of Appeal of a Writ of Habeas Corpus in State Court	Denied **07/10/2019**
275P19	Elizabeth M.T. O'Nan, an Individual v. Nationwide Insurance Company, a Corporation; Servpro Industries, Inc., a Corporation; Servpro of Marion, a Corporation, aka Servpro of Asheville East, aka Servpro of Asheville West, aka Servpro of McDowell and Rutherford Counties, aka J.L. Kuder Enterprises, a Corporation; John Kuder, an Individual; Linda Kuder, an Individual; Spencer Gates, an Individual; Debra Whittemore, and Individual; Jennifer Robinson, an Individual; and Lisa Tilley, an Individual	1. Plt's Pro Se Motion for Temporary Stay (COA18-990) 2. Plt's Pro Se Petition for Writ of Supersedeas 3. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question 4. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 5. Defs' (Servpro of Marion, et al.) Motion to Dismiss Appeal	1. Allowed **07/18/2019** Dissolved **08/14/2019** 2. Denied 3. Dismissed *ex mero motu* 4. Denied 5. Dismissed as moot

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277P18-4	State v. Gabriel Adrian Ferrari	Def's Pro Se Motion to Strike the Court Order to Dismiss as Illegal and Non-Constitutional in Violation of Defendant's Constitutional Rights, TN. Law and U.S. Federal Rules, by Court in Conference March 27, 2019	Dismissed
279A19	Global Textile Alliance, Inc. v. TDI Worldwide, LLC, et al.	Plt's Motion to Admit Stanley E. Woodward, Jr. Pro Hac Vice	Allowed **08/07/2019**
291P19	State v. Harvey Lee Stevens, Jr.	1. Def's Motion for Temporary Stay (COA17-584) 2. Def's Petition for Writ of Supersedeas	1. Allowed **08/01/2019** 2.
293A19	State v. Adam Richard Carey	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **08/05/2019** 2.
294P19	State v. Leo Kearney	Def's Pro Se Motion for Extension of Time to File Federal Habeas Corpus Petition	Dismissed **08/02/2019**
309P15-7	State v. Reginald Underwood Fullard	Def's Pro Se Motion for Objection Entry to Motion to Dismissed by Order of Court Conference of 9 May 2019	Dismissed
310P19	State v. Luis Guillermo Neira	1. Def's Motion for Temporary Stay (COA19-653; COAP19-380) 2. Def's Petition for Writ of Supersedeas 3. Def's Petition for Writ of Certiorari to Review Order of the COA 4. Def's Motion to Adjudicate Petitions and Motions Without Undue Delay 5. Def's Motion to Issue a Brief Precedential Published Order but Not a Full Opinion on the Issues 6. Def's Motion to Seal All Motions and Petitions Filed Before this Court 7. Def's Motion to Seal All Motions and Petitions Filed Before the COA 8. Def's Motion to Allow Defendant to Proceed Using the Pseudonym "John Doe" or "L.G.N." at this Court 9. Def's Motion to Allow Defendant to Proceed Using the Pseudonym "John Doe" or "L.G.N." at the COA	1. Denied **08/12/2019** 2. Denied **08/12/2019** 3. Denied **08/12/2019** 4. Dismissed as moot **08/12/2019** 5. Dismissed **08/12/2019** 6. Denied **08/12/2019** 7. Denied **08/12/2019** 8. Denied **08/12/2019** 9. Denied **08/12/2019**

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		10. Def's Motion to Re-caption the Above-Titled Action to "State of North Carolina v John Doe" or "State of North Carolina v. L.G.N." 11. Def's Motion to Re-caption the Titled of the COA Action to "State of North Carolina v John Doe" or "State of North Carolina v. L.G.N." 12. Def's Motion to Bar the COA from Publishing any Documents, Particularly Opinions, Containing the Def's Real Name During the Pendency of His Action Before this Court	10. Denied **08/12/2019** 11. Denied **08/12/2019** 12. Denied **08/12/2019**
316P18-2	Johnny Jermaine McMillan v. Harvey Clay, Superintendent (Now referred to as Warden) of Lumberton Correctional Institution, State of N.C.	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **07/11/2019**
317P16-3	State v. Ronald Thompson Corbett	1. Def's Pro Se Motion for Notice of Petition to Appeal (COA18-327) 2. Def's Pro Se Motion to Make Appeal Private and Sealed	1. Dismissed *ex mero motu* 2. Dismissed as moot **Davis, J. recused**
319P18	Dale Thomas Winkler; and DJ's Heating Service v. North Carolina State Board of Plumbing, Heating & Fire Sprinkler Contractors	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-873) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
324A16	State v. Antwan Anthony (DEATH)	Def's Motion to Provide Full Transcript to Defendant	Special Order
327P18	DavFam, LLC v. Arthur E. Davis, III	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-43)	Denied **Davis, J. recused**

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

14 AUGUST 2019

332P18	State v. Michael Stanley Mazur and Anne-Marie Mazur	1. Def's (Anne-Marie Mazur) Motion for Temporary Stay (COA17-736)	1. Allowed **10/05/2018** Dissolved **08/14/2019**
		2. Def's (Anne-Marie Mazur) Petition for Writ of Supersedeas	2. Denied
		3. Def's (Anne-Marie Mazur) Notice of Appeal Based Upon a Constitutional Question	3. ---
		4. Def's (Anne-Marie Mazur) PDR Under N.C.G.S. § 7A-31	4. Denied
		5. State's Motion to Dismiss Appeal	5. Allowed
		6. Def's (Michael Stanley Mazur) Motion for Temporary Stay (COA17-736)	6. Allowed **10/08/2018** Dissolved **08/14/2019**
		7. Def's (Michael Stanley Mazur) Petition for Writ of Supersedeas	7. Denied
		8. Def's (Michael Stanley Mazur) PDR Under N.C.G.S. § 7A-31	8. Denied
341P18	State v. Olivia Chisholm	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-23)	Denied
343P18	Mario Seguro-Suarez, by and through his Guardian *Ad Litem*, Edward G. Connette v. Key Risk Insurance Company, Joseph J. Abriola, Sharon Sosebee, Suzanne McAuliffe, Cheryl Gless, Robert E. Hill, and Carolina Investigative Services, Inc.	1. Defs' (Key Risk Insurance Company, Joseph J. Abriola, Sharon Sosebee, Suzanne McAuliffe, and Cheryl Gless) PDR Under N.C.G.S. § 7A-31 (COA17-697)	1. ---
		2. Defs' (Key Risk Insurance Company, Joseph J. Abriola, Sharon Sosebee, Suzanne McAuliffe, and Cheryl Gless) Motion to Withdraw PDR	2. Allowed **07/12/2019** **Davis, J. recused**
349P09-3	State v. Jeffrey Robinson	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-222)	Denied **06/25/2019**
362P17-3	James Cornell Howard v. Wayne County Clerk of Court	Def's Pro Se Petition for Writ of Mandamus	Denied **Davis, J. recused**

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

14 AUGUST 2019

378P18-4	State v. Napier Sandford Fuller	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COAP18-623) 2. Def's Pro Se Motion for Emergency Stay	1. Denied **06/21/2019** 2. Denied **06/21/2019**
379P18	State v. Van Buren Killette, Sr.	Def's PDR Under N.C.G.S. § 7A-31 (COA18-26)	Special Order
392P18	State v. Kevin Deshaun Dixon	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1333)	Denied **Davis, J. recused**
398P18	Town of Pinebluff v. Moore County, Catherine Graham in her capacity as a County Commissioner, Nick Picerno in his capacity as a County Commissioner, Otis Ritter in his capacity as a County Commissioner, Randy Saunders in his capacity as a County Commissioner, and Jerry Daeke in his capacity as a County Commissioner	Defs' PDR Under N.C.G.S. § 7A-31 (COA17-286)	Allowed
399P18	State v. Joshua A. Bice	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1188)	Denied
402PA15-3	State v. Donna Helms Ledbetter	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-414-3) 2. Def's Motion for Temporary Stay 3. Def's Petition for Writ of Supersedeas 4. State's Motion to Dismiss PDR	1. Special Order 2. Allowed **10/15/2018** Dissolved **08/14/2019** 3. Denied 4. Dismissed as moot
406PA18	State v. Cory Dion Bennett	1. Amicus Curiae's (Coalition of State and National Criminal Justice and Civil Rights Advocates) Motion for Leave to Participate in Oral Argument 2. Amicus Curiae's (Korematsu Center) Motion for Leave to Participate in Oral Argument	1. Denied 2. Denied

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

14 AUGUST 2019

414P18	State v. Owen P. Williams	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-620) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
420P18	State v. Temon Tavoi McNeil	1. State's Motion for Temporary Stay (COA18-175) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/28/2018** Dissolved **08/14/2019** 2. Denied 3. Denied
449P11-22	Charles Everette Hinton v. State of North Carolina, et al.	1. Plt's Pro Se Motion for En Banc Judicial Writ of Sequestration 2. Plt's Pro Se Motion for En Banc Ex Parte Replevin at Common-Law Action 3. Plt's Pro Se Motion for Independent Judicial Writ for Certiorari	1. Dismissed 2. Dismissed 3. Dismissed **Ervin, J. recused**
432P18	Jian Shen v. Charles Hugh McGowan, III	Def's PDR Under N.C.G.S. § 7A-31 (COA18-263)	Denied
433P18	Rebecca B. Everett and Simon J. Everett, Co-Administrators of the Estate of Simon T. Everett v. Duke Energy Carolinas, LLC; and FDB, LLC	1. Def's (Duke Energy Carolinas, LLC) PDR Under N.C.G.S. § 7A-31 (COA18-159) 2. Def's (FDB, LLC) PDR Under N.C.G.S. § 7A-31 3. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied 3. Dismissed as moot
434PA18	PHG Asheville, LLC v. City of Asheville	Respondent's Motion to Supplement the Record on Appeal	Allowed
437PA18	Chavez et al. v. Carmichael	1. United States of America's Motion for Leave to File Amicus Brief 2. United States of America's Motion to Amend Certificate of Service 3. Amicus Curiae's Motion to Admit Joshua S. Press Pro Hac Vice 4. Amicus Curiae's (United States of America) Motion to Participate at Oral Argument	1. Allowed **07/31/2019** 2. Allowed **08/02/2019** 3. Allowed **08/02/2019** 4. Denied
451P18	State v. Kendrick Louis Robinson	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1262)	Denied **Davis, J. recused**

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

14 AUGUST 2019

453P18	State v. Barbara Jean Myers-McNeil	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1404) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Deem Response Timely Filed 4. Def's Motion for Temporary Stay 5. Def's Petition for Writ of Supersedeas 6. Def's Motion to File an Amended PDR 7. Def's Amended PDR under N.C.G.S. § 7A-31 8. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Dismissed *ex mero motu* 2. Dismissed as moot 3. Allowed 4. Allowed **04/17/2019** Dissolved **08/14/2019** 5. Denied 6. Allowed 7. Denied 8. Dismissed as moot
455A18	John Tyler Routten v. Kelly Georgene Routten	1. Def's Pro Se Notice of Appeal Based Upon A Constitutional Question (COA17-1360) 2. Def's Pro Se PDR Under N.C.G.S § 7A-31 3. Plt's Notice of Appeal Based Upon a Dissent	1. Dismissed *ex mero motu* 2. Denied 3. ---
499P04-3	Andre M. Spates v. State of North Carolina, et al.	Petitioner's Pro Se Petition for Writ of Mandamus	Denied
504P04-3	State v. Marion Beasley, Sr.	1. Def's Pro Se Motion for Appeal (COAP19-167) 2. Def's Pro Se Motion for Declaratory Judgment	1. Dismissed 2. Dismissed
548A04-2	State v. Vincent Lamont Harris	1. State's Motion for Temporary Stay (COA18-952) 2. State's Petition for Writ of Supersedeas	1. Allowed **07/17/2019** 2.
580P05-16	State v. David Lee Smith	Def's Pro Se Motion for PDR	Dismissed **Ervin, J., recused**

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

14 AUGUST 2019

597P01-6	State v. Maechel Shawn Patterson	1. Def's Pro Se Motion for Amended Notice of Appeal (COAP17-245) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Denied 3. Dismissed **Ervin, J. recused**

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Beaufort County
	)	
ORLANDO COOPER	)	

No. 90P19

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019), including determining what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand.

By order of the Court in conference, this the 4th day of September, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE v. DRAVIS

[372 N.C. 721 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wake County
	)	
FRED DRAVIS	)	

No. 305P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019), including determining what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand.

By order of the Court in conference, this the 4th day of September, 2019.

Davis, J., recused.

s/Earls, J.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE OF NORTH CAROLINA	)	
	)	
v.	)	FORSYTH COUNTY
	)	
AARON LEE GORDON	)	

No. 312P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019), including determining what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand.

By order of the Court in conference, this the 4th day of September, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE v. GRIFFIN

[372 N.C. 723 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Craven County
	)	
THOMAS EARL GRIFFIN	)	

No. 270A18

ORDER

The State's notice of appeal is decided as follows: The Court, on its own motion, dismisses the State's notice of appeal and remands this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019), including determining what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand.

By order of the Court in conference, this the 4th day of September, 2019.

Davis, J., recused.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE v. SPRINGLE

[372 N.C. 724 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Carteret County
	)	
ROBERT HUGHES SPRINGLE	)	

No. 329P18

ORDER

Defendant's alternative petition for writ of certiorari to review order of the Court of Appeals is decided as follows: The Court allows defendant's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019).

By order of the Court in conference, this the 4th day of September, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE v. WESTBROOK

[372 N.C. 725 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Forsyth County
	)	
AARON KENARD WESTBROOK	)	

No. 301A18

ORDER

The State's notice of appeal is decided as follows: The Court, on its own motion, dismisses the State's notice of appeal and remands this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019).

By order of the Court in conference, this the 4th day of September, 2019.

Davis, J., recused.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE v. WHITE

[372 N.C. 726 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Durham County
	)	
MICHELLE SMITH WHITE	)	

No. 302A18

ORDER

The State's notice of appeal is decided as follows: The Court, on its own motion, dismisses the State's notice of appeal and remands this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019), including determining what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand.

By order of the Court in conference, this the 4th day of September, 2019.

Davis, J., recused.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

DISPOSITION OF PETITIONS (SPECIAL CONFERENCE)

4 SEPTEMBER 2019

090P19	State v. Orlando Cooper	1. State's Motion for Temporary Stay (COA18-637)	1. Allowed **03/20/2019** Dissolved **09/04/2019**
		2. State's Petition for Writ of Supersedeas	2. Dismissed as moot
		3. State's PDR Under N.C.G.S. § 7A-31	3. Special Order
270A18	State v. Thomas Earl Griffin	1. State's Motion for Temporary Stay (COA17-386)	1. Allowed **08/24/2018** Dissolved **09/04/2019**
		2. State's Petition for Writ of Supersedeas	2. Dismissed as moot
		3. State's Notice of Appeal Based Upon a Dissent	3. Special Order
		4. State's PDR as to Additional Issues	4. Dismissed as moot
		5. State's Motion to Take Judicial Notice of Public Records	5. Dismissed as moot
		6. Def's Motion to Amend Response to PDR	6. Dismissed as moot
			Davis, J., recused
301A18	State v. Aaron Kenard Westbrook	1. State's Motion for Temporary Stay (COA18-32)	1. Allowed **09/13/2018** Dissolved **09/04/2019**
		2. State's Petition for Writ of Supersedeas	2. Allowed **09/13/2018** Dissolved **09/04/2019**
		3. State's Notice of Appeal Based Upon a Dissent	3. Special Order
		4. Def's Motion to Dismiss State's Appeal	4. Dismissed as moot
		5. Def's Motion to Stay Briefing Schedule Until Resolution of the Motion to Dismiss	5. Allowed **11/08/2018**
			Davis, J., recused

DISPOSITION OF PETITIONS (SPECIAL CONFERENCE)

4 SEPTEMBER 2019

302A18	State v. Michelle Smith White	1. State's Motion for Temporary Stay (COA18-39) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Defendant's Motion to Dismiss State's Appeal 5. Def's Motion to Stay Briefing Schedule Until Resolution of the Motion to Dismiss	1. Allowed **09/13/2018** Dissolved **09/04/2019** 2. Allowed **09/13/2018** Dissolved **09/04/2019** 3. Special Order 4. Dismissed as moot 5. Allowed **11/08/2018** **Davis, J., recused**
305P18	State v. Fred Dravis	1. State's Motion for Temporary Stay (COA18-76) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Amend Response to State's PDR	1. Allowed **09/13/2018** Dissolved **09/04/2019** 2. Dismissed as moot 3. Special Order 4. Dismissed as moot **Davis, J., recused**
312P18	State v. Aaron Lee Gordon	1. State's Motion for Temporary Stay (COA17-1077) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Amend Response to PDR	1. Allowed **09/21/2018** Dissolved **09/04/2019** 2. Dismissed as moot 3. Special Order 4. Dismissed as moot

DISPOSITION OF PETITIONS (SPECIAL CONFERENCE)

4 SEPTEMBER 2019

329P18	State v. Robert Hughes Springle	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-652)	1. Dismissed as moot
		2. Def's Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Carteret County	2. Dismissed as moot
		3. Def's Petition in the Alternative for Writ of Certiorari to Review Order of the COA	3. Special Order
		4. Def's Motion to Amend PDR and Alternative Petition for Writ of Certiorari	4. Dismissed as moot

APPENDIXES

BICENTENNIAL CEREMONIAL SESSION

INVESTITURE CEREMONY OF JUSTICE EARLS

INVESTITURE CEREMONY OF CHIEF JUSTICE BEASLEY

INVESTITURE CEREMONY OF JUSTICE DAVIS

SUPREME COURT JUSTICES – 1819-2019

DISCIPLINE AND DISABILITY OF ATTORNEYS

LEGAL SPECIALIZATION

LEGAL SPECIALIZATION

RULES OF PROFESSIONAL CONDUCT

RULES OF PROFESSIONAL CONDUCT

RULES OF PROFESSIONAL CONDUCT

BUSINESS COURT RULES

GENERAL RULES OF PRACTICE

APPELLATE PROCEDURE

REVIEW OF RECOMMENDATIONS OF THE JUDICIAL STANDARDS COMMISSION

BUSINESS COURT RULES

CONTINUING JUDICIAL EDUCATION

Bicentennial Ceremonial Session

★★★

2:00 p.m.
January 7, 2019

Sounding *of the* Gavel
and Opening *of the* Court
Amy Funderburk
Clerk *of* Court
Supreme Court *of* North Carolina

Opening Prayer
Reverend Dr. Dumas Harshaw
Senior Pastor
First Baptist Church, Raleigh, North Carolina

Pledge *of* Allegiance
Lieutenant General Buster Glosson
United States Air Force (Ret.)
Veteran *of* Operation Desert Storm *and* Vietnam War

Welcome *from the*
Chief Justice
The Honorable Mark Martin
Chief Justice
Supreme Court *of* North Carolina

Greetings *from the*
Governor
The Honorable Roy Cooper
Governor
State *of* North Carolina

Greetings *from the*
Lieutenant Governor
The Honorable Dan Forest
Lieutenant Governor
State *of* North Carolina

Remarks
Dewey W. Wells
Law Clerk *in* 1954
Supreme Court *of* North Carolina

Greetings *from the*
North Carolina State Bar
G. Gray Wilson
President
North Carolina State Bar

Reflections *on the*
History *of the* Court
Video Presentation

Greetings *from the*
North Carolina Bar Association
Jacqueline D. Grant
President
North Carolina Bar Association

History *of the* Court
The Honorable Willis Whichard
Former Associate Justice
Supreme Court *of* North Carolina

Closing Remarks
Chief Justice Mark Martin

Chief Justice
Mark Martin

Senior Associate Justice
Paul M. Newby

Associate Justice
Robin E. Hudson

Associate Justice
Cheri Beasley

Associate Justice
Samuel J. Ervin, IV

Associate Justice
Michael R. Morgan

Associate Justice
Anita Earls

★★★

Winter Term
2019

Reception Immediately Following Ceremony

North Carolina State Capitol
1 East Edenton Street, Raleigh, NC 27601

CHIEF JUSTICES *of the* SUPREME COURT *of* NORTH CAROLINA

*(in order from present to past) *current Chief Justice*

Mark Martin*
Sarah Parker
I. Beverly Lake, Jr.
Henry E. Frye
Burley B. Mitchell, Jr.
James G. Exum, Jr.
Rhoda Billings
Joseph Branch
Susie Sharp
William H. Bobbitt
R. Hunt Parker
Emery B. Denny
J. Wallace Winborne
M. Victor Barnhill
William A. Devin
Walter P. Stacy
William A. Hoke
Walter Clark
David M. Furches
William T. Faircloth
James E. Shepherd
Augustus S. Merrimon
William N.H. Smith
Richmond M. Pearson
Frederick Nash
Thomas Ruffin, Sr.
Leonard Henderson
John Louis Taylor

1819 200 years Supreme Court 2019

ASSOCIATE JUSTICES *of the* SUPREME COURT *of* NORTH CAROLINA

*(in order from present to past) *current Associate Justice; +also served as Chief Justice*

Anita Earls*
Michael R. Morgan*
Samuel J. Ervin, IV*
Robert N. Hunter, Jr.
Cheri Beasley*
Barbara Jackson
Robin E. Hudson*
Patricia Timmons-Goodson
Paul M. Newby*
Edward Thomas Brady
G.K. Butterfield, Jr.
Robert H. Edmunds, Jr.
Franklin E. Freeman, Jr.
George L. Wainwright, Jr.
Mark Martin+
James A. Wynn, Jr.
Robert F. Orr
Sarah Parker+
I. Beverly Lake, Jr.+
Willis P. Whichard
John Webb
Robert R. Browning
Francis I. Parker
Rhoda Billings+
Earl W. Vaughn
Henry E. Frye+
Harry C. Martin
Burley B. Mitchell, Jr.+
Louis B. Meyer
J. Phil Carlton
Walter E. Brock
David M. Britt
J. William Copeland
James G. Exum, Jr.+
Dan K. Moore
J. Frank Huskins
J. William Pless, Jr.
Joseph Branch+
I. Beverly Lake, Sr.
Susie Sharp+
Clifton L. Moore
William B. Rodman, Jr.
William H. Bobbitt+
Carlisle W. Higgins
R. Hunt Parker+
Itimous T. Valentine
Jefferson D. Johnson, Jr.
Murray G. James
Samuel J. Ervin, Jr.
Emery B. Denny+
Aaron A.F. Seawell
J. Wallace Winborne+
M. Victor Barnhill+
William A. Devin+
Michael Schenck
Willis J. Brodgen
Lycurgus R. Varser
George W. Connor
Heriot R. Clarkson
Walter P. Stacy+
William J. Adams
William R. Allen
James S. Manning
George H. Brown
William A. Hoke+
Platt D. Walker
Henry G. Connor
Charles A. Cook
Robert M. Douglas
David M. Furches+
Walter A. Montgomery
Armistead Burwell
James C. MacRae
James E. Shepherd+
Alphonso C. Avery
Walter Clark+
Joseph J. Davis
Augustus S. Merrimon+
Thomas Ruffin, Jr.
John H. Dillard
Thomas S. Ashe
William T. Faircloth+
William P. Bynum
Nathaniel Boyden
Thomas Settle
William B. Rodman, Sr.
Robert P. Dick
Edwin G. Reade
Matthias Manly
Richmond M. Pearson+
William H. Battle
Frederick Nash+
William Gaston
Joseph J. Daniel
Thomas Ruffin, Sr.+
John D. Toomer
Leonard Henderson+
John Hall

SUPREME COURT OF NORTH CAROLINA
BICENTENNIAL
CEREMONIAL SESSION

At 2:00 on the afternoon of 7 January 2019, the Supreme Court of North Carolina convened for the purpose of celebrating the Court's 200th anniversary.

Upon the opening of Court, the Clerk of the Supreme Court, Amy Funderburk, sounded the gavel and announced:

"His Excellency, the Governor of the State of North Carolina, the Honorable Roy Cooper."

The Governor, accompanied by Chief Deputy Marshal Ricky Parks, entered the Courtroom from the rear door to the Courtroom, and proceeded to his seat at the front of the Courtroom across the aisle from the Justices' spouses.

The Clerk sounded the gavel again and announced:

"The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of North Carolina."

All persons in the Courtroom remained standing, and upon the members of the Court reaching their respective seats and places on the Bench, the Clerk announced:

"Reverend Dr. Dumas Harshaw, Senior Pastor of First Baptist Church in Raleigh, North Carolina, will deliver the Opening Prayer."

Reverend Dr. Harshaw proceeded from his seat in the Courtroom to the podium where he delivered the Opening Prayer and then returned to his seat in the Courtroom. The Clerk then announced:

"Lieutenant General Buster Glosson, Veteran of Operation Desert Storm and the Vietnam War, will lead us in the Pledge of Allegiance."

Lieutenant General Buster Glosson proceeded from his seat in the Courtroom to the podium where he led the Pledge of Allegiance and then returned to his seat in the Courtroom. The Clerk then announced:

"Oyez, Oyez, Oyez -- The Supreme Court of North Carolina is now sitting for the Ceremonial Session of the Court to commemorate its bicentennial anniversary. God save the State and this Honorable Court."

The gavel fell, and everyone was seated.

Chief Justice Mark Martin welcomed official and personal guests of the Court with the following remarks.

WELCOME AND REMARKS
by
CHIEF JUSTICE MARK MARTIN

On behalf of the entire Court, I welcome each of you to this special Ceremonial Session of Court to commemorate the bicentennial anniversary of this Court. We are grateful for your presence with us to celebrate this most important occasion.

I will not undertake to recognize by name all of our distinguished guests, so that our attention may be focused on the celebration of our Court's 200th anniversary.

However, no ceremony would be complete without the support of my wife, Kym Martin, and the spouses of our Associate Justices:

Justice Newby's wife Macon Newby

Justice Hudson's husband Victor Farah

Justice Beasley's husband Curtis Owens

Justice Morgan's wife Audrey Morgan; and

Justice Earls' husband Charles Walton

As always, we are pleased to have with us former Chief Justices and Associate Justices of this Court and their spouses:

Chief Justice Sarah Parker

Chief Justice Henry Frye and his wife, Shirley

Chief Justice Jim Exum

Associate Justice Barbara Jackson

Associate Justice Bob Edmunds and his wife, Linda

Associate Justice Bob Hunter

Associate Justice Patricia Timmons-Goodson

Associate Justice Bob Orr and his wife, Louise

Associate Justice Franklin Freeman and his wife, Lynn

Associate Justice and current United States Circuit Judge Jim Wynn

Associate Justice Willis Whichard and his wife, Leona; and

Associate Justice Phil Carlton

We welcome current AOC Director Judge Marion Warren, and all former AOC Directors.

We also welcome Chief Judge Linda McGee and the members of the Court of Appeals, as well as judges from the Superior Court, the District Court, and Office of Administrative Hearings.

From the federal bench, in addition to Judge Wynn, we welcome United States Circuit Judge Allyson Duncan.

We are also delighted to have Governor Roy Cooper, Lieutenant Governor Dan Forest, and members of the Council of State, including:

Secretary of State Elaine Marshall

Attorney General Josh Stein

Superintendent of Public Instruction Mark Johnson

State Treasurer Dale Folwell; and

Commissioner of Insurance Mike Causey

We are pleased to welcome Deans from our law schools, as well as leaders of the N.C. State Bar and the N.C. Bar Association.

We also welcome representatives from the Equal Access to Justice Commission and the Chief Justice's Commission on Professionalism.

Last but not least, we welcome all former research assistants and court staff. Welcome home!

I also want to recognize and thank Dr. Harshaw for his participation in this momentous occasion, and for his regular support of the Court.

We are further honored today by Lieutenant General Buster Glosson's participation. After graduating from N.C. State University, General Glosson served in the United States Air Force from 1965 until 1994. Notably, General Glosson was the principal architect of the complex and extremely successful air campaign that led to victory for our forces over Iraq in the First Gulf War in 1991. General Glosson, thank you for joining us today, and thank you for your long and distinguished service to our country.

A 200th anniversary is a remarkable achievement in the life of any institution. It's a cause for celebration. It's also an opportunity for deep reflection. How did we get here? How should we proceed? Noted American historian, David McCullough, once reflected that "[w]e have to value what our forebears . . . did for us, or we're not going to take it very seriously, and it can slip away." Neither the past success nor the future survival of this Court should be taken for granted.

One such moment of reflection also took place on the first anniversary of this Court. Then state Senator, and future Justice of this Court, William Gaston reported to the General Assembly the progress of the nascent institution. He remarked: "Ours is emphatically a government of laws . . . . [T]hese are the universal and the only rules of action, it is indispensable that they be so expounded as that in their control of civil conduct, they shall have a steady and uniform application. There is no model by which the different tribunals of justice through the land, held by various persons . . . can be made to concur in the same exposition of the public will, other than by establishing one Supreme Court."

Throughout its history, this institution has sought to remain true to Justice Gaston's ideal that it provide "steady and uniform application" of the laws of this State. The women and men who have served on this Court have done their best to fulfill that solemn obligation. To faithfully adhere to precedent. To administer justice. And to strengthen the rule of law by upholding it in their own time.

The great Roman statesman and orator, Cicero, once wrote that "nothing counterfeit has any staying power." Over the past 200 years, our State has revised its constitution multiple times, changed the way that members of this Court are selected, and witnessed extensive shifts in law and society. Yet, this Court has exhibited remarkable staying power through it all. That we are here celebrating a bicentennial anniversary is itself a testament to this institution's steadfast commitment to consistency, fairness, and justice. It is also a testament to the Justices' tireless efforts to earn the trust and confidence of the people that they serve.

So, with our celebration of this hallmark anniversary comes a friendly admonition and charge for the future that is as applicable now as when it was first given.

In Federalist 78, Alexander Hamilton posited that the judiciary is the least dangerous of the three branches of government. As such, he theorized that "the general liberty of the people can never be endangered from that quarter." But Hamilton, like any good lawyer, noted that his thesis came with an important caveat—that the "judiciary remain[ ] truly distinct from both the legislature and the executive." With this warning in mind, he went on to urge that "[t]he courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body."

Now, if Reverend Dr. Harshaw were up here, he would likely remind us that God has made each person unique. So how does that individuality intersect with the objectivity sought in Federalist 78? Each of us, as

unique individuals, and thus as unique jurists, may not always administer the principles of Federalist 78 in the same exact way as other judges. But the key is that we each strive to do so. That we understand that the judicial office is not a political office. That courts are a coequal branch, but with a different function than the legislative and executive branches. We understand that judges should defer to the other branches on issues of policy as long as constitutional standards are observed. That by assuming a seat on this bench, we lay down our preferences and opinions in joint pursuit of upholding the rule of law.

But if judges do strive in good faith to observe the principles of Federalist 78, then the courts will in fact be the least dangerous branch. It doesn't happen automatically, though. It's an "if-then" conditional.

It has often been quoted that, "Freedom is a fragile thing and is never more than one generation away from extinction. It is not ours by inheritance; it must be fought for and defended constantly by each generation." Our freedoms as Americans are secured by the rule of law, by respect for our constitution, and by each of us doing our part to support the public good.

The members of this Court are the ultimate guardians of the rule of law in this State. So, it is the responsibility of the members of this Court, both now and in the future, to heed Hamilton's charge. To decide each case as the law requires.

In so doing, I am confident that this Court—my colleagues and our successors—will continue to secure the freedoms of North Carolinians and to provide justice for all. I am optimistic that our continued fidelity to the rule of law will ensure that North Carolinians have even more reason to celebrate this institution 100 years from this historic day.

RECOGNITION of
GOVERNOR ROY COOPER
by
CHIEF JUSTICE MARK MARTIN

At this time, it is my honor to invite His Excellency, The Honorable Roy Cooper, Governor of the State of North Carolina, to deliver greetings.

. . . .

Thank you Governor Cooper for being here, and for your remarks.

RECOGNITION of
LIEUTENANT GOVERNOR DAN FOREST
by
CHIEF JUSTICE MARK MARTIN

It is now my honor to invite The Honorable Dan Forest, Lieutenant Governor of North Carolina, to deliver greetings.

. . . .

Thank you, Lieutenant Governor Forest for those remarks.

RECOGNITION of
DEWEY W. WELLS
by
CHIEF JUSTICE MARK MARTIN

Each year, the Justices employ law clerks (or research assistants, as they are now called) to assist them in researching the cases which come before the Court. The one or two years that these young attorneys spend with the Court is the beginning of what will hopefully become a rewarding career in the law.

Today we have the privilege of hearing from one of the Court's first law clerks. Dewey Wells clerked for the Court in 1954, and we welcome him back today to share that experience with us. Mr. Wells, the floor is yours.

. . . .

Thank you, Mr. Wells, for those excellent remarks about your experiences with the Court and for the civility and professionalism that you have displayed throughout your distinguished legal career.

RECOGNITION of
G. GRAY WILSON
by
CHIEF JUSTICE MARK MARTIN

Next, we welcome Gray Wilson, President of the N.C. State Bar, to deliver greetings from the Bar.

. . . .

Thank you, Mr. Wilson, for those remarks, and thank you for your service as President of the State Bar.

REFLECTIONS on the HISTORY of the COURT
VIDEO PRESENTATION INTRODUCED
by
CHIEF JUSTICE MARK MARTIN

At this time, we will have the opportunity to watch a video with reflections on the history of the Court.

. . . .

What a wonderful tribute to our Supreme Court! Thank you to all who took part in making and presenting the video, including: Sharon Gladwell and her staff at AOC Communications (Chris Mears, Andrew Breedlove, and Jason Dallin); Mike Collins and Dick Ellis; Dewey Wells; Fred Wood; and of course Justices Newby, Hudson, Beasley, and Ervin!

RECOGNITION of
JACQUELINE D. GRANT
by
CHIEF JUSTICE MARK MARTIN

In addition to being a member of the N.C. State Bar, N.C. attorneys also have an opportunity to join the N.C. Bar Association. Jacqueline Grant is the current President of the Bar Association, and I am pleased to invite her to extend greetings at this time.

. . . .

Thank you, Ms. Grant, for those remarks, and thank you for your service as President of the N.C. Bar Association.

RECOGNITION of
JUSTICE WILLIS WHICHARD
by
CHIEF JUSTICE MARK MARTIN

Our next speaker is no stranger to the Court, having served as an Associate Justice from 1986 – 1998. He is my predecessor; I assumed his seat on the Court when he retired in 1998. Justice Willis Whichard will share with us remarks on the history of our Supreme Court.

. . . .

Thank you, Justice Whichard for your insightful remarks on the history of our Court. It is always a pleasure to have you with us, and I thank you for all your contributions over time in support of our bicentennial celebration.

CLOSING REMARKS
by
CHIEF JUSTICE MARK MARTIN

I want to close this Ceremonial Session by encouraging each of us to be an example of civility and professionalism.

- Let's unite in support of the rule of law.
- Let's promote public trust and confidence in our courts.
- Let's elevate principles over passion.
- Let's talk to each other, and not past one another.
- Let's genuinely listen to each other, and consider different perspectives.
- Let's be objective when deciding between opposing points of view.
- And when we do disagree, let's do so without being disagreeable.

Even though every generation will always have reasonable disagreements over policy, this institution represents an area where we can unite in support of the rule of law. That our written constitution must be upheld and defended as the bedrock of all our liberties. That the law should be uniformly applied in each case and to each person. That we should strive to administer equal justice under law.

I am thankful that we can come together today to celebrate the past successes of this Court and what it represents in our society. And I sincerely hope that we will all actively support its continued success well into the future.

In a moment, the Clerk will adjourn this ceremonial session. But I first want to thank Philip Miller, Buck Copeland, and Tom Davis with the N.C. Supreme Court Historical Society, and Justice Willis Whichard and Danny Moody with North Carolina Legal History, Inc., for all their collective help in administering and supporting this event and all the other events that have been organized to commemorate our important anniversary milestones within the judicial branch.

I also wish to thank Chief Judge Linda McGee and Christie Roeder, our own Terry Murray and Amy Funderburk, and all other friends of the Court and staff who have helped make this ceremony possible. Finally, I thank Governor Cooper, Lt. Governor Forest, Reverend Dr. Harshaw,

General Glosson, Gray Wilson, Jacqueline Grant, and Dewey Wells for their participation in today's ceremonial session.

Now, immediately following the ceremony, there will be a reception at The State Capitol, which is located directly across the street from this building. Those of you in the Courtroom will be asked to wait until the Justices and the Governor have had an opportunity to leave the room, and then you may proceed to the elevator at the direction of the research assistants, and then on to the reception. The Court's research assistants will be stationed throughout this building to assist you as needed.

Madam Clerk, please adjourn this Ceremonial Session.

CONCLUSION OF CEREMONY

The Clerk ended the Ceremonial Session by sounding the gavel and stating:

"Oyez, Oyez, Oyez -- The Ceremonial Session of the Supreme Court of North Carolina is now concluded. God save the State and this Honorable Court."

Opening Prayer by Rev. Dr. Dumas Harshaw, Jr.

Dear Eternal God, Our Compassionate Guide, the Source and Sense of our human striving, it is with gratitude and joy, that we gather to celebrate the existence and the noble history of the North Carolina Supreme Court. Your grace has been bestowed upon this distinguished body for 200 years since January 7, 1819.

We applaud the just decisions, the defining legal work, the good counsel, and the critical insight across this significant time frame to protect, to guide, and to empower the citizens of our great state. May your amazing grace continue to guide the outstanding justices of this generation as we face new struggles, new challenges, but also new opportunities to adhere to the words of the Old Testament prophet Amos as he appealed to people of purpose and good will of his generation, *"Let justice roll on like a river and righteousness like a never-failing stream."* (Amos 5:24)

We especially thank you, Lord, for the exceptional justices that now sit upon this august court and pray for each of them as they work diligently to extend the hand of justice to all of God's children regardless of political alignment, cultural background, racial heritage, class status, or gender identification. May each one sense your presence with them as they seek not only legal guidance, but also most importantly, divine guidance for these times in which we live, and stand in need of justice, restoration and liberation.

Grant to them, Dear Lord, strong resolve to address the most difficult questions of the law. Grant them courage to stand for what is right, and for what constitutes truth, and the wisdom to know the difference. May we all who seek freedom from terror, equality and fair play, right living and a compassionate community, know the promise of divine presence in our pursuits, uttered in the words of the Prince of Peace, *"Lo, I am with you always, even unto the end of the age."* (Matthew 28:20)

In His Name We Pray, Amen.

Remarks by Governor Roy Cooper

I'm honored to be part of this celebration today—commemorating the 200th anniversary of the North Carolina Supreme Court.

So many great North Carolinians have served on this esteemed court. They have shown deep respect for the law as well as a deep love for our state.

The work of this Court has left countless lasting impacts on the lives of everyday people—on the way we govern ourselves and on how we define and administer justice.

This Court has decided disputes between people, corporations, the state versus the accused, people with a grievance against the state and disagreements between branches of governments.

This Court has been unafraid to do what it thought was right based on the law and the constitution regardless of whether it suited popular opinion at the time.

For example, before the abolition of slavery, this Court overturned the conviction of an enslaved North Carolinian accused of murdering a slave owner by finding in law that the legal doctrine of self defense could be used.

Before women were granted their long overdue right to vote, this Court granted to Tabitha Holton a license to practice law, opening the way for more women to enter the profession.

This Court has expanded the rights of working people who were hurt on the job.

And this Court held fast to our constitution, finding that every child in this state is entitled to a sound, basic education —no matter who they are or where they live.

This has been and will continue to be with you Justices here – a place to seek justice.

When government becomes too heavy handed, this Court can find violations of due process of law. When unlawful discrimination takes place, this Court can be a remedy. When politics and big money suffocate the rights of everyday people, this Court, can be an equalizer.

Due Process, Equal Protection, Justice. These should not and must not be mere words. This Court makes them reality.

I'm pleased that the Court has marked this 200th anniversary as a time to educate North Carolinians about its critical importance.

This Court may be housed in Raleigh, but its vision and its service extend statewide. To underscore that this is a court for all of North Carolina, you have held special sessions from Hendersonville to New Bern and many places in between, helping spread knowledge and awareness of our justice system.

Above all, this Court works to uphold the virtues of fairness and justice for all North Carolinians.

To the justices, clerks and staff of this great institution: I'm deeply grateful for your wisdom and your service.

Congratulations to the North Carolina Supreme Court and all of its present members and previous members on the achievements of the past two centuries. May this Court continue to bring justice to the people of North Carolina for centuries to come. Thank you very much.

Remarks by Lieutenant Governor Dan Forest

Justices, Governor Cooper, distinguished and honorable guests,

It is truly an honor to speak to you on this solemn occasion of the Supreme Court's 200th anniversary.

It is a testament to the strength of the ideas of our founders that there should be three separate and distinct branches of government, and it is a testament to our people that we have upheld this unique structure for more than two centuries.

As James Madison said of his separation of powers, "it is because men are not angels that we need this form of government", and it has stood the test of time because it has served the people well.

The executive, legislative, and judicial branches of government work together for the good of all North Carolinians, and sometimes work against each other for the good of all North Carolinians. And that is the way that it was intended to be.

How is it that a government can work so well for so long? It is when we hold true to the guiding principles on which the government was founded.

- The executive branch must execute the laws and not attempt to adjudicate disputes or create law by fiat.

- The legislative branch must create the law, rather than attempt to execute those laws or serve as judges over disputes.

- And of all the branches, the judicial branch must show extraordinary restraint.

A Supreme Court Justice, elected by the people, serving the longest term of any elected official, must wisely resist human impulses to make laws or to execute them.

Justice Exum, who would later become Chief Justice said it best - "The role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests. The role of the Court is not to sit as a superior legislature and second-guess the balance struck by the elected officials. Rather than rebalancing, the Court's role is only to measure the balance struck by the legislature against the required minimum standards of the constitution."

The North Carolina Supreme Court is to be commended on its long and distinguished history of fulfilling its duties with the highest integrity.

The Supreme Court is also to be commended for its long and distinguished history of judicial restraint.

There is little doubt that the justices that sit before us on the bench, or those who have previously served in this capacity, when presented with a case, had they held an executive or legislative office may have chosen a different direction, but because the actions of other branches of government did not violate the constitution, the opinion of the Court has given way to those branches that are "closest to the people" - that is what we call judicial restraint.

That is why our system of government has worked for the best interests of the people and not just the best interests of the judges. The three branches provide accountability, and all three of those branches are accountable, ultimately, to the people.

We are here today in the Justice Building. The idea of justice is as old as recorded history. As the prophet Micah said "He has told you, O man, what is good; and what does the LORD require of you but to do justice, and to love kindness, and to walk humbly with your God?"

What is justice? It is doing what is right according to the law.

Lady Justice adorns many courthouses across our great state. She stands with scales in her left hand and a sword in her right, ready to weigh the facts and render judgment. But importantly, Lady Justice is blindfolded.

When justice is at stake, socio-economic status, race, political affiliation, are of no consequence to her. Justice sees no color, no creed, no race, no party. Justice does what is right according to the law based on the facts before her.

In fact, in the center of the seal of this very Court stands a blindfolded Lady Justice, showing this Court's commitment to equal justice for all under the law.

And with that, I congratulate you on this anniversary and encourage you to continue the long-standing and honorable service that this Court has provided to the people of the great state of North Carolina for 200 years.

Remarks by Dewey W. Wells

May it please the Court. If the program were correct and complete, I suggest that as it pertains to my part of it, before the word "remarks" might be the word "light," because there will be nothing profound in what I have to say. And after my name, would go a comma with the words "ancient relic," because the mid-1950s was a simple but very enjoyable time of existence, and that's what I'm here to reminisce about a little with you, and thank you for asking me to do that.

My first appearance in this Court was in September of 1954, when the judges had employed me as the law clerk of the Court, and I appeared here to be sworn in as a licensed attorney by Chief Justice Maurice Victor Barnhill. After that ceremony and for the next twelve months, working for the various judges, I had, from time to time, suggested to me that I come in and listen to arguments in certain cases that they expected would be interesting and somewhat complex, maybe, and they thought that would give me a heads-up on it. And then when the justice who had drawn the case to write an opinion would have me in to discuss it, he would ask for my impressions which I enjoyed giving and I appreciated the attention and apparent interest that the justice had. Now after, in the decades that followed, when I was here to argue a case, it was my earnest hope that the justices would then be as interested in what I was having to say as they had in 1955. Well, now, 64 years after that first appearance, I am honored to have a few minutes here.

I stood in awe of the seven giants of the profession who had hired me. They were, in addition to Chief Justice Barnhill, who was a native of Halifax County but established his work in Nash County; Judge J. Wallace Winborne, Chowan County originally but wound up in McDowell; Justice Jeff Johnson of Sampson County; Emery Denny, originally of Surry and then Gaston County; Carlisle Higgins of Allegheny County, and nothing he liked better when he was not at his desk here was to take his rifle and scope up to the foothills of Alleghany County and shoot groundhogs in that rolling foothills country. He and I had some interesting conversations about that; R. Hunt Parker of Halifax; and William H. Bobbitt of Mecklenburg. Their stature, which to me under those circumstances was enormous, may have been enhanced by, among other things, that they were the seven only appellate judges in the state and generally they had a long tenure in office. They were usually appointed by the Governor, and then retained in office by elections, very predictably winning in this being then a one-party state. In rare contested elections – I recall one that was probably as famous as any in my life for a seat on this Court between Hunt Parker and William H. Bobbitt, both eminent Superior Court judges. Well, Hunt Parker won that election but not long

thereafter, Bobbitt was appointed to fill a vacancy so both were on the Court together. And they were good friends, eventually. Fortunately, for the state, Bobbitt became a member of the Court; fortunate for me because my office was between the elevator and Judge Bobbitt's office, which is the first one on the left. And I not only got to work with him a lot but it just happened he was a very chatty person, and I enjoyed being his neighbor. And then, of course, his being on the Court was fortunate for another reason when Justice Susie Sharp came to the Court. In those days, I was enjoying myself to such an extent, I remember wondering why I should even be getting paid for doing it, and I wasn't being paid very much at that. After three months here, the Chief called me in to commend me for my work and said that the Court had decided to increase my pay to the statutory maximum. And so, beginning January, I began to draw $300 a month. I might have received a higher salary had I stayed in Raleigh and worked for the State, because the Chief began to talk to me about the perceived need for administrative help to the Chief Justice in running what was then a much simpler court system, but still it was making inroads upon his time to decide cases, and they were thinking about hiring an administrative assistant. I think in those days there were maybe about 30 or 32 Superior Court judges; I think there are now over a hundred. Anyway, I did not stay in Raleigh to do that even though they were kind enough to suggest that I might want to stay over and do the administrative work, but probably more as a result of that, I watched what was happening in Raleigh with respect to the need for administrative help for the Court, and they did begin to hire administrative assistants. But it was ten years later when, by constitutional amendment, the Administrative Office of the Courts was set up. And that's now history, and it has become quite an institution in itself.

Some other personalities of the Court in those days were John Strong, the official court reporter. He had an office down on the east end of the second floor, the only office on that floor that was not occupied by the Attorney General. And in that office, he would sit and he would read the opinions of the Court, and he would make notes on 3x5-inch index cards. And he would organize those cards in a retrievable way, and from those cards came the headnotes of the published opinions, and from those headnotes came the set of books that John Strong ultimately published which was a very helpful set of books in those days, called the N.C. Index. And if you remember that set of books, you're not young anymore. Well, two very fine friends I made here that I must mention, John and Henry, the Court's custodians. There was no marshals in those days. The custodians had a little desk out here between the elevator and my office; my office is now the marshals' office. Anyway, John and Henry were really great companions, and I enjoyed my year here, passing their

desk several times a day. They taught me, among other things, that Judge Hunt Parker's presence on the floor could be detected by the aroma of his Turkish cigarettes. I called it aroma; they called it more akin to the burning trash pile. He would light those cigarettes only with British wooden matches. Judge R. Hunt Parker was quite an individual, who I'm glad I got to know.

My *ex officio* responsibility as law clerk was to be Secretary of the Judicial Council. That body was created by statute to study the judicial system and procedure and make recommendations for improvement, which they were very capable of doing. It was some fine people; people like Bill Womble, Fred Helms, and I could go on and on, but they were wonderful people and it was my pleasure to meet with them occasionally. And I remember one of the subjects that was on the table for discussion was the Missouri Merit Selection Plan, which had been around for a decade or more by then, and the second was whether or not that would be good for North Carolina and whether they should recommend it to the Legislature as a constitutional amendment. It never got to the point where they prepared a bill, but they were very much interested in it. And I find it noteworthy that after all those years, we are still talking about reform in judicial selection in this state. I think that's worth pondering, you know. But that's a story for another day. So, in the 1955 Session of the General Assembly, the Judicial Council's bills were being lobbied by a young man less than one year out of law school. I was as much in over my head in those days as I am now addressing this august assemblage. And I thank you for listening.

Remarks by G. Gray Wilson

The North Carolina State Bar is a creature of statute, but historically this government agency has been subject to the welcome oversight of the North Carolina Supreme Court. I say welcome because we at the State Bar take our obligations as a self-regulatory body quite seriously, and look to the court for guidance, wisdom and counsel as we strive to perform our solemn statutory duties to the legal profession and the public we are sworn to protect. Hardly a quarter goes by when we do not propose changes and amendments to State Bar regulations, which this Court has the sole and exclusive authority to approve. This is hardly a sterile process. We regularly meet and confer with the Chief Justice about programs and issues on which we seek his advice, and he has always been open, accessible and willing to consider whatever proposals we bring to the Court. Perhaps the best example of this close relationship is that, within a couple of days after being sworn in as president of the State Bar, I received a request to provide my cell phone number to Justice Martin, which was quickly followed by a pleasant telephone call to tell me he hoped the relationship of these two entities would remain as cordial and engaging as it has been in the past. I can assure you that, for at least another year, it will. I will not be mortally offended if I am not invited back to this Court for a celebration 200 years from now, because I believe that there will be such a celebration and that this Court will still be here manning the ramparts of justice.

For if there can be anything more important than the interactive relationship between these two institutions, it is the sanctity of our judicial system as the third branch of government. Demagogues come and go, and on occasion we are happy to see that happen, but the judicial system is the bedrock of our freedom, the repository of the values we hold dear: access to justice, fair and efficient adjudication of rights and obligations in the courts, and above all, equality under the law. For in the final analysis, there is only the law, and we see many of the purveyors and custodians of the rule of law among us here today. We honor them, we honor the judicial system, and we pray for the fair and lasting administration of justice in this state, at least for another 200 years.

Remarks by Jacqueline D. Grant

It is a pleasure to be here with you today to celebrate the North Carolina Supreme Court's 200th Anniversary.

I am Jacqueline Grant, 124th President of the North Carolina Bar Association, and I bring you greetings from the North Carolina Bar Association and Foundation.

Since its inception the NCBA has enjoyed a unique relationship with the N.C. Supreme Court. The organizational meeting of the Bar Association was held in the Supreme Court/State Library Building in 1899. It is where we begin our mission of service to the profession and to the public. Four of the charter members of the Bar Association later served on the Supreme Court (Henry Groves Connor, Walter Clark, Heriot Clarkson and Platt D. Walker).

Through the years, the Bar Association has worked with the Supreme Court to facilitate the administration of justice.

In recent years this has included:

1) The Bar Association's support of the North Carolina Commission on the Administration of Law and Justice. We were proud to host the convening event at the Bar Center and to support its work through the participation of our members, who made up more than half of the Commission, and by promoting and working to support the resulting initiatives of the Commission including Raise the Age.

2) Prior to the Commission, through our Open Courts Committee, we worked to support the Supreme Court and the judicial branch by raising awareness about the work of the Court and our judiciary and advocating for increased resources for the judiciary.

3) We work to promote and communicate initiatives of the Court and the Chief Justice and to help advocate for the importance of an independent judiciary. We recognize that an independent judiciary is a required cornerstone of democracy. In order to have a fair and impartial judicial branch, a judge's actions should be free from outside influence, which includes being free from fear of political or social backlash. Judicial Independence seeks to insulate judges against political forces, including the legislative and executive branches, that might seek retribution for particular judicial decisions.

4) We remain proud to have the Chief Justice's State of the Judiciary address at our annual meeting.

In closing, the Bar Association congratulates the N.C. Supreme Court on its 200th Anniversary. We look forward and pledge to continue our support of the initiatives of the Court and the Chief Justice as we embark on the next 200 years.

Thank you.

Remarks by Justice (Ret.) Willis P. Whichard

Thank you, Mr. Chief Justice, and may it please the Court.

In 1977 I was a member of a Southern Legislative Conference delegation to China. Welcoming remarks informed us that there was so much to see and learn that the experience would be "like looking at the flowers from a galloping horse." Today our brief venture through 200 years of North Carolina Supreme Court history will require an even faster horse to accommodate the allotted time. Problems of inclusion and exclusion defy felicitous solution. But let us begin.

The colony of North Carolina had a supreme common law and equity tribunal styled "The General Court," which was a trial court. There was no court for appeals, though the presiding officer was called "Chief Justice." On December 19, 1776, the newly created State of North Carolina adopted its first constitution. It provided that the General Assembly should by joint ballot appoint judges of the Supreme Court who would hold office during good behavior. The General Assembly seemed to consider that, there being no appellate court, the superior court filled this requirement, for there was no formal appellate court until 1799.

Informally, however, the state's three trial judges functioned as a court of conference to decide one of the more significant cases in the state's judicial history, Bayard v. Singleton (1787). In the aftermath of the American Revolution the state had little tolerance for those who had remained loyal to the British Crown. A 1785 Act of the General Assembly provided for confiscation of property held by or through such persons. The legislation provided for commissioners to transfer such property from its Loyalist owners to the purchasers, who supported the newly created independent state. To prove their title, purchasers at the confiscation sales had only to present their deeds from the confiscation commissioners. The court was then to dismiss the claims of the Loyalist owners or their successors.

There was a problem, however. The state constitution gave to every citizen a right to a decision in regard to his or her property by a trial by jury. The informal court of conference awarded the plaintiff her constitutionally mandated trial by jury, thereby voiding the legislative enactment. The principle of judicial review of legislative acts for conformity to the fundamental law was thus established in North Carolina sixteen years before John Marshall ensconced it into the fabric of the American experiment in self-government in his better-known opinion in Marbury v. Madison.

In 1799 the General Assembly formally adopted a system under which the three superior-court judges sat to decide appeals in what was styled the "Court of Conference." In 1804 the court was first required to file written opinions. In 1810 the judges hearing appeals in conference were authorized to elect a Chief Justice. Any two trial judges, of which there were now six, when sitting in Raleigh, constituted a quorum for deciding appeals.

The Supreme Court, contemplated forty-two years earlier by the Constitution of 1776, was at last created by legislative enactment in November, 1818. The bill's sponsor, prominent New Bern attorney William Gaston, would later become one of the Court's most illustrious members. The Court's existence commenced on January 1, 1819, and its first session was held on January 5, 1819, 200 years ago the day before yesterday.

At its inception the court functioned with three members chosen for life, subject to good behavior, by the General Assembly. The members designated one of their number as Chief Justice, and only he had the title "Justice." The other members were "judges." The Reconstruction Constitution of 1868 provided for a Chief Justice and four Associate Justices to be elected by the people for terms of eight years. In the event of a vacancy, the Governor was to appoint to fill it until the next general election. The number was reduced to three from 1879-1888, when the Constitution was again amended to provide for a Chief Justice and four Associate Justices. A 1936 amendment provided for a Chief Justice and not more than six Associate Justices. The General Assembly authorized appointment of two additional Associate Justices as of July 1, 1937, and the Court has functioned with seven members ever since.

John Louis Taylor, Leonard Henderson, and John Hall constituted the original Court. The members chose Taylor to be the first chief justice. Upon Taylor's demise, the General Assembly elected Thomas Ruffin to the vacant position. Judge Henderson became the chief justice, and was, by all appearances, a popular and respected one. The court, however, was a fledgling institution and unpopular. Every General Assembly session brought efforts to abolish it. Upon Henderson's death, the election of William Gaston to the vacancy was believed to be essential to the Court's survival.

One possible impediment was brushed aside. Gaston was a Roman Catholic, and the North Carolina Constitution then banned from state office anyone who denied the truth of the Protestant religion. Gaston and his supporters rationalized that insofar as the Protestant religion could be defined, it was the Apostles' Creed, which Catholics also believed.

The fact that they held other beliefs that Protestants did not share could be disregarded.

There were further impediments, foremost among them the candidate's finances. Ultimately Gaston was willing to "leave it to a few friends… to say what duty demands of me." He specified the friends: Governor David Swain, and Raleigh lawyers Thomas Devereux and George Badger. In their appeal to Gaston, these three played the civic-virtue card. "[I]f any other name is presented," Governor Swain asserted, "the Supreme Court dies with the lamented Ch[ief] J[ustice]." Only Gaston's election, Devereux claimed, could "restore confidence in the public mind" and save the Court. Gaston yielded, the legislature overwhelmingly elected him, and he served the Court ably for the remainder of his life. Chief Justice Walter Clark would say that with Ruffin and Gaston together on the Supreme Court bench, the court "has never been surpassed in ability and reputation." Roscoe Pound, longtime Dean of the Harvard Law School, would consider Ruffin one of the ten greatest American common law judges.

Walter Clark holds the record for the longest tenure of any member of the Court: thirty-four years, six months, and three days. A noted progressive for his time, Clark advanced the law of the state considerably in its effects on women and children. He also led the effort in North Carolina, and provided constitutional analysis and argument nationally, for ratification of the Nineteenth Amendment, which granted the right to vote to women.

Walter Stacy had the second longest tenure on the Court: thirty years, eight months, and twelve days. He had the longest tenure as chief justice: twenty-six years, four months, and twenty-six days. Like Clark, Stacy was active beyond the Court, particularly in the settlement of numerous controversies between management and labor pursuant to requests from four presidents of the United States.

For the first 143 years of its existence, the Court was composed exclusively of white male judges. In 1962 Governor Terry Sanford appointed Susie Marshall Sharp to the Court. Sharp had also been the first woman to serve as a superior court judge in North Carolina and would become the first woman elected by the voters of a state to be the chief justice of a state supreme court.

For the first 164 years of its existence the Court had no African American members. In 1983 Governor James B. Hunt, Jr. appointed Henry E. Frye, a state senator, to be an associate justice. In 1999 Frye became the first, and to date only, African American chief justice, and served in that position through most of the year 2000.

Three members of this Court had sons who later served on it: Thomas Ruffin, Jr. followed his father, Thomas Ruffin, Sr.; George Whitfield Connor followed his father, Henry Groves Connor; and I. Beverly Lake, Jr. followed his father, I. Beverly Lake, Sr. A sitting member, Sam J. Ervin IV, came to the Court six decades after his grandfather. Sam J. Ervin, Jr., left it to acquire national renown as a member of the United States Senate. Justice William Rodman retired from the Court approximately two weeks after I came to it as a law clerk. He followed his grandfather with the same name who had served on the Court in the nineteenth century.

The establishment of the Court of Appeals in 1967 profoundly altered the nature of the Supreme Court's work. I was in the next-to-last group of Supreme Court law clerks prior to creation of the Court of Appeals. Approximately two-thirds of the cases in which I assisted Justice William Bobbitt would now be Court of Appeals cases and approximately one-third would be Supreme Court cases. Prior to creation of the Court of Appeals there was a right of appeal from the superior court to the Supreme Court. Petitions seeking review of an intermediate appellate court opinion were nonexistent. Today, such petitions consume a considerable portion of this Court's time and energy.

In closing, a brief word about an institution critical to the Court's functioning, the Supreme Court Library. In 1812, before it created the Supreme Court, the General Assembly established a law library for the state. The 1831 fire that burned the State Capitol destroyed virtually all of the State Library Collection, including the law library. In January 1834, while the new capitol was under construction, Governor David Swain, as president of the Literary Fund, submitted to its board a resolution of the General Assembly requesting that the board purchase, preserve, and manage a public library for the state. Swain requested assistance from Chief Justice Thomas Ruffin, who was in Philadelphia. Ruffin, however, would be there too briefly "to admit of his attending to the commission." As he often did, Swain then turned to William Gaston, telling him the Court was greatly in need of a library. Within the month Gaston had purchased the books for the Supreme Court Library "on very fair terms." Governor Swain thus could state in the Literary Fund report that a good library, greatly needed by the Supreme Court, had been purchased under Gaston's direction.

In his Fourth Institute Lord Coke wrote, "[L]et us now peruse our ancient authors, for out of the old fields must come the new corne." In its 200 years of existence, 100 people have served as members of this Court. There have been twenty-eight chief justices. The seven of you privileged to sit here today are mining "the old fields," initially plowed by

your predecessors, as you seek "the new corne" from which to resolve the matters the citizens of the state bring to you for decision. As the Court moves into its third century, you, too, are contributing to what will become "old fields" from which your successors will mine "new corne." May the blessings of heaven be upon you as you do it, and may this grand old institution not only survive, but thrive, in the third century of its existence.

INVESTITURE

OF

Anita Earls

ASSOCIATE JUSTICE

SUPREME COURT OF NORTH CAROLINA

Law and Justice Building
Raleigh, North Carolina

January 3, 2019
2:00 p.m.

Anita Sue Earls was born in Seattle, Washington on February 20, 1960, and was raised there by her parents, Garnett Austin Brooks and Hazel Elliott Brooks, both deceased. Her father was a certified urology technician, and her mother was a registered nurse. Their mixed-race marriage was illegal in many states at the time, but courageously they built a family together. Anita attended public schools and was awarded a National Achievement Scholarship. She also received a Lehman Scholarship from Williams College, where in 1981, she graduated Magna Cum Laude with a Bachelor of Arts Degree in Political Economy (with honors) and Philosophy.

Upon graduation, Anita was awarded a Thomas J. Watson Fellowship to study cooperative work organizations and the role of women in Tanzania, Italy and England. Returning home after three years abroad, Anita obtained her J.D. from Yale Law School, where she was a Senior Editor on the Yale Law Journal and published a note titled "Petitioning and the Empowerment Theory of Practice." She was the first Robert Masur Fellow in Civil Rights and Civil Liberties at the Nation Institute in 1987.

In January 1988, Anita joined the firm of Ferguson, Stein, Watt, Wallas, Adkins & Gresham in Charlotte, North Carolina. In private practice, she litigated in state and federal courts, handing family law, criminal defense, personal injury, voting rights, police misconduct, school desegregation, and employment discrimination cases.

Anita was appointed by President Clinton in 1998 to serve as Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice. From 2000 to 2003, she directed the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law. Returning to North Carolina in 2003, she joined Julius Chambers at the UNC Center for Civil Rights as Director of Advocacy.

In 2007, Anita founded the Southern Coalition for Social Justice, a non-profit legal advocacy organization and was its Executive Director for ten years. While there, she litigated voting rights and other civil rights cases. Anita previously taught at the University of Maryland and the University of North Carolina law schools, and in the African and African-American Studies Department at Duke University.

Anita has served on the North Carolina State Board of Elections and the North Carolina Equal Access to Justice Commission.

A mother of two sons, and now a grandmother of two, Anita lives in Durham with her husband, Charles D. Walton.

PROGRAM

Sounding of the Gavel	Amy L. Funderburk Clerk Supreme Court of North Carolina
Invocation	Reverend Johnathan Richardson Pastor Stoney Creek AME Church Elon, North Carolina
Welcoming Remarks	Honorable Mark Martin Chief Justice Supreme Court of North Carolina
Remarks	James E. Ferguson, II, Esq. Charlotte, North Carolina
Recognition of Attorney General	Chief Justice Mark Martin
Presentation of Commission	Honorable Josh H. Stein Attorney General State of North Carolina
Administration of Oath	Chief Justice Mark Martin
Remarks	Honorable Anita Earls Associate Justice Supreme Court of North Carolina
Adjournment	Amy L. Funderburk

Reception following ceremony at
The State Capitol
One East Edenton Street
Raleigh, N.C.

SUPREME COURT

OF

NORTH CAROLINA

Chief Justice

MARK MARTIN

Associate Justices

PAUL M. NEWBY

ROBIN E. HUDSON

CHERI BEASLEY

SAM J. ERVIN, IV

MICHAEL R. MORGAN

ANITA EARLS

Court Motto

"Suum Cuique Tribuere"

"TO RENDER TO EVERYONE HIS OWN"

ONE OF THE THREE FUNDAMENTAL MAXIMS

OF THE LAW LAID DOWN BY JUSTINIAN

Remarks by James E. Ferguson, II, Esq.

Thank you, Mr. Chief Justice and Associate Justices.

May it please the Court. It is a singular honor for me to be with you today on this occasion that has special meaning to me and special meaning to my law partner, Geraldine Sumter, who is with us and my former law partners, Adam Stein and John Gresham. We remember, back in 1988, when this shy young law student who had just stepped out of Yale came to the office. So shy was she, and a bit uneasy and a bit uncomfortable, we wondered whether we had made the right decision. Today we are confirmed that we did.

I have had the honor and pleasure of working alongside Anita – I can still call her Anita; she hasn't gone up there yet. I can remember the times we worked together on just a variety of cases, so I know her commitment to law and to justice and her commitment to excellence. Sometimes she made me feel unprepared because she was so prepared. But her commitment was such that she was determined to give each of her clients, many of whom had never dealt with a lawyer before, many of whom couldn't afford a lawyer, but they were people crying out for justice and they were people who needed help the most. And Justice Earls was there, not because they were paying her a fee – and I can assure you, often they did not – but she was there because she was committed to justice for all and particularly for those who otherwise might not get it. And so she would prepare, and prepare, and prepare. And she would be ultimately prepared going into court. And she knew that, that she was a bit shy, so over the years she worked on it. And I only tell you this so that when you see her today, presenting herself with such grace and power, it wasn't all there at the beginning. But over time, I have watched her growth. And the one thing about her career is that she has always been on the path of growth. And even now, as she has reached this pinnacle, this will be a path for growth for her. Because her commitment to the rule of law, her commitment to justice and equal justice for all is such that she will always grow, because as we all work towards that, we never quite achieve it.

So it is a special honor for me to have this opportunity to have remarks today, and I cannot help but think back fifty years ago when I argued my very first case in this courtroom. I was a bit taken aback because, as I stood up to argue, the Chief Justice stood up and left the courtroom. I didn't know what to make of that, and I still don't fifty years later. But I know now that when I stand before this Court, and when I stand before a Court with my former associate but forever friend, Anita Earls, that no one will be turning their backs on me, no one will

be walking out of this Court because we'll be engaged in the process together to seek justice.

And I must tell you that I feel a little bit amiss today, because rarely am I in the presence of so many justices and judges, and here I am standing before you and I have no case. Hopefully, the next time I do have a case, I will have the opportunity to have as pleasant a venture with you as I do today. I can tell you that your newest justice is a brilliant mind, an unceasingly hard worker, fully committed to equal justice for all, and she will help you do that job. And as I stand here in front of North Carolina's highest court, I know that you are adding a justice who will take even this Court higher. It is my pleasure to have these remarks for my former partner, my associate, and my forever friend, Justice Anita Earls. Thank you for this opportunity.

Remarks by Justice Anita Earls

Mr. Chief Justice, Associate Justices, Governor Cooper, Governor Hunt, members of the legislature and members of the judiciary, and to each of you able to hear these words, I stand before all of you assembled here today humbled by the tremendous responsibility entrusted to me by the voters of North Carolina, to do justice, and I am firmly committed to my solemn oath to do all that I can to carry out that responsibility to the best of my abilities.

Growing up in the time and place that I did, as a young girl I believed it was my responsibility to bring together my family, my community and my country across the racial lines that divided us. Indeed, I saw that my life, my very survival, depended on it. Watching the news stories of riots in Watts with my parents, I feared that my family would be violently torn apart because of my race. This was not a child's make-believe, my aunt and uncle and cousins lived in Watts at the time and I had visited them the year before. Would rioters attack me because I look white? Would the police arrest my cousin because she looked black? I believed I had to find a way to bring us all together, show us all our shared humanity and guarantee equal opportunities to all. My grandmother, an African-American woman born in 1899, worked as a maid much of her life and was unable to read and write. She wouldn't have wanted me to tell you that, but I am so proud of all that she was. I wanted the world to see her as I did and to understand her beauty, her wisdom, her strength and the many talents that she had to contribute to her community.

And now I understand, so many years later, that bringing us together across all the lines that threaten to divide us -- race, gender, ideology, wealth, among others, I understand that no one person can do it alone. It will take changes in our culture, it is influenced by the millions of choices that we all make every day, and it will take all of our country's public and private institutions to effect that healing, to bring us together for the common good, to lift us up instead of tearing us apart.

And it requires a system of justice that adheres to the rule of law. A system of laws and institutions to enforce them, that genuinely, and with intellectual honesty, aspires to equal justice. A system in which no one is above the law; and justice does not depend on gender, wealth, status, political party, race, creed or color. The cases that come before this court impact individual people's lives in profound ways, and have wide-ranging effects on the future of the state. I pledge to give every case full and fair consideration.

My personal commitment is to serve justice with a strong heart.

I am enormously thankful to so many people who have been instrumental in making this opportunity possible for me, there is simply not enough time to mention everyone by name right now. I have benefited from the patient guidance of family, friends, professional colleagues, mentors, trailblazers, fearless leaders and courageous clients, many of whom are at the court today and some who did not live to see this day. I try my best to live up to the examples that you set and to never let you down.

I am so grateful to my colleagues on the Court who have been so gracious and welcoming to me. Many people connected with the Court have worked incredibly hard to make this transition and today's ceremony extraordinary and memorable. Thank you so much.

North Carolina is my adopted home, and so it is the home that I have chosen, because of the remarkable potential that exists alongside tremendous challenges. Members of the judiciary here are rising to meet those challenges. Statewide initiatives such as the Equal Access to Justice Commission, and the N.C. Commission on Racial and Ethnic Disparities in the Criminal Justice System, as well as local initiatives such as Mecklenburg County's Race Matters for Juvenile Justice Collaborative, are examples of the important efforts that give us hope and promise that we can be better.

We live in a time now where just when we need our institutions to be the strongest they can be to meet the global challenges facing the world, the very legitimacy of our constitutional guarantees are under fundamental attack. Ultimately, however, the answer is a basic one:

Chief Justice Earl Warren explained it well, when he wrote:

"The democratic way of life is not easy. It conveys great privileges with constant vigilance needed to preserve them. This vigilance must be maintained by those responsible for the government. And in our country those responsible are, we the people, no one else. Responsible citizenship therefore is the … anchor of our republic. With it we can withstand the storm. Without it, we are helplessly at sea."

So in the face of the storms that swirl around us now, I am most encouraged by all the people I met over the past year campaigning throughout this state, who are responsible citizens. I am most encouraged by all of you here today. I trust each of you to help bridge the divides we experience and unite us for the common good. Together we can make a difference. And I mean that very sincerely in this context. The law is shaped as much by the clients who are willing to step forward, by the attorneys who represent them and come up with the framing of legal arguments to advocate on their behalf, as it is by the courts

that hear their cases. So I ask you to remember your responsibilities in helping guarantee justice.

In closing, let me say, while I am grateful that we have come a long way, we have much work ahead of us. Thank you so much to all of you who are here today. May God bless you and this Court.

INVESTITURE
OF

Cheri Beasley

CHIEF JUSTICE
SUPREME COURT OF
NORTH CAROLINA

2:00 P.M.
MARCH 7, 2019

SUPREME COURT OF
NORTH CAROLINA
RALEIGH, NORTH CAROLINA

Chief Justice Cheri Beasley
Supreme Court of North Carolina

★★★

As the Court commemorates its 200th Anniversary, Cheri Beasley becomes the first African-American woman to serve as Chief Justice of the Supreme Court of North Carolina. Beasley's judicial career spans two decades, beginning in 1999 with her appointment as a District Court Judge in the Twelfth Judicial District by Governor James B. Hunt, Jr. She served ten years in that position, elected in 2002 and in 2006. In 2008, Beasley was elected to serve as an Associate Judge on the North Carolina Court of Appeals, making her the first African-American woman elected in *any* statewide election without an initial appointment by the Governor. After four years on the Court of Appeals, she was appointed to the Supreme Court of North Carolina by Governor Beverly Perdue, and subsequently won election to that position in 2014. At the time of her appointment, she was only the sixth woman and only the second African-American woman to serve on the State's highest court.

Beasley's commitment to serve North Carolina extends far beyond the halls of justice. She mentors countless young people and reads at a local elementary school weekly. She lectures at area law schools. She promotes the rule of law and the administration of justice in lectures throughout the United States, Europe, Egypt, and the Caribbean, emphasizing the importance of an independent judiciary and fair judicial selection. Beasley has served in a number of leadership roles in the North Carolina Bar Association including, as vice-president, as a member of the Litigation Section Council, Women in the Profession Committee, and Awards and Recognitions Committee. She has also served as a member of the N.C. Bar Foundation Endowment Committee and the American Bar Association Standing Committee for Legal Aid and Indigent Defense.

Beasley is the recipient of many awards and honors including the Fayetteville State University Chancellor's Medallion, the North Carolina Association of Women Attorneys' Gwyneth B. Davis Award, The University of Tennessee Knoxville Trailblazer Award, as well as inductions into The Douglass Society, the highest honor bestowed by Douglass College of Rutgers University, and the Rutgers University African-American Alumni Alliance Hall of Fame.

Beasley earned a Master of Laws (L.L.M.) in Judicial Studies from Duke University School of Law and is a graduate of The University of Tennessee College of Law and Douglass College of Rutgers University. She and her husband, Curtis Owens, are the proud parents of twin sons, Thomas and Matthew, college freshmen. Their home church is First Baptist Church, Moore Street, Fayetteville. They are members of First Baptist Church, South Wilmington Street, Raleigh where Beasley serves on the Board of Trustees.

Sounding of the Gavel
AMY FUNDERBURK

Invocation
REV. DR. DUMAS A. HARSHAW, JR.

Welcome
SENIOR ASSOCIATE JUSTICE PAUL NEWBY

Special Remarks
WALTER HOLTON
CATHARINE BIGGS ARROWOOD
JOCELYN MITNAUL MALLETTE

Recognition of Governor
SENIOR ASSOCIATE JUSTICE PAUL NEWBY

Introduction
GOVERNOR ROY COOPER

Presentation of Commission
THE HONORABLE JOSHUA STEIN

Administration of Oath
SENIOR ASSOCIATE JUSTICE PAUL NEWBY

Remarks
CHIEF JUSTICE CHERI BEASLEY

Benediction
REV. DR. CURETON L. JOHNSON

Adjournment
AMY FUNDERBURK

Reception following ceremony at City Club Raleigh

★★★

CHIEF JUSTICE
Cheri Beasley

ASSOCIATE JUSTICES
Paul M. Newby

Robin E. Hudson

Sam J. Ervin, IV

Michael R. Morgan

Anita Earls

★★★

COURT MOTTO
"Suum Cuique Tribuere"

"TO RENDER TO EVERYONE HIS OWN"

ONE OF THE THREE FUNDAMENTAL MAXIMS
OF THE LAW LAID DOWN BY JUSTINIAN

1819 200 years SUPREME COURT 2019

Not printed at government expense

Invocation by Rev. Dr. Dumas A. Harshaw, Jr.

Shall we pray?

Dear Eternal God, in whom we live and move and have our beings, we declare this day as a day of jubilee as we gather to affirm, bless, and exalt this, your servant, Chief Justice Cheri Beasley. Our hearts are filled with the deepest gratitude as we install her and as we celebrate the victory for her appointment, symbolizing this wonderful achievement for her, those who love and support her, and those whose labor, love, and long-suffering are rewarded on this momentous, momentous day. Our hearts cry out with the former slaves of this state and even our nation whose blood has watered the red clay in this state, with the words steeped in the biblical meaning of an overcoming faith and diligent prayers, "Glory Hallelujah, God is great and greatly to be praised."

We have come this far by faith and trusting in the Lord. We are mindful of the awesome meaning of this moment in North Carolina history, and the significant opportunity for service to the Great North State and the longing of a people whose path has led through the valley of tears, articulated best by James Weldon Johnson: "Stony the road we trod/ Bitter the chastening rod/Felt in the days when hope unborn had died/ Yet with a steady beat/Have not our weary feet/Come to the place for which our fathers sighed?/We have come over a way that with tears has been watered/Treading our path through the blood of the slaughtered/ Out from the gloomy past/Till now we stand at last/Where the white gleam of our bright star is cast."

So while, in glorious experiences like this one, we arrive at the mountaintop of joy, we are also reminded of the spiritual battle that is reflected in our times when good is done in the context of bitter division, political-parted loyalties, and in the atmosphere of racism shaped by hateful language and deeds. We are still fighting the good fight for equality, integration, inclusion at the tables of power, and justice for all of God's children, men and women, black and white, the young and the mature.

And so, Lord, we pray for Chief Justice Cheri Beasley and for your protection around her. And may she remember that underneath are Your everlasting arms. May she remember to be strong in the Lord and in the power of Your might. And may she remember where her help comes from. She, like all people of faith, understands that her help comes from the Lord, the Maker of heaven and earth. We believe that the same God who watched over a little girl from Tennessee will watch over the Chief Justice of the Supreme Court of North Carolina. In times of difficulty and challenge, may she find comfort and strength in the words of her Savior, Jesus Christ our Lord, who said, "Lo, I am with you always, even until the end of the age." It is in His name we pray. Amen.

Remarks by Walter Holton

May it please the Court. Justice Newby, I'm thankful for many things, but one of them is that I did not have your job today. What an amazing day! It was just over 150 years ago that a young woman stood before this Court, just aged 23 years old, and she stood next to her brother and next to 18 other young men, and she requested this Court's permission to take the examination to practice law in the State of North Carolina. This was just 13 years after the Civil War and no southern state allowed a woman to practice law. So the Court was somewhat taken aback. The Court administered the test to the 19 young men; they asked the young lady to return in two days with an attorney to plead her case for admission. Justice Beasley, in the words of that young woman, she died—she suffered the horrors of a hundred deaths during that two-day period. But to the surprise of many and the disappointment of some, she returned. The Court, after a 90-minute argument and 10 minutes of deliberation, voted unanimously to allow this young lady to take the test. It was administered by Justice Edwin Reade of Person County, and she passed the test and was admitted to practice law. And the Clerk of the Court was kind enough to backdate her license by two days so it would bear the same date as her brother's, January 8th, 1878.

Members of the Court, that young woman was my grandfather's sister, and today, as in 1878, North Carolina stands on the right side of history. I consider this event every bit as significant as that of January 1878. I cannot imagine a more effective leader or a stronger voice for justice in North Carolina than Chief Justice Cheri Beasley. She is the right person at the right time, and it is such an important time. Justice Beasley, as you lead us down this new path, we want you to know that the people of this state love you and that they will walk with you every step of the way, from the police officers who walk the beat to the neighborhoods that those officers serve to protect. I can't help but think how proud my great aunt would be today as I looked at her law license this morning, which hangs in my office, and I can't help but tell you how proud I am to be here today as her descendant to welcome a new chief justice and to honor this historic occasion.

In closing, Justice Beasley, I bring with me a short letter which I'll just read the last sentence of from a former U.S. attorney from the State of Alabama which reads, "Thank you for serving the people of North Carolina so well. Please know how proud you have made your country and your state. Signed, The Honorable Doug Jones, United States Senator from the Great State of Alabama." Justice Beasley, we know you will succeed. And we know that your success will be our state's success. And we know that today, just as 150 years ago, our state will lead this country forward. Thank you so very much.

Remarks by Catharine Biggs Arrowood

It is a privilege to address you all today. This is a good time to be reminded that the Chief Justice of our Supreme Court serves as the head of our third branch of government. The Chief Justice leads the lawyers – the professionals – who appear before this Court. Those professionals are at all times officers of the court, a role that is often obscured from the public in the fog of advocacy. As officers of the court, we have the duty to see that people are treated in this place with respect, dignity, and fairness. *Respect. Dignity. Fairness.* Without these principles, the rule of law that we claim our society is based upon, is meaningless.

Our new Chief Justice learned these principles well before she went to law school. And she learned them from her late mother, Lou Beasley, a social work educator. Chief Justice Beasley has frequently spoken about her mother and said that these principles inspired her to go to law school. *Respect, dignity, and fairness.* She wanted to go to law school so that she could not only speak to these principles but could live and implement them and make a difference in the lives of people. As Chief Justice she will now have the opportunity to act on these principles in a way few of us are permitted.

This is a historic moment for our state. We have change . . . a Court more diverse than most of us thought we'd see in our lifetimes, and many challenges face the legal professional and its role in our state and country. But we also have the comfort of continuity. Because the new leader of our third branch of government is a person who understands the core values of professionalism. *Respect, dignity, and fairness.*

Chief Justice Beasley, thank you for your willingness to serve in this role. We look forward to your leadership with both confidence and pride. Thank you.

Remarks by Jocelyn Mitnaul Mallette

Thank you, Justice Newby, and may it please the Court. Poet Rupi Kaur reflected on the trailblazing women in her life, asking, "*What can I do to make this mountain taller, so the women after me can see farther?*" It is undeniable that Chief Justice Cheri Beasley has stood as a pillar in our community, making the mountain taller with every step she took along the path to where she sits today.

I am so grateful that Governor Roy Cooper saw what so many people see in Chief Justice Beasley: her unshakable integrity, her firm grasp of the law, her bold leadership. Chief Justice Beasley is truly a remarkable woman. She's a thoughtful and intelligent jurist. She's a firm and courageous leader. She is a wife, a mother, a church leader, a friend. She has a warm and kind spirit that is contagious among her colleagues and friends.

So as the President of the Capital City Lawyers Association, which is the African American bar association of Raleigh and as the Second Vice President of the North Carolina Association of Black Lawyers, I have witnessed firsthand the vibrant revitalization these organizations have experienced because of Chief Justice Beasley's support and encouragement. And what's more is that I've also seen the positive influence she has had on countless individual members of these organizations. So on behalf of CCLA and NCABL, I want you all to know we are very grateful to our Chief Justice.

I had the pleasure of serving as a law clerk here at the Supreme Court for Associate Justice Barbara Jackson. As the appellate attorneys and law clerks settled into the courtroom each time the Court heard arguments, I would have a few quiet moments to just take it all in. I remember looking around at the portraits of the former Chief Justices, and I quickly realized that most of them looked quite similar. Not only because of their race, but also because of their gender. Chief Justice Beasley is the fourth woman and the second African American to lead this Court. So today, as I walked into this courtroom, it hit me that the view is about to change.

For the first time in its 200-year history, the Supreme Court of North Carolina has an African American woman sitting in the seat of the Chief Justice. And that means, for the first time, I am able to see a Chief Justice of our State's highest court who looks like me. But it's not just about African American female attorneys like me feeling empowered. It's about the elementary school students–of all races—who come to this Court for field trips. It's about the female *and* male attorneys who stand at this podium and argue before this Court. It's about changing

everyone's perspective of what the norm is—of what a Chief Justice is expected to look like. So now at some point in the future, a portrait that looks very different from all the others will finally have a place in this courtroom.

So, as I close, I want to say thank you, Chief Justice Beasley. Thank you for selflessly mentoring young people all across the State, thank you for being an extraordinary example of a hardworking wife and mother, and thank you for making the mountain taller, so that women like me can see farther.

Remarks by Chief Justice Cheri Beasley

Wow. Thank you all so much for being here today. Thank you, Governor Cooper, for placing your trust and confidence in my abilities to lead this Court and to lead the third branch of government. I'm excited about doing the work, and I just know that the work that we do together as a branch will be stronger and greater because of the wonderful folks who are part of the work that we do. They're committed, and I know that in all the ways that we think about striving for improvements, they've already begun to make those efforts, and so I'm grateful to you and to them.

Today is really a day of hope. It's a day of hope for justice, really for all of us. Hope for accessibility to the processes that we have in our justice system and to the practices in our justice system, and most importantly to treat everybody—everybody—fairly regardless of what matter they bring before the courts. One of the really wonderful things is this is obviously March 7th, women's history month, and for Christians it is a time where we are entered the Lenten season. And so many of us as Christians have thought about many of the important things that we stand for during the season.

As I think about how important justice is, I think about, "But all of us who live cry out together for justice," which is in the book of Isaiah. It says, "Cry out, do not hold back, raise your voice like a trumpet." And it really is the crying out for justice, the cry that calls upon all of us to understand the conditions of humanity—yes, as judges, but also as people who are concerned about the communities across this state. And it seems to me that as Chief Justice, and really for all of us, that our roles are not monolithic. Yes, we're tasked with doing the jobs that we've each taken an oath to do, but really the impact of our service is so much greater, and the impact of our service is so much greater in the communities that surround us, and we should always be mindful of that.

There is hope in the many people who have reached out, who've been excited about this appointment. There is hope in the many people who have celebrated this moment, people in North Carolina, a whole lot of folks right here in this courtroom who have literally traveled from all over the country. But we've also heard from folks literally from all over the world who are excited about this day. And I wonder, why are all of these folks who I'll likely never meet excited about this day? I think it's because justice is a bedrock for all of us, regardless of where we live, regardless of where our experiences take us, regardless of where our stations in life might be.

Justice is central to finding answers and solutions to the things that ail us in our lives. And often it's through the courts that people come and they are able to find solutions, find the answers that they're looking for. As I think about that, I think about the Administrative Office of the Courts. You've heard the interim director, McKinley Wooten, being introduced today. It is an agency with six thousand folks, many of whom are elected judges, elected courtroom clerks, elected DAs, public defenders, magistrates, and so many other folks who really do understand what it is we're tasked with, that these really are not just jobs. But when people come to us seeking answers and solutions for the problems that they're facing, they expect—and rightfully so—number one, to be treated with respect but also to be able to find an opportunity to navigate the system in a way such that they come away with the answers that they need. So the folks at the AOC do that every single day and I thank them for that.

The other thing that's really exciting about folks reaching out for today is I think people understand that if this is indeed the right time and I'm the right person, that it really does offer all of us a lot of hope and promise for North Carolina. A lot of hope and promise for the young people who I see right here in this courtroom. And in the very same way that some folks poured into us, whether it be parents or other people, we always have an obligation to pass it on to young people so that they can go on and do really awesome things with their lives.

You may know that the Chief Justice wears two hats. So I will, with my colleagues here, and you may also note that we are sitting as a bench of six. Right now we have six; we're usually up to seven. I will sit with them, we will hear our cases, decide them, write opinions, and we'll have the exact same duties. The Chief Justice is also the head of the Judicial Branch and then, therefore, the Administrative Office of the Courts, and so that hat will be very different from that of my colleagues.

Yesterday evening, in preparation for this day, I thought about my friend, Chief Justice Henry Frye, and I thought about what this day twenty years ago must have felt like for him. And so my staff and I, we found a television with a VCR, believe it or not, and we watched it in my chambers, and as you can imagine, it was very moving. It was very moving as he thanked his family, of course, and Mrs. Frye and talked about the kind of preparation it took to be whatever he wanted to be which is what his parents told him. He also gave his judicial philosophy and he said, "My philosophy is this world is full of problems. I believe we should treat our problems as challenges and opportunities to do what is right and good." I'm prepared to treat our problems as challenges. I'm prepared with so many other people who are a part of our justice system to make sure that where there are challenges that we are there and

ready to answer those challenges, that we offer the best judicial system that there can possibly be, and that it is important to do what is right and good. I am very excited.

We have had a week of court this week. My colleagues were very supportive in this week, because it was an interesting week of court, but we had a really good week of court. I'm ready to lead this Court, I'm ready to lead the Administrative Office of the Courts, and most importantly I'm just so grateful for this opportunity.

I'd like to thank my family. My husband, Curtis, who after twenty-six years of marriage, we have—God is probably really kind of laughing at us right now. I mean, there's just no way we could have imagined that He would have brought us this far and in this way. And you have been such an important part of our journey. You have been full of humor and great spirit, and you've made this so much easier, and I appreciate you for that. Matthew, mighty Matthew. Matthew, who's majored in math and statistics, Matthew. Thank you for being so wonderful and so strong. Thank you for teaching us the essence of who people really are. Thank you so much for teaching us more and more about love as you become such the young man that you are. I am proud of you in your own right as a student and as a person and the wonderful young man that you are and are becoming. I love you. And Thomas. Thomas means "twin." And he's a twin. Thank you, son. You are insightful and prophetic and there've been times that you've told this family things that we just never could have imagined, but in some sweet way God was speaking through you and you allowed us to see and I appreciate you for that. Mama Ruby, my mother-in-law, thank you for being here. Thank you for being the mother. Thank you for being the bedrock for this family. And my dear cousin, Candace, who is awesome. She's just awesome. A very special woman. I love you and I appreciate you so, so much. We don't have siblings, we have four first cousins and none of us have siblings, so we're sister-cousins. But I have a lot of family who has flown in from all over and I just really, really thank you so much for giving of your time and your friendship and for making us better, for making me better, and for pouring into us. I want to thank everyone who has participated in this service today. Thank you, Governor Cooper, and to the spouses as well. I'm ready to lead, I'm excited about leading, and I'm looking forward to continued service to the people of the State of North Carolina. Thank you.

INVESTITURE

OF

Mark A. Davis

ASSOCIATE JUSTICE

SUPREME COURT OF NORTH CAROLINA

Law and Justice Building
Raleigh, North Carolina

April 3, 2019
2:00 p.m.

Mark Allen Davis is a lifelong resident of North Carolina. He was born in Jacksonville to Leah and Bernard Davis and is the youngest of three children. In 1975, the family moved to Fayetteville. He graduated from E.E. Smith High School in 1984. He received his undergraduate degree in Political Science from the University of North Carolina at Chapel Hill where he was inducted into Phi Beta Kappa. He obtained his law degree from the University of North Carolina School of Law and served on the North Carolina Law Review.

Upon graduation from law school, Justice Davis served as a law clerk to the Honorable Franklin T. Dupree, Jr., in the United States District Court for the Eastern District of North Carolina. He then practiced law for almost two decades. From 1993 to 2006, he worked in the Raleigh office of Womble Carlyle Sandridge & Rice where he became a member of the firm in its Litigation Section. For the next five years, he served as a Special Deputy Attorney General in the North Carolina Department of Justice. As a practicing attorney, he litigated over two hundred cases in the state and federal courts. He also handled over 65 appeals, making numerous appearances in the Supreme Court of North Carolina, the United States Court of Appeals for the Fourth Circuit, and the North Carolina Court of Appeals. He also handled a number of pro bono cases in conjunction with the Wake County Volunteer Lawyers Program.

For approximately two years, Justice Davis served as General Counsel in the Office of the Governor. In 2012, he was appointed to the North Carolina Court of Appeals by Governor Beverly Perdue. During his six years as an Associate Judge on the Court of Appeals, he authored over 500 opinions. While serving on the Court of Appeals, he was accepted into the Master of Laws program in Judicial Studies at the Duke University School of Law and received his LL.M. degree in 2018.

Justice Davis has been active in professional and civic organizations. He has served on a number of committees of the North Carolina Bar Association and has lectured extensively throughout the state on appellate advocacy issues. He is a member of The Rotary Club of Raleigh, the Susie Sharp Inn of Court, and the Supreme Court Historical Society and has served as a coach of youth basketball and soccer. He is also a recipient of The Order of the Long Leaf Pine.

Justice Davis lives in Raleigh with his wife, Marcia Schwartz Davis, and their three children, Jack, Ted, and Lea. He and his family are longtime members of Congregation Sha'arei Israel.

PROGRAM

Sounding of the Gavel	Amy L. Funderburk Clerk Supreme Court of North Carolina
Invocation	Rabbi Pinchas Herman Congregation Sha'arei Israel Raleigh, North Carolina
Welcoming Remarks	The Honorable Cheri Beasley Chief Justice Supreme Court of North Carolina
Special Remarks	Dean J. Rich Leonard Justice (Ret.) Robert F. Orr Chief Justice (Ret.) James G. Exum, Jr.
Recognition of Attorney General	Chief Justice Cheri Beasley
Presentation of Commission	The Honorable Josh H. Stein Attorney General State of North Carolina
Introduction	The Honorable Burley B. Mitchell, Jr. Chief Justice (Ret.)
Administration of Oath	Chief Justice Cheri Beasley
Remarks	The Honorable Mark A. Davis Associate Justice Supreme Court of North Carolina
Benediction	Rabbi Eric M. Solomon Beth Meyer Synagogue Raleigh, North Carolina
Adjournment	Amy L. Funderburk

Reception following ceremony at
Market Hall • 215 Wolfe Street • Raleigh, N.C.

SUPREME COURT

OF

NORTH CAROLINA

Chief Justice

CHERI BEASLEY

Associate Justices

PAUL M. NEWBY

ROBIN E. HUDSON

SAM J. ERVIN, IV

MICHAEL R. MORGAN

ANITA EARLS

MARK A. DAVIS

Court Motto

"Suum Cuique Tribuere"

"TO RENDER TO EVERYONE HIS OWN"

ONE OF THE THREE FUNDAMENTAL MAXIMS

OF THE LAW LAID DOWN BY JUSTINIAN

Invocation by Rabbi Pinchas Herman

It is an honor to be here with you today as we witness the investiture of my dear friend and congregant, Justice Mark Davis.

American Jews thank G-d every day for this country, a country in which we are not only allowed to live in peace, but allowed to flourish without compromising our beliefs. Wherever Jews have lived throughout our more than 3300 year history, we have always sought to be good citizens and contribute to the welfare of our country.

Jewish citizens of North Carolina have served our great state in many capacities, including politics, academia at every level, and in businesses that provide jobs for thousands of people. Today, we are fortunate to witness a proud Jewish American, born and bred in North Carolina, beginning his service on the highest court of our state. Justice Davis will be the first Jew to serve on the Supreme Court of North Carolina and, knowing him as I do, I am confident that he will serve with honor, integrity, and distinction.

Deuteronomy 16:20 commands, "Tzedek Tzedek Tirdof, Justice, justice you shall pursue." Biblical commentaries explain the repetition of the word "justice" in this verse to mean that we must pursue justice with justice. Indeed, one of the primary functions of the Supreme Court is to assure that the justice system in our state is implemented in a fair, equitable, and lawful way for all our citizens.

Let us take a moment to recognize and pray before the Ultimate Judge, the One we all seek to emulate.

Ribono shel Olam! Master of the Universe,

You created a world that functions only through the rule of law--laws that recognize the inalienable rights and inherent responsibilities of all people, regardless of race, ethnicity, religion or social standing. It is through these laws that our great nation continues to be a shining example to the rest of the world... an example of democracy, freedom, respect for humanity, and the endless possibilities that are open to all who wish to pursue their dreams.

You, O G-d, the One who guides all of our steps, have brought every one of us to this moment by Your Divine Providence, to bear witness to the strength and continuity of our judiciary as Justice Mark Davis commits himself to uphold the laws of our great state as an associate Justice of the Supreme Court of North Carolina.

Ever since Noah re-established life on earth to create a new and better world, You charged him and his descendants with settling, developing, and protecting Your earth in a peaceful and civilized way.

In order to achieve this vision, You gave the progenitor of all humankind seven commandments, the Seven Universal Laws of Noah, which include belief in Your Oneness, respect for the sanctity of life and morality, protecting the rights of others, guarding the wellbeing of all the creatures who depend upon us, and the establishment of a judicial system that upholds these laws. Indeed, You refer to upright and honorable judges as Your partners in creation.

We ask that you grant Justice Davis, chochma, bina v'da'as, wisdom, understanding and knowledge, together with all the judges of our great state and our beloved country, to judge fairly and honestly, to pursue truth, no matter the cost, and to see that our laws are administered with respect, fairness, and equality for all who seek justice.

G-d and G-d of our ancestors, grant our judges the strength not only to decide the law, but to teach the citizens of North Carolina and inspire them to distinguish right from wrong, goodness from evil, and honesty from deceit, so that we all do our part to perfect Your world and help it attain the age of redemption when peace and harmony will reign.

As the prophet Zachariah states, "Emes, Umishpat Shalom, Shiftu B'Sha'areichem" - "Truth, and a judgement of peace, you shall judge at your city gates."

Amen.

Remarks by Dean J. Rich Leonard

Madam Chief Justice, Governor Cooper, Associate Justices, members of the Davis family, colleagues and friends:

As I stand at the podium in this hallowed place, I cannot help but recall my first experience in this building. Despairing of ever finding a path to return to a much more parochial North Carolina from law school in New Haven, I was overjoyed when Chief Justice Susie Sharp's secretary called inviting me for an interview to be her law clerk. It went well until halfway through, she looked down at my resume and looked up in abject horror. "Are you in law school at Yale?" When I confessed that I was, she said: "I misread your resume. I do not hire law clerks from Yale. Good day." So I got in my ancient VW beetle and drove dejectedly back to New Haven, certain I would never see my beloved North Carolina again, at least not professionally.

It was not to be, for a few blocks down the street, Judge Frank Dupree saw it differently and offered me the opportunity to clerk for him for two years. Several years later, he offered the same opportunity to Justice Davis, and it is that congruence in our lives on which I want to focus today.

A few of us are lucky to have an experience in the early days of our career that then becomes the polar star for the rest of your life, and that is how it was for both of us. As I have traveled the world, I have seen great skepticism about this peculiar American institution of law clerks. The idea that we make new lawyers fresh from their studies the only confidential advisors of the most powerful justices and judges strikes other jurists as exceedingly odd. But we all know it is one of the strongest attributes of our system. Scratch a lawyer who fervently advocates for the independence of the judiciary, the autonomy of the courts, and the rule of law, and you will find a former law clerk.

Like most law clerks, Mark and I share an awe and a reverence for our judicial mentor, and have often reminisced about lessons we learned from him that still guide us today. However, we have confessed to each other that we got the job through deception, as we both in our interview exaggerated the required prowess on the tennis court. Mark recalls that the judge commented on his unorthodox form, while he asked me when was the last time I had played. We were the working clerks left behind in chambers while our co-clerks made up the doubles team.

We learned that judging is hard work, more so than appears to outside observers. In our day the Eastern District was backlogged, and we worked very long days, weekends, and often nights. And we learned that arriving at a right result takes careful preparation, scrupulous attention,

and thoughtful reflection. I recall that in the first case I ever worked up, I concluded what I thought to be a brilliant analysis with, "It could go either way." The response was, "You realize you just told me you could be replaced by a monkey."

We also learned that for lawyers like Justice Davis who do this work, judging is an art. The most powerful statement that I took away from my clerkship that became my mantra on the bench is this: "If you are cut out for this work, and if you prepare and pay careful attention, there will come a time in every case where you see what the result should be. The art of judging is to trust that instinct."

We learned that it is possible to integrate work and play, and family and friends, with a successful judicial career. We all inwardly snickered at the ridiculous appearance of Judge Dupree changing into his tennis whites at the afternoon recess, with only his dress shoes and socks showing from under his robe, all to save a few minutes of precious daylight for his favorite pastime. And we would try not to laugh out loud when he sternly called us to the bench to share a pun, a limerick or a verse he had penned about the ongoing proceeding.

We learned that the personal touch matters, as he cared deeply about our personal lives and those of our spouses and children. We watched in amazement how each morning, no matter what was before him that day, he spent the first hour writing dozens of personal notes to colleagues and friends.

We learned to write quickly, leanly and concisely. He disliked adjectives and adverbs and was merciless with his red pencil, especially in those first weeks. On my first draft, he marked out seven of my eight pages and wrote; "This may be your first case. It is not mine."

We learned that trains and courts function best when they run on time. We pitied the poor custodian who almost daily was called to adjust the courtroom clock so that it synchronized precisely with the judge's watch.

We learned to respect the solidarity of the bench. Even when we knew that something a colleague was doing judicially or administratively really irked him, he could never be goaded into a word of criticism of a fellow brother or sister on the bench. He believed that the position commanded that respect, even if what the incumbent was doing at the moment did not.

We saw a judge who held strong political views leave partisanship behind when he came through the courtroom door. He found his answers in the Constitution, the statutes, and the precedent, not in his subjective beliefs.

Whatever we thought we wanted to do when we started our clerkships, we all left wanting to do what he did. And it has worked out for a number of us. I know that Mark has been a great judge on the Court of Appeals, and will be an exceptional justice. And that is a tribute to his native intellect, his hard work, and his kind heart. But it is also because of the polar star he had early in his career.

In November of 1835, the bench and bar of North Carolina gathered to mourn the passing of the great chief justice John Marshall. They knew him well, as he had sat in Raleigh twice annually on the North Carolina Circuit court for 32 years. The eulogy was delivered by Judge Henry Potter, the North Carolina District Judge who had sat with Marshall each time he came. His concluding lines apply equally to that great justice and to this one, and I end with them:

"In him are happily blended all the constituent qualities of the really great man. His striking characteristics are a clear head, a vigorous intellect, a logical mind and an honest heart."

Congratulations my friend, and thank you for inviting me to be a part of your special day.

Remarks by Justice (Ret.) Robert F. Orr

Chief Justice Beasley, members of the Court, Justice Davis, Marcia, family and friends, Governor Cooper and Governor Hunt, I am delighted to be here today for such a special occasion and to reflect for a few minutes on this Court's newest member – Justice Mark Davis. This has been a remarkable beginning to 2019 with two new members, Justice Earls and now, Justice Davis joining the Court and of course Justice Beasley being sworn in as Chief Justice only a few weeks ago. All this has happened since the beginning of the year. Who would have predicted that after celebrating the 200th anniversary of this court on January 9th, that the nascent days of the next 200 years would be filled with so many historic events? But here we are – and it's only April 3rd.

I know that our focus today is on Justice Davis – and rightfully so. But if I could, let me take a few moments to preliminarily reflect not so much on the individual but on the institution. This court is comprised of seven members, each with unique skills and perspectives. Each with talents and experiences as lawyers and judges and each with an unrelenting commitment to the independent role of the judiciary in our system of government. All of the members of the court possess the intellectual skills, experience, sense of justice, and dedication to judicial independence that the public wants and expects in members of our state's highest Court. However, we live in a culture and society that tends to focus way too much on the individual and each individual's unique identity. That individualized focus by others when examining the Court, results, I would submit, in a somewhat skewed view of the Court and our judicial system. That skewed, identity-driven view and how it works, does not accurately reflect how the Court in reality goes about its judicial business.

After all, when decisions are made, whether it's the filing of opinions or the issuance of orders – that opinion or order is "for the Court." The collective decisions of the justices reflect a unique work experience and environment in which each member of the Court weighs in, offering his or her best judgment and understanding of the law and the case. This process reflects the aggregate work of all the members, done in a reflective and collaborative way that adheres faithfully to each member's oath of office and understanding of the law and justice and the collective wisdom of the Court.

I am confident from my years of observing and interacting with Justice Davis, that he will bring all the necessary skills to the Court and do so with a commitment to the tradition of excellence, hard work, and independence associated with this Court. I've observed Justice Davis as a practicing attorney from my time on the bench. I've observed him on the bench from my perspective as a practicing attorney. And, perhaps

surprisingly, I have observed him and interacted with him as opposing counsel in a handful of cases that we've litigated against each other over the years. He has always been extraordinarily well prepared; conscientious in all of his responsibilities; and unfailingly polite and professional in every interaction. Justice Davis possesses all the qualities as a lawyer and judge that will make him a valued colleague and friend to each member of the Court, a significant contributor to the Court's body of work, and a respected jurist to all who bring matters before this Court.

Having briefly referenced the many talents that Justice Davis brings to his new responsibilities, I would also like to point out two unique aspects about him. However, I will have to modify my observations since I had planned to note that Justice Davis would be sporting perhaps the finest mustache on the court since the early 1900s and Justice James Manning, whose portrait is just down the hall. But it occurred to me that perhaps such a conclusion would offend Justice Morgan, so I'm smart enough to modify my remarks to reflect that Justice Davis will be sporting one the best mustaches to grace the bench in years. And since Justice Davis will soon be occupying that vacant seat next to Justice Morgan, perhaps Court watchers will now refer to them as the mustached wing of the Court.

Secondly, and this may surprise many in the audience, Justice Davis will become the only member of this Court, as now constituted, to have received his undergraduate degree from the University of North Carolina at Chapel Hill. And, thus, as the lone Tar Heel justice, he becomes the cheerleader-in-chief for all things Carolina basketball on this Court. Now lest anyone not believe that the Supreme Court takes its basketball seriously, I will leave you with this short story from my days on this Court. The Tar Heels had just suffered an ignominious thrashing in basketball by the Deamon Deacons and I was sitting at my desk down the hall, when I heard a "thump, thump, thump" echoing through the corridor. Peering out of my office door, I observed Justice I. Beverly Lake, Jr., replete with his Wake Forest sweat shirt, dribbling a basketball and heading for the offices of the Court's members who were Tar Heel alums. Justice Davis, I wish you only the best in fulfillment of your basketball responsibilities on this Court, especially in light of the fact that two of your new colleagues have undergraduate degrees from Duke University.

In conclusion, I can only proclaim that it's a great day for Justice Davis, Marcia, his family and friends, but it is also a great day for this Court, and a great day for our profession and our state. Justice Davis, I wish you long service and great enjoyment as you embark on this new professional adventure as you go about meeting the challenges that come with being a member of North Carolina's Supreme Court. Thank you.

Remarks by Chief Justice (Ret.) James G. Exum, Jr.

Chief Justice Beasley, Associate Justices: May it please the Court.

Coming back to this place is always special. It is where I spent the happiest part of my professional life, both behind the bench and in front of it. But to have an opportunity to make remarks here concerning my good friend, Justice Mark Davis, is a real privilege for which I am grateful.

We like to say sometimes that nothing is certain but death and taxes. There is, however, it seems to me, another inevitable that could be added to the list; and that is change. Change is inevitable. The world is not static; life is not static; this court is not static. They all change. Indeed, the court has seen its share of change within the year--change which continues today with the investiture of Mark Davis as its newest associate justice.

Although old fossils like me often resist change, sometimes because we don't understand it, we shouldn't. Change, writ large, is not only constant, it also offers the opportunity, not always realized, to move us forward, to improve, to make things better.

It's good that courts do change because the law, like everything else, is not static. It, too, is constantly changing. Whenever a court decides a case involving new circumstances, it tends to move the law along one path or another. If the law is like a brick wall, then each judicial decision that addresses novel circumstances adds a brick to that wall.

There is a great line in the recent movie, "On the Basis of Sex," about the early professional life of Justice Ruth Bader Ginsburg. The line is, roughly: "Courts do not pay much attention to changes in the weather; they do, however, take note of trends in the climate." Lawyer Ginsburg took advantage of a "trend in the climate" when she prevailed in the early cases involving gender discrimination.

So, we rightly celebrate change occasions like this one and like other recent events in this chamber when positions shift and we get a new leader like Chief Justice Beasley and new members like Justice Earls and Justice Davis. Our hope is that they and their colleagues, each with unique backgrounds and life experiences, can discern those trends in the climate that often portend change in the law.

I have known and admired Mark Davis both as a lawyer, judge and friend for just a few years; but I got to know him much better when, a little over a year ago, he began interviewing me for a masters thesis he was writing. The interviews went on, periodically for about a year. His thesis is about this Court and its work during the 1980s and 1990s when

Justices Meyer, Webb, Martin, Whichard, Mitchell, Frye, Parker, Lake and I were in charge of things. I understand there is now a publisher for the thesis and a book is on the way. This is, indeed, a red-letter year for the Court's newest justice.

From that experience with Mark Davis and his thesis, I observed qualities that bode well for his tenure as a member of this Court: He is a person of faith. In his work, he is careful, he is thorough, he is fair-minded, he is objective. When I read the manuscript of his thesis about the Court on which I sat, I sometimes felt that he was objective to a fault: believe me, he cut us no slack.

Justice Davis well understands the Court is different from the other two political branches. He knows that even though judges and justices are now required to campaign as political partisans, being a Democrat or a Republican is neither a qualification nor disqualification for judicial office. Indeed, it is irrelevant to the job of judging. I would not be surprised if Justice Davis publicly acknowledged this should he ever find himself campaigning before the people to retain his seat on the Court. For all judicial candidates to do the same would be a great way to protest the current system for selecting and retaining our judges and justices.

The Court's newest justice has a deep appreciation for this Court's role as caretaker of the law. He understands the law exists for certain purposes: One is to maintain order while not trampling on important freedoms. When the late professor of law emeritus at Columbia University, Harry W. Jones, was asked, "What is law for?" his answer is one I have long admired: He said law is for "the creation and preservation of a social environment in which, to the degree manageable in a complex and imperfect world, the quality of human life can be spirited, improving and unimpaired."

If Justice Davis was asked what he thought law was for, I believe his answer would resemble the one given by Professor Jones.

So it is that I am proud to speak about Justice Davis on this important day for him and for the Court, and I thank him and the Court for allowing me this privilege.

Remarks by Chief Justice (Ret.) Burley B. Mitchell

Madam Chief Justice and Associate Justices. May it please the Court.

It is my privilege to introduce and speak this afternoon on behalf of my dear friend and former law partner Judge Mark A. Davis. I thank the Court for this opportunity.

This Court has had many outstanding Justices over its two centuries. I am happy to say that Judge Davis' education, broad professional experience, and his temperament and demeanor make him as well suited and prepared as anyone who has ever served on this Court.

Judge Davis was Phi Beta Kappa as an Undergraduate at the University of North Carolina, Chapel Hill and a member of the law review when attending its law school. Thereafter, he served a two-year clerkship with United States District Court Judge Franklin Dupree.

Judge Davis has had an exceptionally broad and varied practice since entering the legal profession. He was in private practice for thirteen years with Womble Carlyle (now Womble, Bond Dickinson) where we were Partners. There he represented both private and public clients in dozens of cases involving bench and jury trials. He also prepared and argued many appeals. Having worked with him on a regular basis, I can assure you his work ethic is second to none.

In 2006 Judge Davis joined the North Carolina Department of Justice as a Deputy Attorney General in the Special Litigation Section. There he litigated many cases at trial and on appeal.

From 2011 through 2012 he served as General Counsel to then Governor Perdue. He advised her on legal issues arising from the exceptionally wide range of subjects that any governor faces.

Of perhaps particular relevance here, during his practice years he presented and argued more than sixty-five appeals for both private clients and government officials. He has successfully argued cases before this Court, the North Carolina Court of Appeals and United States Appellate Courts.

During his years on the North Carolina Court of Appeals, Judge Davis has served on panels deciding over 1,500 appeals and has authored approximately five hundred opinions.

While serving on the Court of Appeals, Judge Davis was accepted to the Master of Laws Program in Judicial Studies at the Duke University School of Law. He was awarded the LLM degree last year. He has recently authored a book on the Supreme Court of North Carolina that will be published this year.

Throughout his career he has been very active in the civic and professional life of the state. He also has served on Bar committees too numerous to mention here. In addition, he has been active in Rotary, the North Carolina Supreme Court Historical Society and the Susie Sharp Inn of Court and been awarded the Order of the Long Leaf Pine.

Though Judge Davis and his wife Marcia both have extremely active careers they have always maintained a close, loving and well balanced family life. They have reared three wonderful children – sons Jack and Ted and daughter Lea, who are with us today.

I have personally known almost every justice to serve on this Court since the late 1950s. In light of Judge Davis' outstanding professional, civic and family life, I believe that no North Carolinian has ever been better prepared to join this Court than he.

Finally, as noted earlier Mark Davis will be the first member of the Jewish faith to serve on this Court in its 200 year history. I am delighted that Governor Cooper has corrected this historical oversight.

I am reminded that one hundred and three years ago, in 1916, President Woodrow Wilson appointed Louis Brandeis as the first Jewish Justice of the Supreme Court of the United States. His confirmation took six months and was accompanied by openly anti-semitic attacks. Brandeis persevered though and became one of the greatest justices ever to serve this nation. Today an outstanding university bears his name.

My hope for Mark, for this Court and for the State is that he will follow in the footsteps of the great Brandeis. I believe he is well equipped and motivated to do so.

Remarks by Justice Mark A. Davis

I want to thank all of you for sharing this special day with my family and me. There are so many people to whom I am grateful but there are a few I would be remiss if I went any farther in my remarks without mentioning them by name.

First, thank you, Governor Cooper for giving me this tremendous opportunity. I am so honored that you have placed your trust in me with regard to this appointment, and thank you for taking time out of your busy schedule to be here.

Second, I want to thank my family. My wife Marcia and I will celebrate our 27th anniversary next month, and she is the true star in our family. I am so glad all three of our children are here today. Jack is a junior in college; Ted is in the 11th grade; and Lea is a 6th grader. As I look at them sitting in the courtroom today, I am reminded of the time six years ago when I found out I was being appointed to the Court of Appeals. I came home and excitedly told my family I was going to be a judge and without missing a beat my daughter – who was then 5 – said: "That's great, Daddy. Are you going to judge figure skating or gymnastics?" . . . I don't think she was very happy with my answer of "none of the above."

I have had two wonderful executive assistants at the Court of Appeals, Pat Hansen and Sandra Timmons. Today's events are the result of their tireless efforts and I am so grateful to both of them. I also want to thank all of my law clerks on the Court of Appeals. I am so touched that all of them are here today.

I want to thank all of our speakers today for being here and for their overly generous remarks. Rabbi Herman has been my family's rabbi for 24 years, and Rabbi Solomon is a longtime friend. The Wake County Jewish community is so fortunate to have two such well-respected spiritual leaders.

A number of people have asked me how it feels to be the first Jewish member of this Court. My answer is: very proud. While my religion will play no role whatsoever in how I decide cases, my faith is a huge part of my life, and this is an honor I accept on behalf of the entire statewide Jewish community. Jewish North Carolinians have a long history of public service in this state. In fact, you heard from one of them a few minutes ago. Thank you, Attorney General Stein, for your presence today and for your kind remarks.

As you heard, Dean Rich Leonard and I have known each other since 1991 when I was a law clerk. Even back then it was clear that

he was one of the smartest people I had ever met and that he was extraordinarily competent. Thirty years later, history has proven both of those observations to be correct.

My first experiences with Bob Orr occurred while he served on this Court and I was an appellate lawyer arguing appeals to him. Then after he left the bench, we litigated several cases together – which was a very enjoyable experience – and we became good friends.

Jim Exum was Chief Justice of this Court at the time when I was admitted to the bar. As a result, I was in awe of him. I remember one occasion when I stepped on the elevator in this building to go to the library on the fifth floor, which was a regular practice for me as a young lawyer in those pre-Westlaw days. A few seconds later, Chief Justice Exum also got into the elevator and the doors closed. I was so nervous I could not say a word and looked away for the entire elevator ride. He must have thought I was an incredibly rude person. But life is funny sometimes. Never in my wildest dreams would I have ever predicted that 25 years later he and I would collaborate on a book project about this Court and that we would become close friends. Although I have to admit I'm still a little bit in awe of him.

I have been fortunate to have many excellent mentors over my career, but I have never had a better one than former Chief Justice Burley Mitchell. As I have said publicly a number of times, to me, Justice Mitchell is the gold standard both as a judge and as a human being. I learn from him every moment I am around him. And Marcia and I are so happy that his wife, Lou, is here as well. Lou is truly a special person, and we consider ourselves very lucky to count her as a dear friend.

I want to thank Chief Justice Beasley and the associate justices on this Court for the incredibly warm welcome they have given me and for answering my endless questions – many of which surely fall within the category of "dumb questions". It is an incredible honor to be working with such an amazing group of jurists.

This is a very happy day for me, but there is one aspect of it that is sad. That is the realization that I will no longer be serving on the Court of Appeals. For the past six years, I have truly had the greatest job in the world. I looked forward to coming to work every single day and enjoyed every minute I spent on that court. I served under two outstanding chief judges – Linda McGee and John Martin – and served with 25 associate judges. I consider every one of them to be a close friend, and I greatly enjoyed having all of them as colleagues.

But my dream has always been to serve on *this* Court. I have always had such a great reverence for the Supreme Court of North Carolina. As

a lawyer, I had the privilege of arguing a number of appeals in this Court and I remember every one of them as if they were yesterday. My first argument was particularly memorable – but not necessarily for the right reasons. After preparing for weeks, I walked up to the podium and before I could get my name out a member of the Court began persistently – and correctly – pointing out that I had not signed the brief of the party on whose behalf I was arguing. As many of you know, a longstanding rule of this Court is that an attorney cannot conduct an oral argument unless they have previously signed the brief. As it happened, while I had written the brief in my case, I had been out of town on the day it was filed so my supervising attorney signed it instead. So as I stood at the podium thinking my appellate career was ending before it had even begun, Chief Justice Mitchell performed the first of many acts of kindness he would extend to me over the next 20 years and said: "Well, just be sure you sign the brief on the way out."

So I was able to proceed with my argument. I was very glad I was standing behind a podium because my knees were literally shaking for the entire 30 minutes I was up there. Human beings possess great powers of self-delusion, and I somehow convinced myself I had done well. Then a few months later I received the opinion. I lost 7-0 and, as the saying goes, the reason the vote was 7-0 was because there were only seven members of the Court. To make matters worse, in the opinion the Court proceeded to overrule three precedents from the Court of Appeals that my law firm had previously established. As I sat in my office that day wondering why I had not chosen medical school or dental school rather than law school, one of my colleagues – trying to console me – came in and said: "Mark, think of it this way. Your career cannot possibly go anywhere but up after this!" And he was right.

A few weeks ago, I spent some time walking the halls of this building and I have to say that looking at the portraits of the men and women who have served on this Court over the last 200 years gave me chills. These are truly some of the greatest legal figures in North Carolina history.

And as I look to my right in this courtroom today and see the former justices of this Court who are here, I feel chills once again. All of you are my heroes. I argued cases before you, attended all of your public speeches, and was thrilled when I got the chance to meet you. So it is very surreal to me that I am now sitting in the seat that you once sat. I pray that hard work – lots and lots of hard work – will enable me to live up to the extremely high standards each of you has set.

Finally, I would like to take this opportunity to add my voice to the chorus of voices from our profession championing the cause of judicial independence. We live in a time when our democracy is particularly

robust. We find ourselves confronted by many important public policy issues, and our political parties are often sharply divided on how best to address these issues.

For these reasons, it is more crucial than ever for courts to maintain their independence from the political branches of government. It is vital to our democracy *both* that cases brought by litigants be decided fairly and impartially by our judiciary *and* that litigants enter the courtroom secure in the belief that this is what will, in fact, happen. As Richard Arnold, a federal judge on the 8th Circuit, once said of our courts: "There has to be a safe place and we have to be it."

Judging is very difficult. On this Court, there are certainly no easy cases. You all heard the powerful words of the oath I took moments ago. Judges swear before G-d that we will "administer justice without favoritism to anyone." That is the bedrock principle that guides us every minute of the day. While we run for election and re-election like other political candidates, our jobs are very different from theirs. Our personal beliefs are irrelevant to how we go about our work. Instead, all we care about is faithfully applying the law. I pledge to use the platform I have been given to spread the message to anyone that will listen about the critical need to preserve judicial independence both in our state and our nation.

In closing, I hope all of you will come to the reception at Market Hall that will immediately follow this ceremony so I can express my gratitude to you in person for being here.

Thank you.

Benediction by Rabbi Eric M. Solomon

Eloheinu v'Elohei Avoteinu v'Emoteinu, Elohei Avraham Yitzhak v'Yaakov, Elohei Sarah, Rivkah, Rachel v'Leah, Elohei HaTzedek:

Our God and God of our Forefathers and Foremothers, the God of Abraham Isaac and Jacob, the God of Sarah Rivkah Rachel and Leah, the God of Justice:

We ask You to shower your blessings upon Judge Mark Davis, the newest member and the first Jewish member of this North Carolina Supreme Court;

May You grant him great wisdom as he seeks to discern and interpret this great state's legal codes;

May he hold close to his heart Your esteemed values of both justice and compassion so that he may make valuable contributions to this glorious institution, the Supreme Court of North Carolina;

May You always remind him that he stands on the shoulders of giants in American history, North Carolina history and Jewish history—legal scholars whose insight and wisdom have helped us all to reach this holy moment;

And may You help guide him in the inevitably challenging moments that all leaders face, reminding him that he is surrounded by an erudite team of justices and that You are by his side as the great Source of strength and love;

Judge Davis---May God bless you and keep you; May God's face shine upon you and be gracious to you; May God always look upon you and grant you peace.

And may God bless the great state of North Carolina.

And we say together: Amen.

MEMBERS OF THE SUPREME COURT OF NORTH CAROLINA – 1819-2019

Compiled by Harry C. Martin, Associate Justice, for years 1819-1989 (originally published in 323 N.C. 732-39 (1989)); Willis P. Whichard, Associate Justice (Ret.), for years 1989-2019.

MEMBERS OF THE SUPREME COURT OF NORTH CAROLINA – 1819-2019

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1819	Taylor, J.L.[1]	Hall, J.[2]	Henderson, L.[3]				
1820			June Term[4]				
1821							
1823							
1824							
1825							
1826							
1827							
1828							
1829	Henderson, L.[5]		Toomer, J.D.[6] Ruffin, T.[7]				
1830							
1831							
1832							
1833	Ruffin, T.	Daniel, J.J.[8]	Gaston, W.[9]				

[1]Died 29 January 1829.
[2]Resigned 15 December 1832.
[3]Elected to Superior Court 1808; died 13 August 1883. Taylor, Hall, and Henderson were Superior Court Judges who, as members of the "Court of Conference," performed appellate functions. The Supreme Court was not actually created until 1818, and Taylor, Hall, and Henderson sat for the Court's first session on 5 January 1819.
[4]Murphey, A.D., presided in several cases in place of Henderson.
[5]Elected Chief Justice June 1829; died August 1833.
[6]Appointed by Governor Owen, May 1829; term expired December 1829.
[7]Elected December 1829.
[8]Died 10 February 1848.
[9]Died 23 January 1844.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1834							
1835							
1836							
1837							
1838							
1839							
1840							
1841							
1842							
1843							
1844			Nash, F.[10]				
1845							
1846							
1847							
1848		Battle, W.H.[11] Pearson, R.M.[12]					
1849							
1850							

[10]Elected June 1844.
[11]Appointed by Governor Graham, May 1848; term expired December 1848.
[12]Elected by General Assembly December 1848.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1851							
1852	Nash, F.		Battle, W.H.[13]				
1853							
1854							
1855							
1856							
1857							
1858	Pearson, R.M.	Ruffin, T.[14]					
1859		Manly, M.[15]					
1860							
1861							
1862							
1863							
1864							
1865		Reade, E.G.[16]					
1866							
1867							
1868			Dick, R.P.[17]	Rodman, W.B.	Settle, T.[18]		

[13]Elected 1852.
[14]Resigned in 1852 as Chief Justice; elected Associate Justice by the General Assembly in 1858; resigned December 1859. Ruffin was the only Justice to resign as Chief Justice and to rejoin the Court as Associate Justice.
[15]Elected 1860.
[16]In 1865, the last Supreme Court Justice to be elected by the General Assembly; chosen by the people of North Carolina in 1868 to succeed himself.
[17]Appointed U.S. District Court Judge June 1872; resigned from Supreme Court 1 December 1872.
[18]Resigned April 1871.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1869							
1870							
1871					Boyden, N.[19]		
1872			Settle, T.[20]				
1873					Bynum, W.P.[21]		
1874							
1875							
1876			Faircloth, W.T.[22]				
1877							
1878	Smith, W.N.H.[23]						
1879		Ashe, T.S.	Dillard, J.H.[24]	---	---[25]		
1880							
1881			Ruffin, T., Jr.[26]				
1882							
1883			Merrimon, A.S.[27]				
1884							

[19]Appointed by Governor Caldwell, May 1871; died 20 November 1873.
[20]Appointed by Governor Caldwell, 5 December 1872; resigned 1876.
[21]Appointed by Governor 21 November 1873; term expired 1 January 1879.
[22]Appointed by Governor Brogden, 18 November 1876, upon resignation of Settle.
[23]Appointed by Governor Vance, 14 January 1878, upon death of Pearson.
[24]Resigned in 1881.
[25]Two seats vacant following termination of ten-year terms of Rodman and Bynum.
[26]Appointed by Governor Jarvis 11 February 1881; elected 1882; resigned September 1883.
[27]Appointed by Governor Jarvis 29 September 1883.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1885							
1886							
1887		Davis, J.J.[28]					
1888							
1889	Merrimon, A.S.[29]		Clark, W.[30]	Avery, A.C.[31]	Shepherd, J.E.[32]		
1890							
1891							
1892	Shepherd, J.E.[33]	MacRae, J.C.[34]			Burwell, A.[35]		
1893							
1894					Montgomery, W.A.[36]		
1895	Faircloth, W.T.[37]	Furches, D.M.[38]					
1896							
1897				Douglas, R.M.			
1898							
1899							

[28]Appointed by Governor upon death of Ashe (February Term 1887).
[29]Appointed Chief Justice by Governor Fowle upon death of Smith, November 1889.
[30]Appointed by Governor Fowle upon appointment of Merrimon to Chief Justice 16 November 1889.
[31]Elected by virtue of amendment to constitution at General Election, November 1888; took seat January 1889.
[32]Elected by virtue of amendment to constitution at General Election, November 1888.
[33]Appointed Chief Justice by Governor Holt upon death of Merrimon 14 November 1892.
[34]Appointed by Governor Holt upon death of Davis 7 August 1892.
[35]Appointed by Governor Holt November 1892.
[36]Elected to unexpired term 1894; elected to full term 1896.
[37]Elected Chief Justice 1894.
[38]Elected; took seat 1 January 1894.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1900							
1901	Furches, D.M.[39]	Cook, C.A.[40]					
1902							
1903	Clark, W.	Connor, H.G.	Walker, P.D.[41]				
1904							
1905				Hoke, W.A.[42]	Brown, G.H., Jr.[43]		
1906							
1907							
1908							
1909		Manning, J.S.					
1910							
1911		Allen, W.R.[44]					
1912							
1913							
1914							
1915							
1916							
1917							

[39]Faircloth died 30 December 1900; Furches appointed 5 January 1901.
[40]Appointed by Governor Russell 7 January 1901; term expired January 1903.
[41]Clark, Connor, and Walker elected November 1902.
[42]Took seat 1 January 1905, succeeding Douglas.
[43]Took seat 1 January 1905, succeeding Montgomery.
[44]Took seat 1 January 1911, succeeding Manning.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1918							
1919							
1920							
1921		Adams, W.J.[45]			Stacy, W.P.		
1922							
1923			Clarkson, H.[46]				
1924	Hoke, W.[47]			Connor, G.W.[48]			
1925	Stacy, W.P.[49]				Varser, L.R.[50]		
1926					Brogden, W.J.[51]		
1927							
1928							
1929							
1930							
1931							
1932							
1933							
1934		Schenck, M.[52]					

[45]Appointed by Governor Morrison 8 September 1921 upon death of Allen.
[46]Appointed by Governor Morrison upon death of Walker at close of 1922 Term.
[47]Appointed Chief Justice by Governor Morrison upon death of Clark; resigned 16 March 1925.
[48]Appointed by Governor Morrison to succeed Hoke.
[49]Appointed Chief Justice by Governor McLean upon retirement of Hoke 16 March 1925.
[50]Appointed by Governor McLean to succeed Stacy; resigned 31 December 1925.
[51]Appointed by Governor McLean 1 January 1926 to succeed Varser.
[52]Appointed by Governor Ehringhaus 23 May 1934 to succeed Adams, who died 20 May 1934.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1935					Devin, W.A.[53]		
1936							
1937						Barnhill, M.V.	Winborne, J.W.[54]
1938				Seawell, A.R.F.[55]			
1939							
1940							
1941							
1942			Denny, E.B.[56]				
1943							
1944							
1945							
1946							
1947							
1948		Ervin, S.J., Jr.[57]					
1949							
1950				James, M.G.[58] Johnson, J.D., Jr.[59]			

[53]Appointed by Governor Ehringhaus 1 November 1935 upon death of Brogden.
[54]Court increased to seven members; Barnhill and Winborne appointed by Governor Hoey 1 July 1937.
[55]Appointed by Governor Hoey 30 April 1938 upon death of Connor.
[56]Appointed by Governor Broughton 29 January 1942 upon death of Clarkson 27 January 1942.
[57]Appointed by Governor Cherry 3 February 1948 upon retirement of Schenck.
[58]Appointed by Governor Scott 19 October 1950 upon death of Seawell 14 October 1950.
[59]Nominated by State Democratic Executive Committee and elected at regular election of 1950 for unexpired term of Seawell.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1951	Devin, W.A.[60]				Valentine, I.T.[61]		
1952					Parker, R.H.[62]		
1953							
1954	Barnhill, M.V.[63]	Higgins, C.W.[64]				Bobbitt, W.H.[65]	
1955							
1956	Winborne, J.W.[66]						Rodman, W.B., Jr.[67]
1957							
1958							
1959				Moore, C.L.[68]			
1960							
1961							
1962	Denny, E.B.[69]		Sharp, S.[70]				
1963							
1964							

[60]Appointed Chief Justice by Governor Scott 17 September 1951, following death of Stacy 13 September 1951.
[61]Appointed by Governor Scott 17 September 1951 as successor to Devin.
[62]Defeated Valentine in primary and elected to unexpired term of Devin 15 November 1952.
[63]Appointed Chief Justice by Governor Umstead 1 February 1954, upon resignation of Devin 30 January 1954.
[64]Appointed by Governor Umstead upon resignation of Ervin 11 June 1954.
[65]Appointed by Governor Umstead; took oath of office 1 February 1954 as successor to Barnhill.
[66]Appointed Chief Justice by Governor Hodges upon retirement of Barnhill, 21 August 1956.
[67]Appointed by Governor Hodges August 1956 to succeed Winborne.
[68]Appointed by Governor Hodges 2 February 1959 following retirement of Johnson 31 January 1959.
[69]Appointed Chief Justice by Governor Sanford following retirement of Winborne.
[70]Appointed by Governor Sanford to succeed Denny.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1965							Lake, I.B.[71]
1966	Parker, R.H.[72]			Branch, J.[73]	Pless, J.W., Jr.[74]		
1967							
1968					Huskins, J.F.[75]		
1969	Bobbitt, W.H.[76]					Moore, D.K.[77]	
1970							
1971							
1972							
1973							
1974							
1975	Sharp, S.[78]	Exum, J.G., Jr.	Copeland, J.W.[79]				
1976							
1977							
1978							Britt, D.M.[80]
1979	Branch, J.[81]			Carlton, J.P.[82]		Brock, W.E.[83]	

[71]Appointed by Governor Moore 30 August 1965 following resignation of Rodman.
[72]Appointed Chief Justice by Governor Moore 5 February 1966 upon retirement of Denny.
[73]Appointed by Governor Moore 21 July 1966 upon death of Justice C. L. Moore.
[74]Appointed by Governor Moore 7 February 1966 to succeed Parker.
[75]Appointed by Governor Moore 5 February 1968 upon retirement of Pless.
[76]Appointed Chief Justice by Governor Scott on 13 November 1969 following death of Parker 10 November 1969; took office 17 November 1969.
[77]Appointed by Governor Scott 20 November 1969; took office 1 December 1969.
[78]Elected Chief Justice 5 November 1974 in anticipation of Bobbitt's retirement 31 December 1974; took office 2 January 1975.
[79]Exum and Copeland elected 5 November 1974; took office 3 January 1975.
[80]Appointed 31 August 1978 to fill unexpired term of Lake, who retired 31 August 1978; elected to full term 7 November 1978.
[81]Appointed Chief Justice by Governor Hunt upon retirement of Sharp 31 July 1979; took office 1 August 1979.
[82]Appointed by Governor Hunt; took office 2 August 1979.
[83]Elected 7 November 1978 in anticipation of Moore's retirement 31 December 1978.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1980							
1981						Meyer, L.B.[84]	
1982					Mitchell, B.B., Jr.[85]		Martin, H.C.[86]
1983				Frye, H.E.[87]			
1984							
1985			Vaughn, E.[88] Billings, R.B.[89]				
1986	Billings, R.B.[90] Exum, J.G., Jr.[93]	Browning, R.[91] Whichard, W.P.	Parker, F.[92] Webb, J.[94]				
1987							
1988							
1989							
1990							
1991							
1992							I. Beverly Lake, Jr.[95]

[84]Appointed by Governor Hunt upon retirement of Brock 1 December 1980; took office 9 January 1981.
[85]Appointed by Governor Hunt upon retirement of Huskins 1 February 1982; took office 3 February 1982.
[86]Appointed by Governor Hunt upon retirement of Britt 31 July 1982; took office 3 August 1982.
[87]Appointed by Governor Hunt upon resignation of Carlton 31 January 1983; took office 3 February 1983.
[88]Appointed by Governor Hunt upon retirement of Copeland 31 December 1984; took office 2 January 1985.
[89]Appointed by Governor Martin upon retirement of Vaughn 31 July 1985; took office 4 September 1985.
[90]Appointed Chief Justice by Governor Martin upon retirement of Branch 1 September 1986.
[91]Appointed by Governor Martin following retirement of Exum 1 September 1986.
[92]Appointed by Governor Martin to succeed Billings 1 September 1986.
[93]Elected Chief Justice in General Election of 1986; sworn into office 26 November 1986.
[94]Webb and Whichard elected in General Election of 1986; sworn into office 26 November 1986.
[95]Appointed by Governor Martin upon retirement of Harry Martin; sworn in 5 February 1992.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1993							Sarah Parker[96]
1994							
1995	Burley B. Mitchell, Jr.[97]				Sarah Parker[98]	Robert F. Orr[99]	I. Beverly Lake, Jr.[100]
1996							
1997							
1998			James A. Wynn, Jr.[101]				
1999	Henry E. Frye[102]	Mark D. Martin[103]	George L. Wainwright, Jr.[104]	Franklin E. Freeman, Jr.[105]			
2000							
2001	I. Beverly Lake, Jr.[106]			Robert H. Edmunds, Jr.[107]			G.K. Butterfield[108]
2002							
2003							Edward Thomas Brady[109]

[96]Elected in General Election of 1992; sworn in 11 January 1993.
[97]Appointed by Governor Hunt upon retirement of Exum; sworn in 3 January 1995.
[98]Appointed by Governor Hunt upon Mitchell becoming Chief Justice; sworn in 3 January 1995. Elected November 1996 and November 2004.
[99]Elected in General Election of 1994; sworn in 5 January 1995. Elected November 2002.
[100]Elected in General Election of 1994; sworn in 3 January 1995.
[101]Appointed by Governor Hunt upon retirement of Webb; sworn in 1 October 1998; term ended 31 December 1998.
[102]Appointed by Governor Hunt upon retirement of Mitchell; sworn in 1 September 1999.
[103]Elected in General Election of 1998 upon retirement of Whichard; sworn in 4 January 1999.
[104]Elected in General Election of 1998; sworn in 5 January 1999.
[105]Appointed by Governor Hunt upon Frye becoming Chief Justice; sworn in 8 September 1999.
[106]Elected November 2000; sworn in 1 January 2001.
[107]Elected in General Election of 2000; sworn in 4 January 2001. Elected November 2008.
[108]Appointed by Governor Easley upon Lake becoming Chief Justice; sworn in 8 February 2001.
[109]Elected in General Election of 2002; sworn in 1 January 2003.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
2004						Paul Martin Newby[110]	
2005							
2006	Sarah Parker[111]				Patricia Timmons-Goodson[112]		
2007			Robin E. Hudson[113]				
2008							
2009							
2010							
2011							Barbara A. Jackson[114]
2012							
2013					Cheri Beasley[115]		
2014	Mark D. Martin[116]	Robert N. Hunter, Jr.[117]					
2015		Samuel J. Ervin IV[118]					

[110]Elected in General Election of 2004 upon retirement of Orr; sworn in 29 November 2004. Elected November 2012.
[111]Appointed by Governor Easley upon retirement of Lake; sworn in 1 February 2006. Elected November 2006.
[112]Appointed by Governor Easley upon Parker becoming Chief Justice; sworn in 1 February 2006. Elected November 2006.
[113]Elected in General Election of 2006 upon retirement of Wainwright; sworn in 1 January 2007. Elected November 2014.
[114]Elected in General Election of 2010; sworn in 1 January 2011.
[115]Appointed by Governor Perdue upon retirement of Timmons-Goodson; sworn in 3 January 2013. Elected November 2014.
[116]Appointed by Governor McCrory upon retirement of Parker; sworn in 1 September 2014; elected 4 November 2014; sworn in 5 January 2015.
[117]Appointed by Governor McCrory upon Martin becoming Chief Justice; term ended 31 December 2014.
[118]Elected November 2014; sworn in 1 January 2015.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
2016							
2017				Michael R. Morgan[119]			
2018							
2019	Cheri Beasley[120]				Mark Davis[121]		Anita Earls[122]

[119]Elected in General Election of 2016; sworn in 1 January 2017.
[120]Appointed by Governor Cooper upon retirement of Martin; sworn in 1 March 2019.
[121]Appointed by Governor Cooper upon Beasley becoming Chief Justice; sworn in 25 March 2019.
[122]Elected in General Election of 2018; sworn in 3 January 2019.

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 October 26, 2018.

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

.0113 Proceedings Before the Grievance Committee

(a) **Probable Cause** - The Grievance Committee or any of its panels acting as the Grievance Committee with respect to grievances referred to it by the chairperson of the Grievance Committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. In its discretion, the Grievance Committee or a panel thereof may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the chairperson of the Grievance Committee. A decision of a panel of the committee may not be appealed to the Grievance Committee as a whole or to another panel (except as provided in 27 N.C.A.C. 1A, .0701(a)(3)).

...

(j) **Letters of Warning**

...

(4) In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent <u>at the commission</u> ~~for a hearing pursuant to Rule .0114 of this subchapter~~.

(k) **Admonitions, Reprimands, and Censures**

...

(l) **Procedures for Admonitions<u>,</u> ~~and~~ Reprimands<u>, and Censures</u>**

(1) A record of any admonition<u>,</u> ~~or~~ reprimand<u>, or censure</u> issued by the Grievance Committee will be maintained in the office of the secretary.

(2) A copy of the admonition, ~~or~~ reprimand, or censure will be served upon the respondent in person or by certified mail. A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the admonition, ~~or~~ reprimand, or censure to the respondent's last known address on file with the NC State Bar. Service shall be deemed complete upon deposit of the admonition, ~~or~~ reprimand, or censure in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(3) Within 15 days after service the respondent may refuse the admonition, ~~or~~ reprimand, or censure and request a hearing before the commission. Such refusal and request will be in writing, addressed to the Grievance Committee, and served upon the secretary by certified mail, return receipt requested. The refusal will state that the admonition, ~~or~~ reprimand, or censure is refused.

(4) ~~In cases in which the respondent refuses an admonition or reprimand, the counsel will prepare and file a complaint against the 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 respondent of the admonition, ~~or~~ reprimand, or censure, the admonition, ~~or~~ reprimand, or censure will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown. A censure that is deemed accepted by the respondent must be filed as provided by Rule .0127(a)(3) of this subchapter.

(5) In cases in which the respondent refuses an admonition, reprimand, or censure, the counsel will prepare and file a complaint against the respondent at the commission.

~~(m) Procedure for Censures~~

~~(1) If the Grievance Committee determines that the imposition of a censure is appropriate, the committee will issue a notice of proposed censure and a proposed censure to the respondent.~~

~~(2) A copy of the notice and the proposed censure will be served upon the respondent in person or by certified mail. A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the notice and proposed censure to the 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 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 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 respondent, the discipline becomes public and must be filed as provided by Rule .0123(a)(3) of this subchapter.~~

~~(4) If the respondent does not accept the censure, the counsel will file a complaint against the defendant pursuant to Rule .0114 of this subchapter.~~

~~(n)~~(m) **Disciplinary Hearing Commission Complaints** - Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chairperson of the Grievance Committee.

.0135, Noncompliance Suspension [NEW RULE]

(a) **Noncompliant and Noncompliance Defined.** Failure to respond fully and timely to a letter of notice issued pursuant to N.C.A.C. 1B, .0112, failure to respond fully and timely to any request from the State Bar for additional information in any pending grievance investigation, failure to respond fully and timely to any request from the State Bar to produce documents or other tangible or electronic materials in connection with a grievance investigation, and/or failure to respond fully and timely to a subpoena issued by the chair of the Grievance Committee or issued by the secretary of the State Bar shall be referred to herein as "noncompliant" or "noncompliance."

(b) **Petition for Noncompliance Suspension**. If a respondent against whom a grievance file has been opened and who has been served with a letter of notice or who has been served with a subpoena issued by the chair of the Grievance Committee or issued by the secretary of the State Bar is noncompliant, the State Bar may petition the chair of the Disciplinary Hearing Commission for an order requiring the respondent to show cause why the chair should not enter an order suspending the respondent's law license.

(c) **Content of Petition**

(1) The petition shall be a verified petition, or shall be supported by an affidavit, demonstrating by clear, cogent, and convincing evidence that the respondent is noncompliant.

(2) The petition shall set forth the efforts made by the State Bar to obtain the respondent's compliance.

(3) Service of Petition

(A) The petition shall be served upon the respondent by mailing a copy of the petition addressed to the last address the respondent provided to the Membership Department of the State Bar pursuant to N.C. Gen. Stat. § 84-34 or addressed to any more recent address that might be known to the State Bar representative who is attempting service.

(B) Service of the petition shall be complete upon mailing.

(d) **Order to Show Cause**

(1) Upon receiving the State Bar's filed petition, the chair of the DHC shall issue to the respondent an order to show cause.

(2) The order to show cause shall notify the respondent that the respondent's noncompliance or failure to respond to the order to show cause may result in suspension of the respondent's law license.

(3) The order to show cause shall be served upon the respondent by mailing a copy of the order addressed to the last address the respondent provided to the Membership Department of the State Bar pursuant to N.C. Gen. Stat. § 84-34, addressed to any more recent address that might be known to the DHC, or addressed to the address where the State Bar served the petition.

(4) Service of the order to show cause shall be complete upon mailing.

(e) **Response to Order to Show Cause**

(1) The respondent shall respond to the order to show cause within 14 days of the date of service of the order upon the respondent.

(2) If the respondent responds to the order to show cause within 14 days of the date of service of the order upon the respondent, the chair of the DHC shall schedule a hearing on the order to show cause

within ten days of the filing of the respondent's response and shall provide notice to the respondent and to the State Bar of such hearing.

(3) If the respondent does not file a response to the order to show cause within 14 days of the date of service of the order to show cause upon the respondent, the chair of the DHC may enter an order suspending the respondent's law license. Such order of suspension will remain in effect until the chair enters an order finding by clear, cogent, and convincing evidence that the respondent fully cured the noncompliance and reinstating the respondent's law license to active status.

(f) **Hearing on Order to Show Cause; Burden of Proof**

(1) The State Bar shall have the burden of proving the respondent's noncompliance by clear, cogent, and convincing evidence.

(2) If the chair of the DHC finds that the State Bar has met its burden of proof, the burden of proof shall shift to the respondent to prove one or more of the following by clear, cogent, and convincing evidence:

(A) That the respondent was and is fully in compliance;

(B) That the respondent has fully cured all noncompliance; or

(C) That there is good cause for the respondent's noncompliance.

(g) **Entry of Order**

If the chair finds that the State Bar has met its burden of proof; finds by clear, cogent, and convincing evidence that the respondent is noncompliant; finds that the respondent has not met the respondent's burden of proof; and fails to find by clear, cogent, and convincing evidence any of the circumstances listed in paragraph 6(b) above, the chair may enter an order suspending the respondent's law license. Such order of suspension shall remain in effect until the chair enters an order finding by clear, cogent, and convincing evidence that the respondent fully cured the noncompliance and reinstating the respondent's law license to active status.

(h) **Wind Down**

Any attorney suspended for noncompliance shall comply with the winddown provisions for suspended attorneys as set forth in N.C.A.C. 1B .0128.

(i) **Reinstatement from Noncompliance Suspension**

(1) Following entry of a noncompliance suspension order, the respondent may seek reinstatement by filing a verified petition with the chair of the DHC demonstrating by clear, cogent, and convincing evidence that the respondent has become, and is at the time of the petition, fully compliant. The respondent shall simultaneously serve a copy of the verified petition on the State Bar.

(2) The State Bar shall have five days from the date of receipt to file an objection to the respondent's petition. If the State Bar does not object, the chair may enter an order finding by clear, cogent, and convincing evidence that the respondent has become, and is at the time of the petition, fully compliant and reinstating the respondent to the active practice of law.

(3) If the State Bar objects to the petition, the chair shall schedule a hearing within ten days of the filing of such objection. It shall be the respondent's burden to prove by clear, cogent, and convincing evidence that the respondent has become, and remains at the time of the hearing, fully compliant.

(4) At the conclusion of the hearing, if the chair finds that the respondent has met her/his burden of proof and finds by clear, cogent, and convincing evidence that the respondent is fully compliant at the time of the hearing, the chair shall enter an order reinstating the respondent to the active practice of law.

(j) **Subsequent Petitions for Noncompliance Suspension**

The State Bar may file a petition under this rule on the first occasion when a respondent is noncompliant and may file a petition on any subsequent occasions when a respondent is noncompliant.

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of March, 2019.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 27th day of March, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

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

This the 27th day of March, 2019.

s/Earls, 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 26, 2018.

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 for Legal Specialization

.1721 Minimum Standards for Continued Certification of Specialists

(a) The period of certification as a specialist shall be five years… To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards.

(1) …

(4) The specialist must comply with the requirements set forth in Rules .1720(a)(1) ~~and (4) of this subchapter~~.

(5) The specialist must make a satisfactory showing of qualification in the specialty through peer review. The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in any state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .1720(a)(4) of this subchapter apply to this standard.

(b) …

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of March, 2019.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 27th day of March, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

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

This the 27th day of March, 2019.

s/Earls, 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 26, 2018.

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 .2100 through Section .3300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D

Section .2100, Certification Standards for the Real Property Law Specialty

.2106 Standards for Continued Certification as a Specialist

The period of certification is five years…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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2105(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .2200, Certification Standards for the Bankruptcy Law Specialty

.2206 Standards for Continued Certification as a Specialist

The period of certification is five years…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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2205(d) of this subchapter apply to this standard.

(d) …

Section .2300, Certification Standards for the Estate Planning and Probate Law Specialty

.2306, Standards for Continued Certification as a Specialist

The period of certification is five years…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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2305(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .2400, Certification Standards for the Family Law Specialty

.2406, Standards for Continued Certification as a Specialist

The period of certification is five years…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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2405(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .2500, Certification Standards for the Criminal Law Specialty

.2506, Standards for Continued Certification as a Specialist

The period of certification is five years…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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. Each applicant also must provide the names and addresses of the following: (i) five lawyers and

judges who practice in the field of criminal law and who are familiar with the applicant's practice, and (ii) opposing counsel and the judge in four recent cases tried by the applicant to verdict or entry of order. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2505(d) of this subchapter apply to this standard.

(d) Time for Application - …

.2509, Standards for Continued Certification as a Specialist in Juvenile Delinquency Law

The period of certification is five years…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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state, practice in the field of juvenile delinquency law or criminal law or preside over juvenile delinquency or criminal law proceedings, and are familiar with the competence and qualification of the applicant as a specialist. An applicant must receive a minimum of three favorable peer reviews to be considered by the board for compliance with this standard. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2508(d) of this subchapter apply to this standard.

(d) Time for Application – …

Section .2600, Certification Standards for the Immigration Law Specialty

.2606, Standards for Continued Certification as a Specialist

The period of certification is five years…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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2605(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .2700, Certification Standards for the Workers' Compensation Law Specialty

.2706, Standards for Continued Certification as a Specialist

The period of certification is five years… 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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers, commissioners or deputy commissioners of the North Carolina Industrial Commission, or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2705(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .2800, Certification Standards for the Social Security Disability Law Specialty

.2806, Standards for Continued Certification as a Specialist

The period of certification is five years…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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in a jurisdiction in the United States and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2805(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .2900, Certification Standards for the Elder Law Specialty

.2906, Standards for Continued Certification as a Specialist

The period of certification is five years…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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2905(e) of this subchapter apply to this standard.

(d) Time for Application - …

Section .3000, Certification Standards for the Appellate Practice Specialty

.3006, Standards for Continued Certification as a Specialist

The period of certification is five years…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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law, have significant legal or judicial experience in appellate practice, and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .3005(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .3100, Certification Standards for the Trademark Law Specialty

.3106, Standards for Continued Certification as a Specialist

The period of certification is five years…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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law, have significant legal or judicial experience in trademark law, and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .3105(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .3200, Certification Standards for the Utilities Law Specialty

.3206, Standards for Continued Certification as a Specialist

The period of certification is five years…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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law, have significant legal or judicial experience in utilities law, and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .3205(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .3300, Certification Standards for the Privacy and Information Security Law Specialty

.3306, Standards for Continued Certification as a Specialist

The period of certification is five years…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 - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in North Carolina or another jurisdiction in the United States; however, no more than three reference may be licensed in another jurisdiction. References must be familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements

relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .3305(d) of this subchapter apply to this standard.

(d) Time for Application - …

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of March, 2019.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 27th day of March, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

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

This the 27th day of March, 2019.

s/Earls, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE RULES OF PROFESSIONAL CONDUCT

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 26, 2018.

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 as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rule 1.15, Safekeeping Property

Comment [to Rule 1.15 and All Subparts]

[1] …

Prepaid Legal Fees

[12] …

[13] Client or third-party funds on occasion pass through, or are originated by, intermediaries before deposit to a trust or fiduciary account. Such intermediaries include banks, credit card processors, litigation funding entities, and online marketing platforms. A lawyer may use an intermediary to collect a fee. However, the lawyer may not participate in or facilitate the collection of a fee by an intermediary that is unreliable or untrustworthy. Therefore, the lawyer has an obligation to make a reasonable investigation into the reliability, stability, and viability of an intermediary to determine whether reasonable measures are being taken to segregate and safeguard client funds against loss or theft and, should such funds be lost, that the intermediary has the resources to compensate the client. Absent other indicia of fraud (such as the use of non-industry standard methods for collection of credit card information), a lawyer's diligence obligation is satisfied if the intermediary collects client funds using a credit or debit card. Unearned fees, if collected by an intermediary, must be transferred to the lawyer's designated trust or fiduciary account within a reasonable period of time so as to minimize the risk of loss while the funds are in the possession of another, and to enable the collection of interest on the funds for the IOLTA program or the client as appropriate. *See* 27 N.C.A.C. 1B, Sect. .1300.

Abandoned Property

~~[13]~~ [14] …

[Renumbering remaining paragraphs.]

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of March, 2019.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 27th day of March, 2019.

s/Cheri L. Beasley
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For the Court

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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 as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rule 3.5 Impartiality and Decorum of the Tribunal

(a) A lawyer representing a party in a matter pending before a tribunal shall not:

(1) seek to influence a judge, juror, member of the jury venire, or other official by means prohibited by law; …

(b)…

(c) A lawyer shall reveal promptly to the court improper conduct by a juror or a member of the jury venire, and improper conduct by another person toward a juror, a member of the jury venire, **or** the family members of a juror or a member of the jury venire~~'s family~~.

(d) …

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law…

[7] The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, ~~is never justified in making a gift or a loan to~~ shall not give or lend anything of value to a judge, a hearing officer, or an official or employee of a tribunal under circumstances which might give the appearance that the gift or loan is made to influence official action.

[8] All litigants and lawyers should have access to tribunals on an equal basis…

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of March, 2019.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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For the Court

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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 26, 2018.

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 as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rule 5.4, Professional Independence of Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) …

(4) …; ~~and~~

(5) …; and

(6) a lawyer or law firm may pay a portion of a legal fee to a credit card processor, group advertising provider, or online marketing platform if the amount paid is for payment processing or for administrative or marketing services, and there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship.

(b) …

Comment

[1] …

[2] A determination under paragraph (a)(6) of this rule as to whether an advertising provider or online marketing platform (jointly "platform") will interfere with the independent professional judgment of a lawyer requires consideration of a number of factors. These factors include, but are not limited to, the following: (a) the percentage of the fee or the amount the platform charges the lawyer; (b) the percentage of the fee or the amount that the lawyer receives from clients obtained through the platform; (c) representations made to prospective clients and to

clients by the platform; (d) whether the platform communicates directly with clients and to what degree; and (e) the nature of the relationship between the lawyer and the platform. A relationship wherein the platform, rather than the lawyer, is in charge of communications with a client indicates interference with the lawyer's professional judgment. The lawyer should have unfettered discretion as to whether to accept clients from the platform, the nature and extent of the legal services the lawyer provides to clients obtained through the platform, and whether to participate or continue participating in the platform. The lawyer may not permit the platform to direct or control the lawyer's legal services and may not assist the platform to engage in the practice of law, in violation of Rule 5.5(a).

[~~23~~] …

[Renumbering remaining paragraphs.]

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2018.

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This the 27th day of March, 2019.

s/Earls, J.
For the Court

ORDER AMENDING THE NORTH CAROLINA BUSINESS COURT RULES

Pursuant to Section 7A-34 of the General Statutes of North Carolina, the Court hereby amends the North Carolina Business Court Rules. This order affects each rule (1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16) and each appendix (A1, A2, A3, A4, and A5) in the rule set.

* * *

~~General Rules of Practice and Procedure for the~~ North Carolina Business Court Rules

Rule 1. Purpose and Scope

1.1. Purpose. These ~~Rules~~rules should be construed and enforced to foster professionalism and civility; to permit the orderly, just, and prompt consideration and determination of all matters; and to promote the efficient administration of justice.

1.2. Scope. These ~~Rules~~rules govern every civil action that is designated as a mandatory complex business case or assigned to a Business Court judge under Rule 2.1 of the General Rules of Practice ~~for the Superior and District Courts Supplemental to the Rules of Civil Procedure~~.

1.3. Integration. These ~~Rules~~rules are intended to supplement, not supplant, the Rules of Civil Procedure and the General Rules of Practice. To the extent these ~~Rules~~rules conflict with local rules or standing orders from the county of venue, these ~~Rules~~rules will govern.

~~**1.4. Effective date.** These Rules take effect on January 1, 2017, and apply to all actions designated to the Court before or after that date.~~

~~1.5.~~ 1.4. Definitions.

(a) "The Court" refers to the North Carolina Business Court.

(b) "The General Rules of Practice" refers to the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure.

~~(c) "The Rules" refers to the Business Court Rules.~~

~~(d)~~(c) "The Rules of Civil Procedure" refers to the North Carolina Rules of Civil Procedure.

1.5. Citations to these rules. Citations to these rules should follow the citation format BCR [Number], such as BCR 1.5.

* * *

Rule 2. Mandatory Business Court Designation

2.1. Designation.

(a) **Form of notice.** The party seeking to designate an action as a mandatory complex business case must file a Notice of Designation as provided in ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-45.4. Appendix 1 to ~~the Rules~~these rules contains a Notice of Designation template.

(b) **Method of service.** In addition to serving the Notice of Designation as required by subsection 7A-45.4(c), the designating party should e-mail the Notice of Designation to the Chief Business Court Judge, the Chief Justice of the Supreme Court of North Carolina, and, as practicable, all parties.

(c) **Civil action number.** Before a party files a Notice of Designation in an action, the Clerk of Superior Court in the county of venue will assign a civil action number to the action. When an action is designated or assigned to the Court, the action retains that civil action number.

(d) **Cost.** Within ten days of the assignment of an action to a Business Court judge, the party responsible for paying the cost described in ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-305(a)(2) must file a certification in the Court that the cost has been paid to the Clerk of Superior Court in the county of venue.

2.2. Opposing a Notice of Designation. If a party files an opposition to a Notice of Designation pursuant to ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-45.4~~(3)~~(e), then any other party may file a response to the opposition. The response must be filed within fifteen days of service of the opposition or as otherwise ordered by the Court. Unless the Court orders otherwise, the party that filed the opposition may not file a reply.

If the case is no longer designated as a mandatory complex business case, the action will proceed on the regular civil docket in the county of venue, although any party may seek to have the action designated as exceptional under Rule 2.1 of the General Rules of Practice.

2.3. Designation based on an amended pleading.

(a) **Procedure.** If a party amends a pleading, and the amendment raises a new material issue listed in ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-45.4(a), any party may seek designation of the action as a mandatory complex business case within the time periods set forth in subsection 7A-45.4(d).

If the party that files the amended pleading seeks designation, the Notice of Designation must be made contemporaneously with the filing of the amended pleading.

If another party seeks designation based on the amended pleading, the Notice of Designation must be filed within thirty days of service of the amended pleading. For proposed amended pleadings, the thirty-day period begins to run on the later of ~~(a)~~(i) the timely filing of the ~~Court-allowed~~court-allowed pleading or ~~(b)~~ (ii) three days after the entry of any order that deems the proposed amended pleading to be filed.

If, as a result of the amended pleading, the action falls within subsection 7A-45.4(b), the action must be designated to the Court under that subsection, and subsection 7A-45.4(g) will apply to any action if there is no designation.

(b) **New eligibility for designation.** ~~Rule~~BCR 2.3(a) applies only to an action that had not previously qualified under subsection 7A-45.4(a) for designation to the Court. Parties added by subsequent pleadings, however, may designate an action to the Court in accordance with subsection 7A-45.4(d).

The Notice of Designation procedure should not be utilized in connection with an amended pleading for the purpose of interfering with or delaying ongoing or upcoming proceedings or where designation of the action as a mandatory complex business case would be inconsistent with the interests of justice given the status of the proceedings.

2.4. What constitutes designation. For purposes of ~~the Rules~~ these rules, an action is designated as a mandatory complex business case when the Chief Justice of the Supreme Court of North Carolina issues an order as described in ~~N.C. Gen. Stat. §§~~

N.C.G.S. § 7A-45.4(c) and (f). A party's filing of a Notice of Designation does not constitute designation of the action as a mandatory complex business case or effectuate the assignment of a case to the Court.

2.5. Designation under ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-45.4(a)(9). When seeking designation based on ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-45.4(a)(9), if the ~~plaintiff, third-party plaintiff, or petitioner~~designating party lacks the consent of all parties, then the ~~plaintiff, third-party plaintiff, or petitioner~~designating party may file a conditional Notice of Designation contemporaneously with the complaint, third-party complaint, ~~or~~ petition for judicial review, answer, or other responsive pleading. The conditional Notice of Designation must be served by e-mail in the same manner set forth in BCR 2.1(b). The conditional Notice of Designation will be construed to comply with subsection 7A-45.4(d)(1). The ~~plaintiff, third-party plaintiff, or petitioner~~designating party will then have thirty days after service on all parties of the complaint, third-party complaint, ~~or~~ petition for judicial review, answer, or other responsive pleading to file a supplement to the conditional Notice of Designation that reflects consent by all parties to the Notice of Designation. A conditional Notice of Designation filed by a ~~plaintiff, third-party plaintiff, or petitioner~~party under subsection 7A-45.4(d)~~(14)~~ is not deemed to be complete until the supplement is filed. Upon a motion or its own initiative, and for good cause shown, the Court may extend the time period to file a supplement to the conditional Notice of Designation.

2.6. Procedure upon remand from federal court. If an action governed by these rules has been removed to federal court, and the action is remanded to state court, then the parties must file a status report within fourteen days of the remand order. BCR 14.3 contains the procedures for remand following an appeal.

2.7. Procedure following entry of stay. If an action governed by these rules has been stayed pending an arbitration or bankruptcy proceeding, then the parties must file a status report within fourteen days of the resolution of the arbitration or bankruptcy proceeding unless otherwise ordered by the Court.

* * *

Rule 3. Filing and Service

3.1. Mandatory electronic filing. Except as otherwise specified in the ~~Rules~~these rules, all filings in the Court must be made electronically through the Court's electronic-filing system beginning immediately upon designation of the action as a mandatory complex business case by the Chief Justice of the Supreme Court of North Carolina or assignment

to a Business Court judge pursuant to Rule 2.1 of the General Rules of Practice. Counsel who appear in the Court are expected to have the capability to use the electronic-filing system. Instructions for filing documents through the Court's electronic-filing system are available on the Court's website. Counsel should exercise diligence to ensure that the description of the document entered during the filing process accurately and specifically describes the document being filed.

3.2. Who may file. A filing through the electronic-filing system may be made by counsel, a person filing on counsel's behalf, or a pro se ~~litigant~~party. Parties who desire not to use the electronic-filing system may file a motion for relief from using the system, but the Court will grant that relief for counsel only upon a showing of exceptional circumstances. A request by a pro se party to forgo use of the electronic filing system will be determined on a good-cause standard.

3.3. ~~Electronic identities~~User account. Counsel who appear in the Court in a particular matter ("counsel of record") and pro se parties who are not excused from using the electronic-filing system must promptly ~~obtain an electronic identity from the Court. An electronic identity consists of a username and password~~create a user account through the Court's website. Any person who has ~~obtained an electronic identity~~established a user account must maintain adequate security over ~~that identity~~the password to the account.

3.4. Electronic signatures.

(a) **Form.** A document to be filed that is signed by counsel must be signed using an electronic signature. A pro se party must also use an electronic signature on any document that the party is permitted to file by e-mail pursuant to ~~Rule~~BCR 3.2. An electronic signature consists of a person's typed name preceded by the symbol "/s/." An electronic signature serves as a signature for purposes of the Rules of Civil Procedure.

(b) **Multiple signatures.** A filing submitted by multiple parties must bear the electronic signature of at least one counsel for each party that submits the filing. By filing a document with multiple electronic signatures, the lawyer whose electronic identity is used to file the document certifies that each signatory has authorized the use of his or her signature.

(c) **Form of signature block.** Every signature block must contain the signatory's name, bar number (if applicable), physical address, phone number, and e-mail address.

3.5. Format of filed documents. All filings must be made in a file format approved by the Court. The Court maintains a list of approved formats on its website. Pleadings, motions, and briefs filed electronically must not be filed in an optically scanned format, unless special circumstances dictate otherwise. Proposed orders must be filed in a format permitted by the filing instructions on the Court's website. The electronic file name for each document filed with the Court must clearly identify its contents.

3.6. Time of filing. If a document is due on a date certain, then the document must be filed by 5:00 p.m. Eastern Time on that date, unless the Court orders otherwise.

3.7. Notice of filing. When a document is filed, the Court's electronic-filing system generates a Notice of Filing. The Notice of Filing ~~is sent by e-mail to~~appears in the user account for all counsel of record and pro se parties who have created a user account. Filing is not complete until issuance of the Notice of Filing. A document filed electronically is deemed filed on the date stated in the Notice of Filing.

3.8. Notice and entry of orders, judgments, and other matters. The Court will transmit all orders, decrees, judgments, and other matters through the Court's electronic-filing system, which, in turn, will generate a Notice of Filing to all counsel of record. The issuance by the electronic-filing system of a Notice of Filing for any order, decree, or judgment constitutes entry and service of the order, decree, or judgment for purposes of Rule 58 of the Rules of Civil Procedure. The Court will file a copy of each order, decree, or judgment with the Clerk of Superior Court in the county of venue. If a pro se ~~litigant~~party is permitted to forgo use of the electronic-filing system under ~~Rule~~BCR 3.2, the Court will deliver a copy of every order, decree, judgment, or other matter to that pro se ~~litigant~~party by alternative means.

3.9. Service.

(a) **Effect of Notice of Filing.** After an action has been designated as a mandatory complex business case or otherwise assigned to the Court, the issuance of a Notice of Filing constitutes adequate service under the Rules of Civil Procedure of the filed document. Service by other means is not required unless the party served is a pro se party who has not established a user account. Service of materials on pro se parties is governed by ~~Rule~~BCR 3.9(e). Documents filed with the Court must bear a certificate of service stating that the documents have been filed electronically and will be served in accordance with this rule.

(b) **E-mail addresses.** Each counsel of record and pro se parties who have established a user account must provide the Court with a current e-mail address and maintain a functioning e-mail system. The Court will issue a Notice of Filing to the e-mail address that ~~counsel~~a person with a user account has provided to the Court.

(c) **Service of non-filed documents.** When a document must be served but not filed, the document must be served by e-mail unless ~~(a)~~(i) the parties have agreed to a different method of service or ~~(b)~~(ii) the Case Management Order calls for another manner of service. Service by e-mail under this rule constitutes adequate service under Rule 5 of the Rules of Civil Procedure.

(d) **Effect on Rule 6(e) of the Rules of Civil Procedure.** Electronic service made under ~~the Rules~~these rules through the electronic-filing system or by e-mail under ~~Rule~~BCR 3.9(c) is treated the same as service by mail for purposes of Rule 6(e) of the Rules of Civil Procedure.

(e) **Service on pro se parties.** All documents filed with the Court must be served upon a pro se party by any method allowed by the Rules of Civil Procedure, unless the Court ~~directs~~or these rules direct otherwise.

3.10. Procedure when the electronic-filing system appears to fail. If a person attempts to file a document, but ~~(a)~~(i) the person is unable for technical reasons to transmit the filing to the Court~~;~~, ~~(b)~~(ii) the document appears to have been transmitted to the Court, but the person who filed the document does not receive a Notice of Filing~~;~~, or ~~(c)~~(iii) some other technical reason prevents a person from filing the document, then the person attempting to file the document must make a second attempt at filing.

If the second attempt fails, the person may (i) continue further attempts to file or ~~may (1)~~(ii) notify the Court of the technical failure by phone call to the judicial assistant for the presiding Business Court judge and ~~(2)~~ e-mail the document for which filing attempts were made to filinghelp@ncbusinesscourt.net. The e-mail must state the date and time of the attempted filings and a brief explanation of the relevant technical failure(s). The e-mail does not constitute e-filing, but serves as proof of an attempt to e-file in order to protect a party in the event of an imminent deadline and satisfies the deadline, notwithstanding ~~Rule~~BCR 3.7, unless otherwise ordered. The e mail should also be copied to counsel of record. The Court may ask the person to make another filing attempt.

The Court will work with the parties on an alternative method of filing, such as a cloud-based file-sharing system, if the parties anticipate or experience difficulties with filing voluminous materials (e.g., exhibits to motions and final administrative records) using the Court's electronic-filing system. In such event, counsel should contact the presiding Business Court judge's judicial assistant for assistance.

For purposes of calculating briefing or response deadlines, a document filed electronically is deemed filed at the time and on the date stated in the Notice of Filing.

3.11. Filings with the Clerk of Superior Court. ~~Any material filed with the Court that is listed in Rule 5(d) of the Rules of Civil Procedure must also be filed with the Clerk of Superior Court in the county of venue within five business days of the date of the filing with the Court.~~ Unless otherwise directed by the Administrative Office of the Courts, the Clerk of Superior Court in the county of venue maintains the official file for any action designated to the Court, and the Court is not required to maintain copies of written materials provided to it. Accordingly, material listed in Rule 5(d) of the Rules of Civil Procedure must be filed with the Clerk of Superior Court in the county of venue, either before service or within five days after service.

3.12. Appearances. Counsel whose names appear on a signature block in a ~~Court~~court filing need not file a separate notice of appearance for the action. After making an initial filing with the Court, counsel should verify that their names ~~are~~and contact information are properly listed on the docket for the action on the Court's ~~e-filing~~electronic-filing system. Counsel whose names do not appear on that docket, but whose names should appear, should contact the judicial assistant for the presiding Business Court judge and request to be added. Out-of-state attorneys may be added to that docket only after admission pro hac vice to appear in the action.

* * *

Rule 4. Time

4.1. Motions to extend time periods.

(a) **Procedure.** After an action has been designated as a mandatory complex business case or assigned to a Business Court judge under Rule 2.1 of the General Rules of Practice, all motions to extend any time period prescribed or allowed by these ~~Rules~~rules, by the Rules of Civil Procedure, or by court order must be filed with

the Court. If the action has been designated as a mandatory complex business case but has not yet been assigned to a particular Business Court judge, then the motion must be submitted to the Chief Business Court Judge.

(b) **Basis.** A motion to extend a time period must demonstrate good cause and comply with ~~Rule~~BCR 7.3.

(c) **Effect.** ~~The~~Except as to deadlines set by court order, including deadlines for the completion of fact and expert discovery, the timely filing of a motion to extend time automatically extends the time for filing or the performance of the act for which the extension is sought until the earlier of the expiration of the extension requested or a ruling by the Court. If the Court denies the motion, then the filing is due or the act must be completed no later than 5:00 p.m. Eastern Time on the second business day after the Court issues its order, unless the Court's order provides a different deadline.

(d) **Modifications by the Court.** The Court may modify any time period on its own initiative, unless a rule or statute prohibits modification of the time period.

(e) **Relationship with Rule 6(b) of the Rules of Civil Procedure.** Nothing in ~~the Rules~~these rules precludes parties from entering into binding stipulations in the manner permitted by Rule 6(b) of the Rules of Civil Procedure.

4.2. Extensions of time that do not require a motion.

(a) **~~Papers~~Documents due within twenty days of designation.** If any statute, rule of procedure, Business Court Rule, or court order requires the filing or service of any ~~paper~~document fewer than twenty days after the designation of an action as a mandatory complex business case or the assignment of an action to a Business Court judge under Rule 2.1 of the General Rules of Practice, then the time for filing or service of that ~~paper~~ document is automatically extended to the twentieth day following the designation, unless a Business Court judge orders otherwise. This rule does not apply to time periods that, by rule or statute, cannot be extended and is subject to modification by ~~Court~~court order.

(b) **Discovery responses.** The parties may agree, without a ~~Court~~court order, to extend any time period for responses to written discovery. A ~~Court~~court order is required, however, if a party seeks to modify any discovery-related deadline that has been established by a ~~Court~~court order. ~~Rule~~BCR 10.4(a) contains the standards and procedure for filing a motion to extend the discovery period or to take discovery beyond the limits set forth in the Case Management Order.

* * *

Rule 5. Protective Orders and Filing under Seal

5.1. ~~Generally~~General principles.

(a) ~~Rule~~BCR 5 applies to both parties and non-parties. References to "parties" in this rule therefore include non-parties.

(b) Parties should limit the materials that they seek to file under seal. The party seeking to maintain materials under seal bears the burden of establishing the need for filing under seal.

(c) This rule should not be construed to change any requirement or standard that otherwise would govern the issuance of a protective order.

(d) Parties are encouraged to agree on terms for a proposed protective order that governs the confidentiality of discovery materials when exchanged between or among the parties.

5.2. Procedures for sealed filing.

(a) **Pursuant to a protective order.** The Court may enter a protective order under Rule 26(c) of the Rules of Civil Procedure that contains standards and processes for the handling, filing, and service of sealed documents. Proposed protective orders submitted to the Court should include procedures similar to those described in subsections (b) through (d) of this rule.

(b) **In the absence of a protective order.** In the absence of an order described in ~~Rule~~BCR 5.2(a), any party that seeks to file a document or part of a document under seal must provisionally file the document under seal together with a motion for leave to file the document

under seal. The motion must be filed no later than 5:00 p.m. Eastern Time on the day that the document is provisionally filed under seal. The motion must contain information sufficient for the Court to determine whether sealing is warranted, including the following:

(1) a non-confidential description of the material sought to be sealed;

(2) the circumstances that warrant sealed filing;

(3) the reason(s) why no reasonable alternative to a sealed filing exists;

(4) if applicable, a statement that the party is filing the material under seal because another party (the "designating party") has designated the material under the terms of a protective order in a manner that triggered an obligation to file the material under seal and that the filing party has unsuccessfully sought the consent of the designating party to file the materials without being sealed;

(5) if applicable, a statement that any designating party that is not a party to the action is being served with a copy of the motion for leave;

(6) a statement that specifies whether the party is requesting that the document be accessible only to counsel of record rather than to the parties; and

(7) a statement that specifies how long the party seeks to have the material maintained under seal and how the material is to be handled upon unsealing.

(c) Until the Court rules on the sealing motion, any document provisionally filed under seal may be disclosed only to counsel of record and their staff until otherwise ordered by the Court or agreed to by the parties.

(d) Within five business days of the filing or provisional filing of a document under seal, the party that filed the document should file a public version of the document. The public version may bear redactions or omit material, but the redactions or omissions should be as limited as practicable. In the rare circumstance that an entire document is filed under seal, in lieu of filing a

public version of the document, the filing party must file a notice that the entire document has been filed under seal. The notice must contain a non-confidential description of the document that has been filed under seal.

5.3. Role of designating party. If a motion for leave to file under seal is filed by a party who is not the designating party, then the designating party may file a supplemental brief supporting the sealing of the document within seven business days of service of the motion for leave. The supplemental brief must comply with the requirements in ~~Rule~~ BCR 7. In the absence of a brief, the Court may summarily deny the motion for leave and may direct that the document be unsealed.

* * *

Rule 6. Hearings and Conduct

6.1. Notice of hearing. The Court will typically issue a notice of hearing prior to a hearing. The Court will usually issue the notice at least five business days prior to the hearing. The Court retains the flexibility to convene counsel informally if doing so would advance the interests of justice. A ruling on a motion heard after notice to the parties will not be subject to attack solely because a notice of hearing was not issued as provided by this rule.

6.2. Hearing procedures. The Court may conduct pretrial hearings in person or by any technological means accessible to all parties in an action. Unless otherwise specified, all pretrial hearings will be held in the Business Court courtroom assigned to the presiding Business Court judge. Unless otherwise ordered, or unless the parties agree otherwise, any court reporter transcribing any pretrial hearing or conference will be present in the Business Court courtroom.

6.3. Conduct before the Court.

(a) **Addressing the Court.** Counsel should speak clearly and audibly from a standing position behind counsel table or the podium. Counsel may not approach the bench without the Court's request or permission.

(b) **Examination of witnesses and jurors.** Counsel must examine witnesses and jurors from a sitting position behind counsel table or standing from the podium, except as otherwise permitted by the Court. Counsel may only approach a witness for the purposes of presenting, inquiring about, or examining the witness about an exhibit, document, or diagram.

(c) **Professionalism**. Participants in ~~Court~~court proceedings must conduct themselves professionally. Adverse witnesses, counsel, and parties must be treated with fairness and civility both in and out of ~~Court~~court. Counsel must yield gracefully to rulings of the Court and avoid disrespectful remarks.

6.4. Contact with the Court.

(a) **E-mail.** Any e-mails to ~~a Business Court judge~~the Court about a pending matter must copy at least one counsel of record for each party.

(b) **Contact with ~~Court~~court personnel.** Counsel may contact the judicial assistants or law clerks of the Business Court judges to discuss scheduling and logistical matters. Neither counsel nor counsel's professional staff may seek advice or comment from a judicial assistant or law clerk on any matter of substance. Counsel should communicate with Business Court judges, law clerks, and judicial assistants with appropriate professional courtesy.

In the absence of exigent circumstances, and unless opposing counsel has consented otherwise, any written communication by counsel to ~~Court~~court personnel regarding a pending matter must include or copy at least one counsel of record for each party.

6.5. Participation of junior attorneys. To promote the professional development of junior attorneys, the Court welcomes their participation at oral argument.

6.6. Secure leave. Notwithstanding subsections (c) and (e) of Rule 26 of the General Rules of Practice, an attorney must designate his or her secure-leave periods using the Court's electronic-filing system in each case in which the attorney is counsel of record.

* * *

Rule 7. Motions

7.1. Filing. After an action has been designated as a mandatory complex business case or assigned to a Business Court judge under Rule 2.1 of the General Rules of Practice, the Business Court judge to whom the action is assigned will preside over all motions and proceedings in the action, unless and until an order has been entered under ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-45.4(e) ordering that the case not be designated

a mandatory complex business case or the Chief Justice of the Supreme Court of North Carolina revokes approval of the designation.

7.2. Form. ~~All motions must be made in electronic form and must be accompanied by a brief (except for those motions listed in Rule 7.10).~~All motions must be double-spaced with a margin of at least one inch at the right, left, top, and bottom of each page, and use at least a 12-point proportional font. All motions must be submitted as a PDF file. All motions must be accompanied by a brief (except for those motions listed in BCR 7.10). Each motion must be set out in a separate document. A motion unaccompanied by a required brief may, in the discretion of the Court, be summarily denied. This rule does not apply to oral motions made at trial or as otherwise provided in the ~~Rules~~these rules.

7.3. Consultation. All motions, except those made pursuant to Rules 12, 55, 56, 59, 60, or 65 of the Rules of Civil Procedure, must reflect consultation with and the position of opposing counsel or any pro se parties. The motion must state whether any party intends to file a response.

7.4. Motions decided ~~on papers and briefs~~without a hearing. The Court may rule on a motion without a hearing. Special considerations thought by counsel sufficient to warrant a hearing or oral argument may be brought to the Court's attention in the motion or response.

7.5. Supporting materials and citations. This rule applies to all motions and briefs filed with the Court.

All materials, including affidavits, on which a motion or brief relies must be filed with the motion or ~~supporting~~ brief. Materials that have been filed previously need not be ~~re-filed~~refiled, but the filing party should ~~use specific references~~, using the form ECF No. ___, cite to the docket location of the previously filed materials ~~to aid the Court~~. In selecting materials to be filed, parties should attempt to limit the use of voluminous materials. If service of process is at issue in any motion, proof of service must be submitted in support of the motion.

The filing party must include an index at the front of the materials. The index should assign a number or letter to each exhibit and should describe the exhibit with sufficient detail to allow the Court to understand the exhibit's contents.

When a brief refers to a publicly available document, the brief may contain a hyperlink to or URL address for the document in lieu of attaching the document as an exhibit. The filing party is responsible for keeping or archiving a copy of the document referenced by hyperlink or URL address.

When a motion or brief refers to any supporting material, the motion or brief must include a pinpoint citation to the relevant page of the supporting material whenever possible. Unless the circumstances dictate otherwise, only the cited page(s) should be filed with the Court in the manner described above.

If a motion or brief cites a decision that is published only in sources other than the West Federal Reporter System, Lexis System, commonly used electronic databases such as Westlaw or LexisNexis, ~~or~~ the official North Carolina reporters, or decisions of the Court listed on its website as opinions, then the motion or brief must attach a copy of the decision.

7.6. Responsive briefs. A party that opposes a motion may file a responsive brief within twenty days of service of the supporting brief. This period is thirty days after service for responses to summary judgment motions and for responses to opening briefs in administrative appeals. If a party fails to file a response within the time required by this rule, the motion will be considered and decided as an uncontested motion.

If a motion has been filed without a brief before a case is designated as a mandatory complex business case, then the time period to file a responsive brief begins running only when the moving party files a supporting brief in the Court. A motion filed without a brief before a case is designated as a mandatory complex business case will not be considered by the Court unless and until the moving party files a supporting brief with the Court.

7.7. Reply briefs. Unless otherwise prohibited, a reply brief may be filed within ten days of service of a responsive brief. A reply brief must be limited to discussion of matters newly raised in the responsive brief. The Court retains discretion to strike any reply brief that violates this rule.

7.8. Length and format. Briefs in support of and in response to motions ~~must be double-spaced and~~ cannot exceed 7,500 words, except as provided in ~~Rule~~BCR 10.9(c). Reply briefs must also be double-spaced and cannot exceed 3,750 words. These word limits include footnotes and endnotes but do not include the case caption, any index, table of contents, or table of authorities, signature blocks, or any required certificates.

A party may request the Court to expand these limits but must make the request no later than five days before the deadline for filing the brief. Word limits will be expanded only upon a convincing showing of the need for a longer brief.

Each brief must include a certificate by the attorney or party that the brief complies with this rule. Counsel or pro se parties may rely on the word count of a word-processing system used to prepare the brief.

In the absence of a ~~Court~~court order, all parties who are jointly represented by any law firm must join together in a single brief. That single brief may not exceed the length limits in this rule.

All briefs must ~~use a 12-point, proportional font, and one-inch margins~~be double-spaced with a margin of at least one inch at the right, left, top, and bottom of each page, and use at least a 12-point proportional font. All briefs must be submitted as a PDF file.

7.9. Suggestion of subsequently decided authority. In connection with a pending motion, a party may file a suggestion of subsequently decided authority after briefing has closed. The suggestion must contain the citation to the authority and, if the authority is not available on an electronic database, a copy of the authority. The suggestion may contain a brief explanation, not to exceed ~~one hundred~~100 words, that describes the relevance of the authority to the pending motion. Any party may file a response to a suggestion of subsequently decided authority. The response may not exceed ~~one hundred~~100 words and must be filed within five days of service of the suggestion.

7.10. Motions that do not require briefs. Briefs are not required for the following motions:

(a) for an extension of time, provided that the motion is filed prior to the expiration of the time to be extended;

(b) to continue a pretrial conference, hearing, or trial of an action;

(c) to add parties;

(d) consent motions, unless otherwise ordered by the Court;

(e) to approve fees for receivers, special masters, referees, or court appointed experts or professionals;

(f) for substitution of parties;

(g) to stay proceedings to enforce a judgment;

(h) to modify the case-management process pursuant to ~~Rule~~BCR 9.1(a), provided that the motion is filed prior to the expiration of the case-management deadline sought to be extended;

(i) for entry of default;

(j) for pro hac vice admission; and

(k) motions in limine complying with ~~Rule~~BCR 12.9.

(l) to seal confidential information (except as provided by BCR 5.3).

These motions must state the grounds for the relief sought, including any necessary supporting materials, and must be accompanied by a proposed order.

7.11. Late filings. Absent a showing of excusable neglect or as otherwise ordered by the Court, the failure to timely file a brief or supporting material waives a party's right to file the brief or supporting material.

7.12. Motions decided without live testimony. Unless the Court orders otherwise, a hearing on a motion, including an emergency motion, will not involve live testimony. A party who desires to present live testimony must file a motion for permission to present that testimony. In the absence of exigent circumstances, the motion must be filed promptly after receiving notice of the hearing and may not exceed 500 words. After the motion is filed, the Court will either ~~(a)~~(i) issue an order that requests a response, ~~(b)~~(ii) deny the motion, or ~~(c)~~(iii) issue an order with further instructions. The opposing party is not required to file a response unless ordered by the Court. If the Court elects to conduct a telephone conference on the motion, then the Court may decide the motion during the conference.

7.13. Emergency motions prior to designation.

(a) **Actions in which a Notice of Designation was filed when the action was initiated.** If a party seeks to have an emergency motion heard in the Court, the party should contact the Chief Justice of the Supreme Court of North Carolina promptly after filing the Notice of Designation and request expedited designation of the case as a mandatory complex business case. The party should also promptly contact the Court's Trial Court Coordinator and advise that the party seeks to have an emergency motion heard in the Court.

(b) **Actions subsequently designated as mandatory complex business cases.** If a party has filed an emergency motion in an action before a Notice of Designation has been filed, and the action is later designated as a mandatory complex business case or assigned to a Business Court judge under Rule 2.1

of the General Rules of Practice, then the emergency motion will be heard by the Business Court judge to whom the action has been assigned as provided by ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-~~45~~.4(e). If, however, the emergency motion is heard by a non-Business Court judge prior to designation or assignment, then, barring exceptional circumstances, the Business Court judge will defer to the judge who heard the motion.

(c) **Briefing.** When a party moves for emergency relief under ~~Rule~~BCR 7.13(a) or (b), the Court will, if practicable, establish a briefing schedule for the motion. A party that moves for emergency relief under ~~Rule~~BCR 7.13(a) must file a supporting brief that complies with ~~the Rules~~these rules. The Court's briefing schedule for a ~~Rule~~BCR 7.13(a) motion will establish deadlines for a response and, in the Court's discretion, a reply.

Unless the Court orders otherwise, the length restrictions in ~~Rule~~BCR 7.8 apply to all briefs filed under this rule.

7.14. Amicus briefs.

(a) **When permitted.** An amicus curiae may file a brief only with leave of the Court.

(b) **Motion for leave.** A motion for leave to file an amicus brief must state the nature of the movant's interest, the issues that the amicus brief would address, the movant's position on those issues, and the reasons that an amicus brief would aid the Court. The motion must also attach the proposed amicus brief. The Court will generally rule on the motion without a response or argument.

(c) **Deadline for filing.** A motion for leave to file an amicus brief must be filed no later than the deadline for the brief of the party supported.

(d) **Method of filing**. The motion and proposed amicus brief must be filed consistent with BCR 3.

(e) **Contents, length, and form.** An amicus brief may not exceed 3,750 words and must comply with all other aspects of BCR 7.8. The brief must also state whether (i) a party's counsel authored the brief, (ii) a party or party's counsel paid for the preparation of the brief,

and (iii) anyone other than the amicus curiae paid for the brief and, if so, their identities.

(f) **Response.** A party must obtain leave to file a separate response to an amicus brief. If the Court provides leave, the response must be limited to points and authorities presented in the amicus brief. The response may not exceed 3,750 words. An amicus curiae may not file a reply brief.

(g) **Oral argument.** An amicus curiae may not participate in oral argument without leave of the Court.

* * *

Rule 8. Presentation Technology

8.1. Electronic presentations favored. The Court encourages electronic presentations, but only if the presentation meaningfully aids the Court's understanding of key issues. Counsel should limit the use of paper handouts at ~~Court~~court proceedings. Any paper handout that a party provides to the Court must also be provided to all parties, the court reporter, and the law clerk.

8.2. Courtroom technology. Parties may bring their own electronic technology, including hardware, for presentation to the Court or may use the systems available in each Business Court courtroom. Parties are responsible for consulting in advance with courthouse personnel about security, power, and other logistics associated with the use of any external hardware. Counsel who plan to use the available courtroom technology must be familiar with that technology and must follow any rules established by the Court associated with that technology's use.

* * *

Rule 9. Case Management

9.1. Case Management Meeting.

(a) **General principles.** The case-management process described in this rule should be applied in a flexible, case-specific fashion. ~~The Rules~~These rules have been designed to encourage parties to identify and to implement the case-management techniques—including novel and creative ideas—that are most likely to support the efficient resolution of the case.

(b) **Timing.** No later than sixty days after the designation of an action as a mandatory complex business case or assignment to a Business Court judge pursuant to Rule 2.1 of the General Rules of Practice, counsel must participate in a Case Management Meeting. The filing of an opposition to a Notice of Designation does not, absent a ~~Court~~court order, stay or alter this rule's requirements. Counsel for the first named plaintiff is responsible for contacting other counsel and scheduling the meeting.

A party may, by motion, request that the Court alter the process or schedule for the Case Management Meeting and Case Management Report. The motion must be supported by good cause, be filed as promptly as possible, and identify the reasons for the requested change. Any opposition to a motion filed under this rule must be filed within five days of service of the motion. The Court may schedule a status conference in advance of the Case Management Meeting if circumstances warrant.

(c) **Topics.** Unless the Court orders otherwise, the Case Management Meeting must cover at least the following subjects:

(1) any initial motions that any party might file and whether certain issues might be presented to the Court for early resolution;

(2) the discovery topics described in ~~Rule~~BCR 10.3 through 10.8;

(3) a proposed deadline for amending pleadings and/or adding parties;

(4) a proposed deadline for filing dispositive motions;

(5) a proposed trial date;

(6) whether a protective order is needed;

(7) whether any law other than North Carolina law might govern aspects of the case~~,~~ and, if so, what law and which aspects of the case;

(8) the parties' views on the timing of mediation, including any plans for early mediation, a mediation deadline, and any agreed-upon mediator(s);

(9) whether periodic Case Management Conferences with the Court would be beneficial and, if so, the proposed frequency of those conferences;

(10) whether the Case Management Conference should be transcribed;

(11) whether any matter(s) might be appropriate for a referee; and

(12) whether client attendance at the Case Management Conference would be beneficial.

Ultimately, the parties should discuss any matter that is significant to case management. The parties should review the template Case Management Report in Appendix 2 to ~~the Rules~~these rules for further guidance about the Case Management Meeting. The template does not limit further topics that might be considered as appropriate to achieve an efficient and orderly disposition in light of the particular circumstances of an individual case.

(d) **Discovery management.** ~~The Rules~~These rules envision a full discussion at the Case Management Meeting of the discovery issues described in ~~Rule~~BCR 10.3 through 10.8. If, because of the circumstances of the case, the parties need additional time after the Case Management Meeting to complete their discussion of discovery, then the parties should arrange to have a second meeting on any discovery issues that remain to be discussed. The second meeting should be held as soon as is practicable, but in no event later than thirty days after the Case Management Meeting.

9.2. Case Management Report. The parties must jointly file a Case Management Report no later than the fifteenth day after the Case Management Meeting begins. The template Case Management Report in Appendix 2 to ~~the Rules~~these rules provides guidance for how to structure the report. Counsel for the first named plaintiff is responsible for circulating an initial draft of the report, for incorporating into the report the views of all other counsel, and for finalizing and filing the report. The report should state whether the parties have completed their discussion of the discovery topics described in ~~Rule~~BCR 10.3 through 10.8 and, if they have not, the issues that remain to be discussed and the likely date on which a second discovery meeting will occur. If the parties participate in a second discovery meeting, then the parties must file a supplement to the Case Management Report within ten days of the second discovery meeting.

A party that is not served with process until after the Case Management Meeting may file a supplement to the Case Management

Report if the Court has not already issued a Case Management Order. A supplement must be filed within ten days of when a party makes its first appearance in the case.

9.3. Case Management Conference. The Court retains discretion about when and whether to convene a Case Management Conference and whether more than one conference is needed. The Court may require representatives of each party, in addition to counsel, to attend any Case Management Conference. The Court will issue a notice of the conference in accordance with ~~Rule~~BCR 6.1. The notice will indicate whether a representative of each party will be required to attend. The Court will conduct the conference in accordance with ~~Rule~~BCR 6.2.

Unless it orders otherwise, the Court will not hear substantive motions at a Case Management Conference. The conference will not be transcribed unless a party arranges for a reporter to transcribe the proceedings or unless the Court orders otherwise.

9.4. Case Management Order. The Court will issue a Case Management Order. The order will address the issues developed in the Case Management Report and/or Case Management Conference, as well as any other issues that the Court deems appropriate. Any party may move to modify the terms of the Case Management Order on a showing of good cause, but may do so only after consultation with all other parties.

* * *

Rule 10. Discovery

10.1. General principles. The parties should cooperate to ensure that discovery is conducted efficiently. Courtesy and cooperation among counsel advances, rather than hinders, zealous representation.

10.2. Document preservation. As soon as practicable, but no later than seven days before the Case Management Meeting described in ~~Rule~~BCR 9.1, counsel must discuss with their clients:

(a) which custodians might have discoverable electronically stored information (ESI);

(b) the sources and location of potentially discoverable ESI;

(c) the duty to preserve potentially discoverable materials; and

(d) the logistics, burden, and expense of preserving and collecting those materials.

These requirements do not supplant any substantive preservation obligations that might be established by other sources of law.

10.3. Discovery management. Counsel are required, if possible, to fully discuss discovery management at the Case Management Meeting. As stated in ~~Rule~~BCR 9.1~~(c)~~(d), the parties may conduct a second meeting, no later than thirty days after the Case Management Meeting, to complete their discussion of discovery management. The topics to be discussed include those found in ~~Rule~~BCR 10.3 through 10.8.

Overall, ~~Rule~~BCR 10.3 through 10.8 are designed for the parties to set expectations, with reasonable specificity, about what information each party seeks and about how that information will be retrieved and produced. The parties should discuss at least the following topics:

(a) **Proportionality.** Counsel should discuss the scope of discovery, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the burden and expense of the expected discovery compared with its likely benefit, the importance of the issues at stake in the litigation, and the importance of the discovery for the adjudication of the merits of the case.

(b) **Phased discovery.** Counsel should consider whether phased discovery is appropriate and, if so, discuss proposals for specific phases.

(c) **ESI.** Counsel should prepare an ESI protocol—an agreement between the parties for the identification, preservation, collection, and production of ESI. The ESI protocol will vary on a case by case basis, but the discussion about ESI should include at least the following subjects:

(1) the specific sources, location, and estimated volume of ESI;

(2) whether ESI should be searched on a custodian by custodian basis and, if so, ~~(a)~~(i) the identity and number of the custodians whose ESI will be searched, and ~~(b)~~(ii) search parameters;

(3) a method for designating documents as confidential;

(4) plans and schedules for any rolling production;

(5) deduplication of data;

(6) whether any device(s) need to be forensically examined and, if so, a protocol for the examination(s);

(7) the production format of documents;

(8) the fields of metadata to be produced; and

(9) how data produced will be transmitted to other parties (e.g., in read-only media; segregated by source; encrypted or password protected).

Counsel should jointly prepare a written discovery protocol promptly after they complete their discovery-management discussions. The discovery protocol should not be filed with the Court unless otherwise ordered.

10.4. Presumptive limits.

(a) **Discovery period.** ~~The Rules~~These rules do not discourage the parties from beginning discovery before entry of the Case Management Order, but the presumptive discovery period, including both fact and expert discovery, is seven months from the date of the Case Management Order. That period may be lengthened or shortened in consideration of the claims and defenses of any particular case, but any significantly longer discovery period will require good cause.

Each party is responsible for ensuring that it can complete discovery within the time period in the Case Management Order. In particular, interrogatories, requests for production, and requests for admission should be served early enough that answers and responses will be due before the discovery deadline ends.

Absent extraordinary cause, a motion that seeks to extend the discovery period or to take discovery beyond the limits in the Case Management Order must be made before the discovery deadline. The motion must explain the good cause that justifies the relief sought. The motion must also demonstrate that the parties have pursued discovery diligently.

(b) **Written discovery.** Unless otherwise permitted by the Court, a party may serve no more than twenty-five interrogatories on each party. Each subpart of an interrogatory counts as a separate interrogatory

for purposes of this limit. The same limit applies to requests for admission.

(c) **Depositions.** A party may take no more than twelve fact depositions in the absence of an order by the Court. For purposes of counting depositions taken by any party, for depositions conducted pursuant to Rule 30(b)(6) of the Rules of Civil Procedure, each period of seven hours of testimony will count as a single deposition, regardless of the number of designees presented during that seven-hour period.

(d) **Agreement, reduction, and modification of limits.** The Court encourages the parties to agree, where appropriate, on reductions to the presumptive limits stated above. The presumptive limits will be increased only upon a showing of good cause.

If the parties agree to conduct discovery after the discovery deadline, but the parties do not seek an order that allows the discovery, then the Court will not entertain a motion to compel or a motion for sanctions in connection with that discovery.

10.5. Privilege logs.

(a) **Purpose.** This rule supplements Rule 26(b)(5) of the Rules of Civil Procedure.

(b) **Form.** Parties are encouraged to agree on the form of privilege logs and on the date on which privilege logs will be served. The parties should select a format that limits unnecessary expense and burden of producing a privilege log. Each privilege log should be organized in a manner that facilitates a discussion among counsel on whether documents contain privileged or work-product material. The parties should discuss specifically ~~(1)~~(i) whether particular categories of documents—such as any attorney-client privileged communications or attorney work-product material generated after the action began, or communications on a certain subject—should be omitted from privilege logs~~;~~, and ~~(2)~~(ii) whether entries in the privilege log should be arranged by topic or category.

10.6. Agreements to prevent privilege and work-product waiver. The Court encourages the parties to agree to an order that provides for the non-waiver of the attorney-client privilege or work-product

protection in the event that privileged or work-product material is inadvertently produced.

10.7. Depositions.

(a) **Time limits.** Unless the parties agree otherwise, a deposition is limited to seven hours of on-the-record time. The Court may extend any seven-hour period for good cause.

(b) **Conduct.**

(1) Counsel should cooperate to schedule depositions.

(2) Counsel must not direct a witness to refrain from answering a question unless one or more of the following three situations applies: (i) counsel objects to the question on the ground that the answer is protected by a privilege or another discovery immunity, (ii) counsel proceeds immediately to seek relief under Rules 26(c) or 37(d) of the Rules of Civil Procedure, or (iii) counsel objects to a question that seeks information in contravention of a ~~Court-ordered~~court-ordered limitation on discovery.

(3) Objections should be succinct and state only the basis for the objection. The Court does not tolerate speaking objections.

(4) Counsel and any witness may not engage in private, off the record conferences while a question is pending, except to decide whether to assert a privilege, discovery immunity, or ~~Court-ordered~~court-ordered limitation on discovery.

(5) The Court may impose an appropriate sanction, including the reasonable ~~attorney~~attorney's fees incurred by any party, based on conduct that impedes, delays, or frustrates the fair examination of a deponent.

(c) **Exhibits.**

(1) A copy of any document shown to a deponent must be provided to counsel for each party either before the deposition starts or at the same time that the document is given to the deponent.

(2) Deposition exhibits should be numbered consecutively throughout discovery without restarting

numbers by the deposition being taken or by the party that introduces the exhibit. When there is the potential for simultaneous depositions, the parties should allocate a range of potential exhibit numbers among the parties. To the extent practical, once assigned an exhibit number, a document utilized during a deposition should retain that deposition exhibit number in all subsequent discovery.

(d) **Depositions under Rule 30(b)(6) ~~depositions~~ of the Rules of Civil Procedure.**

~~(1) This rule is designed to encourage parties to resolve disputes about the scope of Rule 30(b)(6) depositions.~~

~~(2)~~(1) After a party serves a deposition notice under Rule 30(b)(6) ~~deposition notice~~ of the Rules of Civil Procedure, the organization to which the notice is issued should present any objections to the noticing party within a reasonable time of service and sufficiently in advance of the deposition.

~~(3)~~(2) Counsel for the noticing party and for the organization to which the notice was issued must then meet and confer in good faith to resolve any disputes over the topics for the deposition.

~~(4)~~(3) If the parties cannot agree, then the dispute will be resolved under the procedures described in ~~Rule~~BCR 10.9.

~~(5)~~(4) The parties should also discuss and attempt to agree on whether a deponent under Rule 30(b)(6) ~~deponent~~ of the Rules of Civil Procedure may be asked questions about the deponent's personal knowledge. Absent an agreement to the contrary, any deposition of a designee under Rule 30(b)(6) ~~designee~~ of the Rules of Civil Procedure in his or her individual capacity should be taken separately from the deposition under Rule 30(b)(6) ~~deposition~~ of the Rules of Civil Procedure.

~~(6)~~(5) See ~~Rule~~BCR 10.4(c) for the manner of counting depositions taken under Rule 30(b)(6) of the Rules of Civil Procedure.

10.8. Expert discovery.

(a) **Procedures.** The parties must attempt to agree on procedures that will govern expert discovery including any limits on the number of experts and/or the number of expert depositions. In the absence of agreement, the Case Management Report should list the parties' respective positions on expert discovery. The parties may elect to exchange disclosures only, or they may elect to exchange reports in addition to or instead of disclosures. The procedures may include, but are not limited to, the following:

(1) **Expert reports.** If the parties elect to exchange expert reports as allowed by Rule 26(b)(4) of the Rules of Civil Procedure, then the parties are encouraged to agree that the name of each expert, the subject matter on which the expert is expected to testify, and the expert's qualifications be exchanged thirty days prior to service of the report.

(2) **Timing and manner of disclosure.** If the parties elect not to exchange expert reports, then they are still encouraged to agree on a schedule for exchange of expert information in the form of expert disclosures. In the absence of an agreement, the Court will establish a sequence in the Case Management Order.

(3) **Facts and data considered by the witness.** The parties should attempt to agree on whether and when they will provide copies of previously unproduced materials that an expert witness considers in forming his or her opinion.

(b) **Expert depositions.** Unless the parties agree otherwise, each expert witness may be deposed by a party adverse to the party designating the expert. The expert witness is only subject to a single deposition at which all adverse parties may appear.

10.9. Discovery motions.

(a) **Application.** This rule applies to motions under Rules 26 through 37 and Rule 45 of the Rules of Civil Procedure. References to "party" or "parties" in this rule include non-parties subject to subpoena under Rule 45 of the Rules of Civil Procedure.

(b) **Pre-filing requirements.**

(1) ~~**Telephonic consultation with presiding Business Court judge**~~**Summary of dispute.** Before ~~a party files~~filing a motion related to discovery, a party must engage in a thorough, good-faith attempt to resolve or narrow the dispute. If the dispute remains unresolved, then the party ~~must initiate a telephone conference among counsel and the presiding Business Court judge about the dispute. To initiate this conference, a party~~seeking relief must e-mail a summary of the dispute to the judicial assistant and law clerk for the presiding Business Court judge and to opposing counsel. The summary may not exceed ~~seven hundred~~700 words; the certificate described in ~~Rule~~BCR 10.9(b)(2) does not count against this limit. Any other party may submit a response to the summary; the response may not exceed ~~seven hundred~~700 words (excluding the response to the certificate) and must be e mailed to the judicial assistant and law clerk for the presiding Business Court judge and to opposing counsel within seven calendar days of when the initial summary was e-mailed. Word limits are to be calculated in accordance with ~~Rule~~BCR 7.8. No replies are allowed.

~~After the summary and any response(s) are submitted, the Court will either schedule a telephone conference with counsel to discuss the dispute, order the parties to file a motion and brief regarding the dispute or provide additional materials, or issue an order with further instructions. If the Court elects to conduct a telephone conference, then the Court may decide the parties' dispute during the conference.~~

(2) **Certification of good-faith effort to resolve the dispute.** ~~When a party requests a telephonic conference~~A dispute summary under ~~Rule~~BCR 10.9(b)(1)~~, the party must also submit to the Court~~must include a certification that, after personal consultation and diligent attempts to resolve differences, the parties could not resolve the dispute. The certificate must state the date(s) of the conference, which attorneys participated,

and the specific results achieved. The certificate ~~should~~must say, if applicable, whether the parties discussed cost-shifting, proportionality, or alternative discovery methods that might resolve the dispute. This certificate may not exceed ~~three hundred~~300 words ~~and should state facts without argument~~. The response by any other party under BCR 10.9(b)(1) may include a response, not to exceed 200 words, to the substance of the certificate.

(3) **Telephone conference among counsel and the presiding Business Court judge.** After the summary, certificate, and any response(s) are submitted, the Court may schedule a telephone conference with counsel to discuss the dispute, order the parties to file a motion and brief regarding the dispute or provide additional materials, or issue an order that decides the issues raised or that provides the parties with further instructions. If the Court elects to conduct a telephone conference, the Court may decide the parties' dispute during the conference.

(c) **Briefs on discovery motions.** If, after the Court conducts a ~~telephonic~~telephone conference ~~described in section (b)(1)~~under BCR 10.9(b)(3), the parties still cannot resolve their dispute or if the Court declines to rule on the dispute, then a party may file a discovery motion. The requirements of ~~Rule~~BCR 7 apply to any such motion, except that: ~~(1)~~(i) the Court may modify the briefing schedule and limits on briefs in its instructions after the ~~Rule~~BCR 10.9(b)~~(1)~~(3) ~~consultation~~ conference~~;~~, ~~(2)~~(ii) ~~unless the Court orders otherwise,~~ the supporting brief and any responsive brief may each not exceed 3,750 words unless the Court orders otherwise~~;~~, and ~~(3)~~(iii) reply briefs will only be permitted if the Court requests on its own initiative or grants a moving party leave to file a reply upon a showing of good cause.

(d) **Cost-shifting requests.** If a party contends that cost shifting is warranted as to any discovery sought, then the party's brief should address estimated costs of responding to the requests and the proportionality of the discovery sought. Counsel's estimate must have

a reasoned factual basis, and the Court may require that any such basis be demonstrated by affidavit.

(e) **Depositions.** This rule does not preclude parties from seeking an immediate ~~telephone~~ ruling by telephone from the Court on any dispute that arises during a deposition that justifies such a conference with the Court.

* * *

Rule 11. Mediation

11.1. Mandatory mediation. All mandatory complex business cases and cases assigned to a Business Court judge pursuant to Rule 2.1 of the General Rules of Practice are subject to the Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions. Although ~~the~~ these statewide mediation rules require participation in a mediation utilizing a certified mediator unless the Court orders otherwise on a showing of good cause, the parties may engage in multiple mediated settlement conferences before the same or different mediators.

11.2. Selection and appointment of mediator. The parties should attempt to ~~reach agreement on a mediator~~select a mediator by agreement. The Case Management Report should contain either the parties' agreement or, in the absence of an agreement, each party's nominee of a certified mediator for ~~Court~~ appointment by the Court. If all parties cannot agree on a mediator, then the Court will appoint a mediator from the list of certified mediators maintained by the North Carolina Dispute Resolution Commission.

11.3. Report of mediator. Within ten days of the conclusion of the mediation, the mediator must mail or e-mail a copy of his or her report to the Court, in addition to filing the report with the Clerk of Superior Court in the county of venue.

11.4. Notification of settlement. The parties are encouraged to keep the Court apprised of the status of settlement negotiations and should notify the Court promptly when the parties have reached a settlement.

* * *

Rule 12. Pretrial and Trial

12.1. Case-specific pretrial and trial management. The Court may modify the deadlines and requirements in this rule as the circumstances of each case dictate.

12.2. Trial date. The Court will establish a trial date for every case. The Court may establish that date in the Case Management Order or otherwise. The Court ordinarily will not set a trial to begin fewer than sixty days after the Court issues a ruling on any post-discovery dispositive motions.

Trial dates should be considered peremptory settings. Any party who foresees a potential conflict with a trial date should advise the Court no later than fourteen days after being notified of the trial date. In addition, after the Court sets a trial date, counsel of record should avoid setting any other matter for trial that would conflict with the trial date. Absent extraordinary and unanticipated events, the Court will not consider any continuance because of conflicts of which it was not advised in conformity with this rule.

12.3. Pretrial process. The following chart sets forth standard pretrial activity with presumptive deadlines. ~~As stated in Rule 12.1, the Court may modify any or all of these deadlines and requirements as the circumstances in a case dictate:~~

45 days before pretrial hearing	Trial exhibits (or a list of exhibits identified by ~~bates~~Bates number if the exhibits were exchanged in discovery) and witness lists served on opposing parties
30 days before pretrial hearing	Deposition designations served on opposing parties
21 days before pretrial hearing	Pretrial attorney conference Deposition counter-designations and objections to deposition designations served on opposing parties Supplemental trial exhibit and witness lists served on opposing parties
17 days before pretrial hearing	Objections to trial exhibits served on opposing parties
14 days before pretrial hearing	Motions in limine and briefs in support, if any, filed and served Proposed pretrial order filed and served

7 days before pretrial hearing	Responses to motions in limine filed and served
No later than 14 days before trial	Pretrial hearing
7 days before trial	Trial brief, if any, filed and served Proposed jury instructions filed and served Proposed findings of fact and conclusions of law, if necessary, filed and served Submit joint statement of any stipulated facts

12.4. Pretrial attorney conference. Counsel are responsible for conducting a pretrial conference. At the conference, the parties should discuss the items listed in the Court's form pretrial order. Lead trial counsel (and local counsel, if different) for each party must participate in the conference. The conference may be an in-person conference or conducted through remote means.

12.5. Proposed pretrial order. Counsel are responsible for preparing a proposed pretrial order. Appendix 5 to ~~the Rules~~these rules contains a ~~template proposed pretrial order~~Proposed Pretrial Order template. The parties are encouraged to use the form order to prepare their own order but may also deviate from the form order as the nature of the case dictates. The proposed order should generally include the following items:

(a) stipulations about the Court's jurisdiction over the parties and the designation and proper joinder of parties;

(b) a list of trial exhibits (other than exhibits that might be used for rebuttal or impeachment) and any objections to those exhibits;

(c) the timing and manner of the exchange of demonstrative exhibits or any proposed exhibits not produced in discovery including whether demonstrative exhibits will be used in opening statements;

(d) a list of trial witnesses, including witnesses whose testimony will be presented by deposition;

(e) a list of outstanding motions and motions that might be filed before or during trial;

(f) a list of issues to be tried, noting (if needed) which issues will be decided by the jury and which will be decided by the Court;

(g) the technology that the parties intend to use, including whether that technology will be provided by the Court or by the parties;

(h) whether the parties desire to use real-time court reporting and, if so, how the parties will apportion the costs of that reporting;

(i) any case-specific issues or accommodations needed for trial, such as use of interpreters, use of jury questionnaires, or measures to be employed to protect information that might merit protection under Rule 26(c)(vii) of the Rules of Civil Procedure;

(j) a statement that all witnesses are available and the case is trial ready;

(k) an estimate of the trial's length; and

(l) a certification that the parties meaningfully discussed the possibility and potential terms of settlement at the pretrial attorney conference.

12.6. Deposition designations. If a party desires to present deposition testimony at trial, then the party must designate that testimony by page and line number of the deposition transcript. A party served with deposition designations may serve objections and counter-designations; the objecting party must identify a basis for each objection.

All designations, counter-designations, and objections should be exhibits to the proposed pretrial order. In addition, the party that designates deposition testimony to which another party objects must provide the presiding judge with a chart in Microsoft Word format that lists ~~(a)~~(i) the testimony offered to which another party objects, ~~(b)~~(ii) the objecting party, ~~(c)~~(iii) the basis for the objection, and ~~(d)~~(iv) a blank line on which the presiding judge can write his or her ruling.

12.7. Pretrial hearing. The Court will conduct a pretrial hearing no later than fourteen days before trial. Lead counsel (and local counsel, if different) for each party must attend the hearing in person. The Court may order a party with final settlement authority to attend the pretrial hearing, but no party will be required to attend unless ordered by the Court. The pretrial hearing may include any matter that the Court deems relevant to the trial's administration, including but not limited to:

(a) a discussion of the items in the proposed pretrial order;

(b) argument and ruling on any pending motions and objections, including objections to exhibits and deposition designations included in the proposed pretrial order;

(c) the resolution of any disagreement about the issues to be tried;

(d) unique jury issues, such as preliminary substantive jury instructions, juror questionnaires, or jury sequestration;

(e) the use of technology;

(f) the need for measures to protect information under Rule 26(c)(vii) of the Rules of Civil Procedure; and

(g) whether any further consideration of settlement is appropriate.

12.8. Final pretrial order. The Court will enter a final pretrial order.

12.9. Motions in limine. ~~Briefs~~Unless the Court orders otherwise, briefs regarding motions in limine are not required if the grounds for the motion are evidenced by the motion itself. Opening and response briefs may not exceed 3,750 words. Reply briefs will only be permitted in exceptional circumstances with the Court's permission or at the request of the Court. The Court may elect to withhold its ruling on a motion in limine until trial, and any ruling the Court may elect to make on a motion in limine prior to trial is subject to modification during the course of the trial.

12.10. Jury instructions.

(a) **Timing.** When filing proposed jury instructions, a party must also e-mail a copy of the proposed jury instructions in Microsoft Word format to the judicial assistant for the presiding Business Court judge.

(b) **Issues.** In addition to the form as provided below, the jury instructions must state the proposed issues to be submitted to the jury.

(c) **Form.**

(1) Every instruction should cite to relevant authority, including but not limited to the North Carolina Pattern Jury Instructions.

(2) Each party should file two different copies of its proposed instructions: one copy with the citations to authority, and one copy without those citations.

(3) Proposed instructions should contain an index that lists the instruction number and title for each proposed instruction.

(4) Each proposed instruction should be on its own separate page, should be printed at the top of the page, and should receive its own number. The proposed instructions should be consecutively numbered.

(5) If the parties propose a pattern jury instruction without modification to that instruction, then the parties may simply refer to the instruction number. If the parties propose a pattern instruction with any modification, then the parties should clearly identify that modification.

(d) **Preliminary instructions.** The parties may further propose that the Court provide the jury preliminary instructions prior to the presentation of the evidence. In that event, the parties must provide the proposed form of any such preliminary instructions and the parties' proposal as to the time at which such preliminary instructions will be presented.

12.11. Proposed findings of fact and conclusions of law. The Court may require each party in a non-jury matter to file proposed findings of fact and conclusions of law.

12.12. Trial briefs. Unless ordered by the Court, a party may, but is not required to, submit a trial brief. A trial brief may address contested issues of law and anticipated evidentiary issues (other than those raised in a motion in limine). The trial brief need not contain a complete recitation of the facts of the case. A party may not file a brief in response to another party's trial brief unless the Court requests a response. Unless otherwise ordered by the Court, a trial brief is not subject to the word limits for briefs under ~~Rule~~BCR 7.

12.13. Stipulated facts. If the parties intend to file a joint statement of any stipulated facts other than any stipulated facts listed in the proposed pretrial order, then the parties must file the statement before the trial begins. The statement should also explain when and how the parties propose that the stipulations be presented to the jury.

If the parties cannot agree on when and how the stipulated facts should be presented to the jury, then the Court will decide this issue before jury selection.

* * *

Rule 13. Review of Administrative Actions

13.1. ~~Generally~~General principles. This rule applies to the Court's review of a final agency decision, including cases brought under ~~N.C. Gen. Stat.~~N.C.G.S. § 105-241.16 (i.e., "administrative appeals"). This rule does not apply to civil actions brought pursuant to ~~N.C. Gen. Stat.~~N.C.G.S. § 105-241.17.

13.2. Case management. Unless the Court orders otherwise, ~~Rule~~BCR 9 and 11 do not apply to administrative appeals.

13.3. Record in administrative appeals. Within fifteen days of the date of the letter from the Office of Administrative Hearings submitting the official record in an administrative appeal to the Wake County Clerk of Superior Court, the parties must meet and confer regarding any further actions that may be required to prepare the appropriate record for use in the Business Court proceeding.

~~Within twenty days of the parties' conference discussed in the prior sentence, the parties must either (a) file a stipulation that they agree to the contents of the record or (b) jointly submit a final record that, as appropriate, modifies the record submitted by the Office of Administrative Hearings.~~Within twenty days of that conference, the parties must file with the Court a final administrative record. This filing must include a statement that clarifies whether the final record consists of (i) the official record that the Office of Administrative Hearings submitted to the Wake County Clerk of Court, or (ii) a modified version of the record to which the parties have agreed.

If the parties cannot agree on a final record, then the parties must ~~notify the Court of the disagreement and seek the Court's assistance in resolving the disagreement~~utilize the procedures described in BCR 10.9(b) to raise their disagreement with the Court.

13.4. Briefs. The petitioner in an administrative appeal must file its brief no later than thirty days after the date that the parties file a stipulation that they are in agreement as to the contents of the record or the date the final record is submitted to the Court under ~~Rule~~BCR 13.3. The respondent may file its brief no later than thirty days after service of the petitioner's brief. The petitioner may file a reply brief no later than ten days after service of the respondent's brief. All briefs must comply with the formatting and length requirements of ~~Rule~~BCR 7.

13.5. Hearings. The Court, in its discretion, may conduct a hearing on an administrative appeal after briefing is completed.

* * *

Rule 14. Appeals

14.1. How an appeal is taken. An appeal from an order or judgment of the Court is taken by filing a written notice of appeal with the Clerk of Superior Court in the county of venue. The notice of appeal must be filed within the time, in the manner, and with the effect provided by the controlling statutes and the North Carolina Rules of Appellate Procedure. The parties should promptly file a copy of the notice of appeal with the Court.

14.2. Orders and opinions issued by the Appellate Division. If an appellate court issues an order or opinion in a case that is simultaneously proceeding (in whole or in part) in the Court, then the parties are encouraged to submit a copy of the order or opinion to the Court by e-mailing it to the law clerk for the presiding Business Court judge.

The parties are also encouraged to notify the law clerk for the presiding Business Court judge if the appellate process for an action has reached its conclusion. This notification allows the Court to close cases that are no longer being litigated.

14.3. Procedures on remand. If an appellate court orders that a case on appeal be remanded to the Court for further proceedings, then—unless the Court instructs otherwise—the parties must confer within fifteen days of the issuance of the mandate pursuant to ~~Appellate~~ Rule 32 of the North Carolina Rules of Appellate Procedure about the case-management issues that apply to the proceedings upon remand. The parties must submit a report to the Court within ten days of the meeting that proposes a case-management structure for the proceedings.

* * *

Rule 15. Receivers

15.1. Applicability.

(a) This rule governs practice and procedure in receivership matters before the Court.

(b) The term "receivership estate," as used in this rule, refers to the entity, person, or property subject to the receivership.

15.2. Selection of receiver. On motion or on its own initiative, and for good cause shown, the Court may appoint a receiver as provided by law.

(a) **Qualifications.** A receiver must have sufficient competence, ~~qualifications,~~ impartiality, and experience to administer the receivership estate and otherwise perform the duties of the receiver.

(b) **Motion to appoint receiver.** When a party moves the Court to appoint a receiver, the party should propose candidates to serve as receiver. The motion should explain each candidate's qualifications. The motion should also disclose how the receiver will be paid, including the proposed funding source. A proposed order describing the ~~proposed~~ receiver's duties, powers, compensation, and any other issues relevant to the ~~proposed~~ receivership must be filed with the motion to appoint a receiver. Non-movants may respond to the motion within twenty days of service of the motion. The Court may appoint one of the proposed receivers or, in its discretion, a different receiver. The Court may also propose or require a different fee arrangement for the receiver.

(c) **Ex parte appointment of receiver.** The Court will not appoint a receiver on an ex parte basis unless the moving party shows that a receiver is needed to avoid irreparable harm. A receiver appointed on an ex parte basis will be a temporary receiver pending further order of the Court.

(d) **Sua sponte appointment of receiver.** If the Court appoints a receiver on its own initiative, then any party may file an objection to the selected receiver and propose an alternative receiver within ten days of entry of the order appointing the receiver. The objection should contain the information listed in ~~Rule~~BCR 15.2(b) about the alternative proposed receiver.

(e) **Duties, powers, compensation, and other issues.** When appointing a receiver, the Court will enter an order that outlines the receiver's duties, powers, compensation, and any other issues relevant to the proposed receivership. Appendix ~~2~~3 to ~~the Rules~~these rules contains a non-exclusive list of provisions that might be appropriate for a receivership order.

15.3. Removal. The Court may remove any receiver for good cause shown.

* * *

Rule 16. Referees

16.1. Appointment and removal. At the Case Management Meeting, the parties must discuss the potential benefit of a referee and summarize their views in the Case Management Report. In addition to that discussion and report, any party may file a motion for the appointment of a referee pursuant to ~~the Rules~~these rules and to Rule 53 of the Rules of Civil Procedure. The motion should comply with Rule 53 of the Rules of Civil Procedure and also contain the following:

(a) the proposed scope of the referee's authority and tasks;

(b) the grounds for reference under Rule 53(a) of the Rules of Civil Procedure, including, if any party has not joined in or consented to the motion, a statement of the circumstances that warrant compulsory reference pursuant to Rule 53(a)(2) of the Rules of Civil Procedure;

(c) the names and qualifications of any candidates that the Court should consider as a referee, as well as a statement as to whether the parties consent to each candidate;

(d) the referee's proposed compensation and the source of the compensation;

(e) any requests for special powers to be provided under Rule 53(e) of the Rules of Civil Procedure; and

(f) if any party has not joined in or consented to the motion, then a certification that counsel for the moving party has consulted with counsel for all non-moving parties and a statement of the position of any non-moving parties.

The Court may appoint a referee on its own motion as provided in Rule 53(a)(2) of the Rules of Civil Procedure. In appropriate cases when reference is not compulsory, the Court may recommend to the parties the use of a referee if the referee would aid judicial economy.

16.2. Discovery referees. Counsel are encouraged to give special consideration to the appointment of discovery referees, particularly

in cases expected to involve large amounts of ~~electronically stored information~~ESI or when there may be differing views regarding the use of keyword searches, utilization of predictive coding, or the shifting or sharing of costs associated with large-scale or costly discovery. The parties are encouraged to be creative and flexible in utilizing discovery referees to avoid unnecessary cost and motion practice before the Court.

16.3. Scope of referee's duties. When appointing a referee, the Court will enter an order that outlines the referee's duties, powers, compensation, and any other issues relevant to the proposed work of the referee. Appendix ~~3~~4 to ~~the Rules~~these rules contains a non-exclusive list of terms that might be appropriate for an order that appoints a referee.

16.4. Agreement to submit to referee's final decision. When a referee issues a final report, the parties may agree to forgo judicial review of that report. This type of agreement must be embodied in a stipulation filed with the Court that ~~(1)~~(i) specifies the case, proceeding, claim, or issue to be submitted to the referee for final decision; ~~(2)~~(ii) states that the parties to the stipulation waive the right to seek further judicial review of the referee's decision; and ~~(3)~~(iii) recites that each party has consulted with counsel and agreed to the submission of the case, proceeding, claim, or issue to the referee for a final decision that will not be reviewable. For the stipulation to take effect, the Court must approve the stipulation.

* * *

Appendix 1. Notice of Designation Template

STATE OF NORTH CAROLINA COUNTY OF _____ JOHN DOE, Plaintiff, v. ABC CORPORATION, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CIVIL ACTION NO.: **~~APPENDIX 1:~~** **NOTICE OF DESIGNATION ~~TEMPLATE~~**

Pursuant to ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-45.4, [INSERT PARTY] seeks to designate the above-captioned action as a mandatory complex business case. In good faith and based on information reasonably available, [INSERT PARTY], through counsel, hereby certifies that this action meets the criteria for:

_____ Designation as a mandatory complex business case pursuant to ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-45.4(a), in that it involves a material issue related to:

_____ (1) Disputes involving the law governing corporations, except charitable and religious organizations qualified under ~~N.C. Gen. Stat.~~N.C.G.S. § 55A-1-40(4) on the grounds of religious purpose, partnerships, and limited liability companies, including disputes arising under Chapters 55, 55A, 55B, 57D, and 59 of the General Statutes.

_____ (2) Disputes involving securities, including disputes arising under Chapter 78A of the General Statutes.

_____ (3) Disputes involving antitrust law, including disputes arising under Chapter 75 of the General Statutes that do not arise solely under ~~N.C. Gen. Stat.~~N.C.G.S. § 75-1.1 or Article 2 of Chapter 75 of the General Statutes.

_____ (4) Disputes involving trademark law, including disputes arising under Chapter 80 of the General Statutes.

_____ (5) Disputes involving the ownership, use, licensing, lease, installation, or performance of intellectual property, including computer software, software applications, information technology and systems, data and data security, pharmaceuticals, biotechnology products, and bioscience technologies.

_____ (6) Disputes involving trade secrets, including disputes arising under Article 24 of Chapter 66 of the General Statutes.

_____ (7) Contract disputes in which all of the following conditions are met:

(a) At least one plaintiff and at least one defendant is a corporation, partnership, or limited liability company, including any entity authorized to transact business in North Carolina under Chapter 55, 55A, 55B, 57D, or 59 of the General Statutes.

(b) The complaint asserts a claim for breach of contract or seeks a declaration of rights, status, or other legal relations under a contract.

(c) The amount in controversy computed in accordance with ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-243 is at least one million dollars ($1,000,000).

(d) All parties consent to the designation. [If all parties have not consented, indicate that the Notice of Designation is conditional pursuant to ~~Rule~~BCR 2.5.]

_____ Designation as a mandatory complex business case pursuant to ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-45.4(b), in that it is an action:

_____ (1) Involving a material issue related to tax law that has been the subject of a contested tax case for which judicial review is requested under ~~N.C. Gen. Stat.~~N.C.G.S. § 105-241.16, or a civil action under ~~N.C. Gen. Stat.~~N.C.G.S. § 105-241.17 containing a constitutional challenge to a tax statute.

_____ (2) Described in subsection (1), (2), (3), (4), (5), or (8) of ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-45.4(a) in which the amount in controversy computed in accordance with ~~N.C. Gen. Stat.~~N.C.G.S. § 7A-243 is at least five million dollars ($5,000,000).

Briefly explain why the action falls within the specific categories checked above and provide information adequate to determine that the case has been timely designated (e.g., dates of filing or service of the complaint or other relevant pleading). If necessary, include additional information that may be helpful to the Court in determining whether this case is properly designated a mandatory complex business case.

Attach a copy of all significant pleadings filed to date in this action (e.g., the complaint and relevant pending motions).

[INSERT DATE AND SIGNATURE BLOCKS]

* * *

Appendix 2. Case Management Report Template

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CIVIL ACTION NO.:
JOHN DOE, Plaintiff, v. ABC CORPORATION, Defendant.	~~**APPENDIX 2:** **CASE MANAGEMENT REPORT TEMPLATE**~~

The undersigned counsel of record began the Case Management Meeting on [INSERT DATE] and submit this report on [INSERT DATE] as required by ~~Business Court Rule~~BCR 9.

1. Summary of the case. Each party (or group of parties represented by common counsel) should summarize the dispute from its (or their) perspective. No summary by any party or group of parties may exceed 250 words. The parties may also agree on a joint summary not to exceed 500 words.

2. Initial motions. This section of the report should list whether any party plans to file a motion for emergency relief, a motion to dismiss, or any other early-stage motion. The party that plans to file the motion may provide a short explanation of the basis for the motion. That party should also list the projected date on which the motion will be filed. The report should reference any proposed modification of the time requirements or word limits for briefing. This section should also discuss whether the parties have agreed on any deadlines for amending the pleadings or adding parties and what the impact of those deadlines would be.

3. Discovery. This section should summarize the parties' agreement and/or competing proposals for discovery. The section should cover at least the following topics:

- a proposed discovery schedule;
- an ESI protocol;
- limits on written discovery and depositions;
- any agreements related to privilege logs;

- any agreement about the effects of the inadvertent waiver of attorney-client privilege or attorney work-product; and
- expert discovery.

One or more parties may also ask the Court in the report to postpone creating a discovery schedule until after the Court decides any initial motions, including but not limited to motions to dismiss.

This section should also state whether the parties have completed their full discussion of discovery management or whether they have scheduled a second discovery-management meeting. If the parties have scheduled a second meeting, then the report must indicate which topics remain for discussion at the second meeting and identify the time by which a further report must be filed with the Court.

4. Confidentiality. The report should indicate which parties, if any, anticipate the need for a protective order. If the parties agree that a protective order should be entered but do not agree on the terms of that order, the report should explain the nature of the disagreement and any specific language in dispute.

5. Mediation. The report must explain whether the parties agree to early mediation and any agreements reached to facilitate an early mediation. If the parties do not agree to early mediation, then the report must confirm that counsel have discussed with their client(s) the cost of litigation and the potential cost savings that may be realized by an early mediation.

In any event, the report must include a deadline for mediation (or competing proposals) and the name of the agreed-upon mediator. If the parties do not agree on a mediator, then the report should list each party's choice of mediator.

6. Special circumstances.

(a) **Class allegations.** If the complaint includes class action allegations, then the report should summarize the parties' agreement and/or competing proposals for the timing, nature, and extent of class certification discovery, how and/or whether class and merits discovery should be bifurcated or sequenced, and a proposed deadline for the plaintiff(s) to move for class certification. In the event that multiple related class actions are pending, the parties must report their views on special efforts that should be undertaken and the time for doing so, such as the appointment of lead counsel, consolidation, or coordination with proceedings in other jurisdictions.

(b) **Derivative claims.** If the complaint includes derivative claims, then the report should summarize the parties' positions on whether proper demand was made. The report should also describe any agreement and/or competing proposals on any special committee investigation, any stay of proceedings, or other issues regarding the derivative claims.

(c) **Related proceedings.** If there are multiple related proceedings, then the parties should state their views on what efforts, including but not limited to consolidation or shared discovery, should be undertaken.

7. Referees. The report should identify any matter(s) that might be appropriate for reference to a referee. The parties are specifically encouraged to think creatively about how the use of a referee might expedite the resolution of the case.

8. Potential cost and time requirements of litigation. Counsel should certify that they have conferred with their respective clients and have given their clients a good-faith estimate of the potential cost and time requirements of the litigation.

9. Other matters. The report should identify and discuss any other matters significant to case management.

[INSERT DATE AND SIGNATURE BLOCKS]

* * *

Appendix 3. Potential Terms of Receivership Order

This appendix contains potential terms for an order under ~~Business Court Rule~~BCR 15.2(e).

1. Duties.

(a) **Acceptance of receivership.** The Court's order may identify a deadline for the proposed receiver to file an acceptance of receivership and give notice of the receiver's bond if required under North Carolina law or by order of the Court. The order may require that the acceptance be served on all counsel and certify that the receiver will:

(1) act in conformity with North Carolina law and rules and orders of the Court;

(2) avoid conflicts of interest;

(3) not directly or indirectly pay or accept anything of value from the receivership estate that has not been disclosed and approved by the Court;

(4) not directly or indirectly purchase, acquire, or accept any interest in the property of the receivership estate without full disclosure and approval by the Court; and

(5) otherwise act in the best interests of the receivership estate.

(b) **Notice of appointment.** The Court's order may direct a deadline for the receiver to provide notice of entry of the order of appointment to any known creditor of the receivership estate and any other person or entity having a known or recorded interest in all or any part of the receivership estate.

(c) **Inventory.** The Court's order may set a deadline for the receiver to file with the Court an itemized and complete inventory of all property of the receivership estate, the property's nature and possible value as nearly can be ascertained, and an account of all known debts due from or to the receivership estate.

(d) **Initial written plan.** The Court's order may set a deadline for the receiver to file an initial written plan for the receivership estate. The order may require the plan to identify:

(1) the circumstances leading to the institution of the receivership estate;

(2) whether the goal of the receivership is to preserve and operate any business within the estate, to liquidate the estate, or to take other action;

(3) the anticipated costs likely to be incurred in the administration of the receivership estate;

(4) the anticipated duration of the receivership estate;

(5) if an active business is to be operated, the number of employees and estimated costs needed to do so;

(6) if property is to be liquidated, the estimated date by which any appraisal and sale by the receiver will occur, and whether a public or private sale is contemplated; and

(7) any pending or anticipated litigation or legal proceedings that may impact the receivership estate.

(e) **Updated plans.** The Court's order may require the receiver to file updated plans on a periodic basis, such as every ninety days. The order may require that each updated plan (i) summarize the actions taken to date measured against the previous plan, (ii) list anticipated actions, and (iii) update prior estimates of costs, expenses, and the timetable needed to complete the receivership.

(f) **Periodic reports.** The Court's order may require the receiver to file periodic reports, such as every thirty days, that itemize all receipts, disbursements, and distributions of money and property of the receivership estate.

(g) **Liquidation and notice.** The Court's order may provide terms relating to the liquidation of the receivership estate—including terms that require the receiver to afford reasonable opportunity for creditors to present and prove their claims pursuant to ~~N.C. Gen. Stat.~~N.C.G.S. § 1-507.6. The order may also require the receiver, upon notice to all parties, to request that the Court fix a date by which creditors must file a written proof of claim and to propose to the Court a schedule and method for notice to creditors.

(h) **Report of claims.** The Court's order may provide a deadline for the receiver to file a report as to claims made pursuant to ~~N.C. Gen. Stat.~~N.C.G.S. § 1-507.7, with service on all parties and on all persons or entities who submitted a proof of claim. The Court's order may set out guidelines for the report, such as requiring recommendations on the treatment of claims (i.e., whether they should be allowed or denied (in whole or in part) and the priority of such claims) and setting a deadline for objections to the report.

(i) **Final report.** The Court's order may require the receiver, before the receiver's discharge, to file a final written report and final accounting of the administration of the receivership estate.

2. Powers. The Court may issue an order that sets forth the powers of the receiver, in addition to the powers and authorities available to a receiver under statutory and/or common law. The powers stated in the order may include the power:

- to take immediate possession of the receivership assets, including any books and records related thereto;

- to dispose of all or any part of the assets of the receivership estate wherever located, at a public or private sale, if authorized by the Court;
- to sue for and collect all debts, demands, and rents of the receivership estate;
- to compromise or settle claims against the receivership estate;
- to enter into such contracts as are necessary for the management, security, insuring, and/or liquidation of the receivership estate;
- to employ, discharge, and fix the compensation and conditions for such agents, contractors, and employees as are necessary to assist the receiver in managing, securing, and liquidating the receivership estate; and
- to take actions that are reasonably necessary to administer, protect, and/or liquidate the receivership estate.

3. Compensation and expenses.

(a) **Timing of compensation application.** The Court's order may require a receiver that seeks fees to file an application with the Court and serve a copy upon all parties and all creditors of the receivership estate. The application may be made on an interim or final basis and must advise the parties and creditors of the receivership estate that any objection to the application must be filed within seven days of service of the notice.

(b) **Substance of application.** The Court's order may require that a receiver's application for fees include a description in reasonable detail of the services rendered, time expended, and expenses incurred; the amount of compensation and expenses requested; the amount of any compensation and expenses previously paid to the receiver; the amount of any compensation and expenses that the receiver has been or will be paid by any source other than the receivership estate; and a disclosure of whether the compensation would be divided or shared with anyone other than the receiver.

(c) **Notice of hearing on application.** The Court's order may require the receiver to notify all creditors of the receivership estate of the date, time, and location of any hearing that the Court sets on the receiver's fee application.

* * *

Appendix 4. Potential Terms of Order Appointing Referee

This appendix contains potential terms for an order under ~~Business Court Rule~~BCR 16.3.

1. Transcription. The Court may order that, when a referee receives witness testimony:

- the testimony be transcribed by a court reporter and filed in the action pursuant to Rule 53(f)(3) of the Rules of Civil Procedure;
- any request to transcribe a proceeding be made at least fourteen days before the proceeding;
- if the referee or the Court requires transcription, then all parties to the proceedings share equally in the transcription costs; and
- if a request for transcription is not joined in by all of the parties to a case, then only those parties that request transcription will be responsible for transcription costs.

2. Reports and exceptions.

(a) **Final written report.** The Court may order the referee to issue a final written report as described in Rule 53 of the Rules of Civil Procedure.

(b) **Draft report.** The Court may require the referee to provide the parties with a report in draft form. The Court may allow parties to submit exceptions to the draft report to the referee within a particular deadline and to allow responses to the exceptions within a deadline.

(c) **Exceptions to final report.** The Court may require that exceptions to a final report be heard exclusively by the Court. The Court may set a deadline for exceptions to final reports.

3. Compensation. The Court may specify the terms of a referee's compensation. The Court may require that applications for advancements made pursuant to Rule 53(d) of the Rules of Civil Procedure be made by the referee in writing and served on all parties. The Court may also set a deadline for any objections to the requested advancement.

* * *

Appendix 5. Proposed Pretrial Order Template

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CIVIL ACTION NO.:
JOHN DOE, Plaintiff, v. ABC CORPORATION, Defendant.	~~**APPENDIX 5:**~~ **PROPOSED PRETRIAL ORDER** ~~**TEMPLATE**~~

Pursuant to Rule 16 of the North Carolina Rules of Civil Procedure and ~~Rule~~BCR 12.4~~ of the Business Court Rules~~, the parties participated in a pretrial conference on [~~insert date~~INSERT DATE] and now submit this pretrial order.

1. Stipulations. The parties should list stipulations on subject-matter jurisdiction, personal jurisdiction, joinder of parties, and any other salient legal and/or procedural issues on which they agree.

2. Exhibits. The parties should attach their exhibit lists to the pretrial order. The parties should also cover at least the following topics related to exhibits:

- whether any party objects to the admission of any exhibit(s);
- whether any party objects to the authenticity of any exhibit(s); and
- the timing and manner of the exchange of demonstrative exhibits including whether demonstrative exhibits will be used in opening statements.

3. Witnesses and deposition designations. The order should contain each party's list of potential trial witnesses. The lists should identify witnesses whose testimony will be presented by deposition. The parties should also attach deposition designations, counter-designations, and related objections.

4. Motions. The parties should list any outstanding motions and any motions that might be filed before or during trial. The list should include pending or anticipated motions in limine.

5. Issues. The parties should list the issues to be tried, noting which issues the jury will decide and which issues the Court will decide. The parties should also describe any disagreement related to these matters.

6. Courtroom technology and other accommodations. The parties should describe the technology that they intend to use during trial. For each technology, the parties should clarify who (the parties or the Court) will provide the technology and, if applicable, how the parties will apportion the cost of the technology. The parties should also list any case-specific accommodations needed for trial, as described in ~~Rule~~BCR 12.5(i).

7. Length and readiness. The parties should estimate how long the trial will last. If the parties disagree on the estimate, then each party should give its own estimate. The parties should also state that all potential trial witnesses are available and that the case is trial-ready.

8. Settlement. The parties should certify that they engaged in a meaningful settlement discussion—including the exchange of potential settlement terms—during the pretrial conference. The parties should immediately notify the Court in the event of a material change in settlement prospects.

[INSERT SIGNATURES OF ALL PARTICIPATING COUNSEL]

* * *

These amendments to the North Carolina Business Court Rules become effective on 1 July 2019.

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

Ordered by the Court in Conference, this the 11th day of June, 2019.

Mark A. Davis
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of June, 2019.

Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to section 7A-34 of the General Statutes of North Carolina, the Court hereby amends Rule 26 of the General Rules of Practice for the Superior and District Courts.

* * *

~~Rule 26. Secure Leave Periods for Attorneys~~

~~(A) **Purpose, Authorization.** In order to secure for the parties to actions and proceedings pending in the Superior and District Courts, 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 33A of the Rules of Appellate Procedure 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 trial, hearing, in-court or out-of-court deposition, or other proceeding in the Superior or District Courts during that secure leave period.~~

~~(D) **Content of Designation**. The designation shall contain the following information:~~

~~(1) the attorney's name, address, telephone number and state bar number,~~

~~(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 33A of the Rules of Appellate Procedure,~~

(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, and

(5) a statement that no action or proceeding in which the attorney has entered an appearance has been scheduled, peremptorily set or noticed for trial, hearing, deposition or other proceeding during the designated secure leave period.

(E) **Where to File Designation.** The designation shall be filed as follows:

(1) if the attorney has entered an appearance in any criminal action, in the office of the District Attorney for each prosecutorial district in which any such case or proceeding is pending;

(2) if the attorney has entered an appearance in any civil action, either

(a) in the office of the trial court administrator for each superior court district and district court district in which any such case is pending or,

(b) if there is no trial court administrator for a superior court district, in the office of the Senior Resident Superior Court Judge for that district,

(c) if there is no trial court administrator for a district court district, in the office of the Chief District Court Judge for that district;

(3) if the attorney has entered an appearance in any special proceeding or estate proceeding, in the office of the Clerk of Superior Court of the county in which any such matter is pending;

(4) if the attorney has entered an appearance in any juvenile proceeding, with the juvenile case calendaring clerk in the office of the Clerk of Superior Court of the county in which any such proceeding is pending.

(F) **When to File Designation.** To be effective, the designation shall be filed:

(1) no later than ninety (90) days before the beginning of the secure leave period, and

~~(2) before any trial, hearing, deposition or other matter has been regularly scheduled, peremptorily set or noticed for a time during the designated secure leave period.~~

~~(G) **Procedure When Court Proceeding Scheduled Despite Designation**. If, after a designation of a secure leave period has been filed pursuant to this rule, any trial, hearing, in-court deposition or other in-court proceeding is scheduled or peremptorily set for a time during the secure leave period, the attorney shall file with the official by whom the matter was calendared or set, and serve on all parties, a copy of the designation with a certificate of service attached. Any party may, within ten days after service of the copy of the designation and certificate of service, file a written objection with that official and serve a copy on all parties. The only ground for objection shall be that the designation was not in fact filed in compliance with this Rule. If no objection is filed, that official shall reschedule the matter for a time that is not within the attorney's secure leave period. If an objection is filed, the court shall determine whether the designation was filed in compliance with this Rule. If the court finds that the designation was filed as provided in this Rule, it shall reschedule the matter for a time that is not within the attorney's secure leave period. If the court finds the designation was not so filed, it shall enter any scheduling, calendaring or other order that it finds to be in the interests of justice.~~

~~(H) **Procedure When Deposition Scheduled Despite Designation.** If, after a designation of a secure leave period has been filed pursuant to this Rule, any deposition is noticed for a time during the secure leave period, the attorney may serve on the party that noticed the deposition a copy of the designation with a certificate of service attached, and that party shall reschedule the deposition for a time that is not within the attorney's secure leave period. Any dispute over whether the secure leave period was properly designated pursuant to this Rule shall be resolved pursuant to the portions of the Rules of Civil Procedure, G.S. 1A-1, that govern discovery.~~

~~(I) Nothing in this Rule shall limit the inherent power of the Superior and District Courts to reschedule a case to allow an attorney to enjoy a leave during a period that has not been designated pursuant to this Rule, but there shall be no entitlement to any such leave.~~

Rule 26. Secure-Leave Periods for Attorneys

(a) **Definition; Entitlement.** A "secure-leave period" is one complete calendar week that is designated by an attorney during which the superior courts and the district courts may not hold a proceeding in any case in which that attorney is an attorney of record. An attorney is

entitled to enjoy a secure-leave period that has been designated according to this rule.

(b) **Allowance.**

(1) Within a calendar year, an attorney may enjoy three different secure leave periods for any purpose. A secure-leave period that spans across calendar years counts against the attorney's allowance for the first calendar year.

(2) Within the twenty-four weeks after the birth or adoption of an attorney's child, that attorney may enjoy twelve additional secure-leave periods for the purpose of caring for the child.

(c) **Form of Designation.** An attorney must designate his or her secure leave periods in writing.

(d) **Content of Designation.** An attorney's designation of a secure-leave period must contain the following information:

(1) the attorney's name, address, e-mail, telephone number, and state bar number;

(2) the date of the Sunday on which the secure-leave period is to begin and the date of the Saturday on which it is to end;

(3) the allowance that the secure-leave period will count against, with reference to either subsection (b)(1) or (b)(2) of this rule;

(4) the dates of any previously designated secure-leave periods that count against that allowance;

(5) a statement that the secure-leave period is not being designated for the purpose of interfering with the timely disposition of any proceeding;

(6) a statement that the attorney has taken adequate measures to protect the interests of the attorney's clients during the secure leave period; and

(7) the attorney's signature and the date on which the attorney submits the designation.

(e) **Where to Submit Designation.**

(1) **In Criminal Actions.** The attorney must submit his or her designation of a secure-leave period to the office of the district attorney for each prosecutorial district in which the attorney's criminal actions are pending.

(2) **In Civil Actions.** The attorney must submit his or her designation of a secure-leave period to the office of the senior resident superior court judge for each superior court district and to the office of the chief district court judge for each district court district in which the attorney's civil actions are pending.

(3) **In Special Proceedings and Estate Proceedings.** The attorney must submit his or her designation of a secure-leave period to the office of the clerk of the superior court of the county in which the attorney's special proceedings or estate proceedings are pending.

(4) **In Juvenile Proceedings.** The attorney must submit his or her designation of a secure-leave period to the juvenile case calendaring clerk in the office of the clerk of the superior court of the county in which the attorney's juvenile proceedings are pending.

(f) **When to Submit Designation.** An attorney must submit his or her designation of a secure-leave period:

(1) at least ninety days before the secure-leave period begins; and

(2) before a proceeding in any of the attorney's cases is scheduled for a time that conflicts with the secure-leave period.

But because of the uncertainty of a child's birth or adoption date, the superior court or district court scheduling authority must make reasonable exception to these requirements so that an attorney may enjoy leave with the child.

(g) **Depositions.** A party may not notice a deposition for a time that conflicts with a secure-leave period that another party's attorney has designated according to this rule.

(h) **Other Leave**. Nothing in this rule limits the inherent power of the superior courts or the district courts to allow an attorney to enjoy leave that has not been designated according to this rule.

* * *

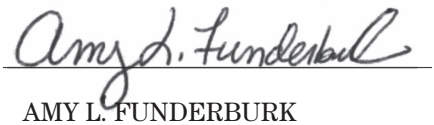
This amendment to the General Rules of Practice for the Superior and District Courts is effective for secure-leave periods designated on or after 11 September 2019.

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

Ordered by the Court in Conference, this the 4th day of September, 2019.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of September, 2019.



AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF APPELLATE PROCEDURE

Pursuant to Article IV, Section 13(2), of the Constitution of North Carolina, the Court hereby amends the North Carolina Rules of Appellate Procedure. This order affects Rule 3.1 and Rule 33.1.

* * *

Rule 3.1. Review in Cases Governed by Subchapter I of the Juvenile Code

(a) **Scope.** This rule applies in appeals filed under N.C.G.S. § 7B-1001 and in cases certified for review by the appellate courts in which the right to appeal under this statute has been lost.

(b) **Filing the Notice of Appeal.** Any party entitled to an appeal under N.C.G.S. § 7B-1001(a) and (a1) may take appeal by filing notice of appeal with the clerk of superior court and serving copies of the notice on all other parties in the time and manner set out in N.C.G.S. § 7B-1001(b) and (c).

(c) **Expediting the Delivery of the Transcript.** The clerk of superior court must complete the Expedited Juvenile Appeals Form within one business day after the notice of appeal is filed. The court reporting manager of the Administrative Office of the Courts must assign a transcriptionist for the appeal within five business days after the clerk completes the form.

The transcriptionist must produce the transcript of the entire proceedings at the State's expense if there is an order that establishes the indigency of the appellant. Otherwise, the appellant has ten days after the transcriptionist is assigned to contract for the transcription of the entire proceedings. In either situation, the transcriptionist must deliver electronically the transcript to each party to the appeal within forty days after receiving the assignment.

(d) **Expediting the Filing of the Record on Appeal.** The parties may settle the record on appeal by agreement at any time before the record on appeal is settled by any other procedure described in this subsection.

Absent agreement, the appellant must serve a proposed record on appeal on each party to the appeal within fifteen days after delivery of the transcript. Within ten days after having been served with the proposed record on appeal, the appellee may serve on each party to the appeal:

(1) a notice of approval of the proposed record on appeal;

(2) specific objections or amendments to the proposed record on appeal; or

(3) a proposed alternative record on appeal.

If the appellee serves a notice of approval, then this notice settles the record on appeal. If the appellee serves specific objections or amendments, or a proposed alternative record on appeal, then the provisions of Rule 11(c) apply. If the appellee fails to serve a notice of approval, specific objections or amendments, or a proposed alternative record on appeal, then the expiration of the ten-day period to serve one of these documents settles the record on appeal.

The appellant must file the record on appeal within five business days after the record is settled.

(e) **No-Merit Briefs.** When counsel for the appellant concludes that there is no issue of merit on which to base an argument for relief, counsel may file a no merit brief. The appellant then may file a pro se brief within thirty days after the date of the filing of counsel's no-merit brief.

In the no-merit brief, counsel must identify any issues in the record on appeal that arguably support the appeal and must state why those issues lack merit or would not alter the ultimate result. Counsel must provide the appellant with a copy of the no-merit brief, the transcript, the printed record on appeal, and any supplements or exhibits that have been filed with the appellate court. Counsel must inform the appellant in writing that the appellant may file a pro se brief and that the pro se brief is due within thirty days after the date of the filing of the no-merit brief. Counsel must attach evidence of this communication to the no-merit brief.

(f) **Word-Count Limitations Applicable to Briefs.** Briefs filed in the Supreme Court or in the Court of Appeals must comply with the word-count limitations found in Rule 28(j).

(g) **Motions for Extensions of Time.** Motions for extensions of time to produce and deliver the transcript, to file the record on appeal, and to file briefs are disfavored and will be allowed by the appellate courts only in extraordinary circumstances.

(h) **Duty of Trial Counsel.** Trial counsel for the appellant has a duty to assist appellate counsel with the preparation and service of appellant's proposed record on appeal.

(i) **Electronic Filing Required.** Unless granted an exception for good cause, counsel must file all documents electronically.

* * *

Rule 33.1. Secure-Leave Periods for Attorneys

(a) **Definition; ~~Authorization~~Entitlement**. A "secure-leave period" is ~~a period of time~~one complete calendar week that is designated by an attorney ~~in~~during which the appellate courts will not hold oral argument in any case in which that attorney is ~~listed as~~ an attorney of record. ~~An attorney may designate secure-leave periods as provided in this rule~~An attorney is entitled to enjoy a secure-leave period that has been designated according to this rule.

~~(b) **Length; Number.** A secure-leave period shall consist of one complete calendar week. During a calendar year, an attorney may designate three different weeks as secure-leave periods.~~

(b) **Allowance.**

(1) Within a calendar year, an attorney may enjoy three different secure leave periods for any purpose.

(2) Within the twenty-four weeks after the birth or adoption of an attorney's child, that attorney may enjoy twelve additional secure-leave periods for the purpose of caring for the child.

(c) **How to Submit Designation.** An attorney ~~shall designate~~must submit his or her ~~secure-leave periods on~~designation of a secure-leave period using the electronic filing site of the appellate courts at https://www.ncappellatecourts.org.

(d) **When to ~~Designate~~Submit Designation.** ~~An attorney shall designate a secure-leave period at least ninety days before it begins.~~An attorney must submit his or her designation of a secure-leave period:

(1) at least ninety days before the secure-leave period begins; and

(2) before oral argument in any of the attorney's cases is scheduled for a time that conflicts with the secure-leave period.

But because of the uncertainty of a child's birth or adoption date, the Supreme Court and the Court of Appeals will make reasonable exception to these requirements so that an attorney may enjoy leave with the child.

* * *

The amendment to Rule 3.1 of the North Carolina Rules of Appellate Procedure becomes effective on 11 September 2019. The amendment to

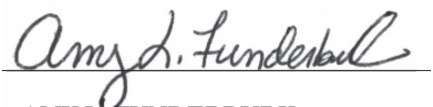
Rule 33.1 of the North Carolina Rules of Appellate Procedure is effective for secure-leave periods designated on or after 11 September 2019.

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

Ordered by the Court in Conference, this the 4th day of September, 2019.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of September, 2019.



AMY L. FUNDERBURK
Clerk of the Supreme Court

THE FOLLOWING ORDER, SIGNED BY THE COURT ON 20 DECEMBER 2016, WAS INADVERTENTLY OMITTED FROM PUBLICATION IN THE NORTH CAROLINA REPORTS.

ORDER ADOPTING AMENDMENTS TO THE RULES FOR SUPREME COURT REVIEW OF RECOMMENDATIONS OF THE JUDICIAL STANDARDS COMMISSION

The Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission are hereby amended and recodified to read as printed on the following pages.

These amendments shall be promulgated by publication in the North Carolina Reports and posted on the Court's web site.

Ordered by the Court in Conference, this the 20th day of December, 2016.

/s/ Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of December, 2016.

/s/ J. Bryan Boyd
J. BRYAN BOYD
Clerk of the Supreme Court

Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission

December 20, 2016

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 in all proceedings before the Court in matters under Article 30 of Chapter 7A of the General Statutes. These rules supersede the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, 288 N.C. 740 (1975), as amended, 289 N.C. 732 (1976). They shall be effective on the 20th day of December, 2016, and shall apply to all cases filed with the Court on or after that date.

Rule 1. Definitions

In these rules:

(a) **Commission** means the Judicial Standards Commission.

(b) **Respondent** means a justice or judge of the General Court of Justice, or a commissioner or deputy commissioner of the North Carolina Industrial Commission, who has been recommended for public reprimand, censure, suspension, or removal under Article 30 of Chapter 7A of the General Statutes.

(c) **Court** means the Supreme Court of North Carolina.

(d) **Clerk** means the Clerk of the Supreme Court of North Carolina.

(e) **Commission's attorney** means the attorney representing the Commission in the respondent's case.

(f) **Service** of a document required to be served means service in the manner provided in Rule 4 of the North Carolina Rules of Civil Procedure.

Rule 2. Confidentiality

Unless the respondent waives confidentiality in a writing filed with the Clerk, all filings and proceedings before the Court in matters under Article 30 of Chapter 7A of the General Statutes are confidential. These filings and proceedings are no longer confidential if the Court publicly reprimands, censures, suspends, or removes the respondent.

Rule 3. Procedure

(a) **Filing and Docketing**. In accordance with the Rules of the Judicial Standards Commission, the Executive Director of the Commission shall certify the Commission's recommendation and the record and file them with the Clerk. After receipt of the Commission's recommendation and the record, the Clerk shall docket the matter for the Court's review.

(b) **Notice to the Respondent**. When the Commission files a recommendation that a respondent be publicly reprimanded, censured, suspended, or removed, the Clerk shall send a copy of the recommendation and the record by certified mail, return receipt requested, to the respondent.

(c) **Request for Briefing and Argument**. Upon receipt of the Commission's recommendation, the respondent is entitled to file a brief and to argue the respondent's case, in person and through counsel, to the Court. If the respondent chooses to invoke this right, the respondent must file a request for briefing and argument. The request must indicate that the respondent desires to file a brief and specify whether oral argument is requested. If oral argument is not requested, the matter will be decided on the briefs.

The request for briefing and argument must be filed with the Clerk within 10 days from the date that the recommendation and the record were delivered to the respondent, as shown on the Clerk's return receipt. The request shall be signed by the respondent or the respondent's counsel of record. At the time the request is filed it shall be accompanied by a certificate showing service of a copy of the request on the Commission's attorney and either its Chairperson or Executive Director. Failure to file a request for briefing and argument waives the respondent's right under Article 30 of Chapter 7A of the General Statutes to file a brief and to be heard on oral argument before the Court.

(d) **Briefs**. The respondent's brief is due within 15 days after filing the request for briefing and argument. At the time the brief is filed the respondent shall also file a certificate showing service of a copy of the brief on the Commission's attorney and either its Chairperson or Executive Director. Within 15 days after being served with the respondent's brief, the Commission's attorney may file a brief, together with a certificate of service upon the respondent and the respondent's counsel of record. The form and content of briefs shall be similar to briefs in appeals to the Court. Failure to file a brief waives the respondent's right to oral argument.

(e) **Oral Argument**. If the respondent requests oral argument and files a brief, the Clerk will proceed to set the case for argument and notify the parties. Oral arguments shall conform as nearly as possible to the rules applicable to arguments on appeals to the Court, except they are confidential in accordance with Rule 2.

Rule 4. Decision by the Court

After considering the record, and the briefs and oral arguments, if any, the Court will act upon the Commission's recommendation. A majority of the Court voting is required to publicly reprimand, censure, suspend, or remove the respondent. A decision to publicly reprimand, censure, suspend, or remove the respondent shall be by published opinion or order. All other decisions of the Court shall be by written order filed with the Clerk and shall be confidential.

Rule 5. Costs

Printing and other costs in this Court will not be taxed, and there will be no filing fee.

THE FOLLOWING ORDER, SIGNED BY THE COURT ON 20 DECEMBER 2016, WAS INADVERTENTLY OMITTED FROM PUBLICATION IN THE NORTH CAROLINA REPORTS.

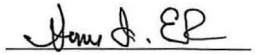
ORDER ADOPTING AMENDMENTS TO THE RULES OF THE NORTH CAROLINA BUSINESS COURT

The Rules of the North Carolina Business Court are hereby amended to read as printed on the following pages.

These rules shall be effective on the 1st day of January, 2017, and shall apply to all actions designated to the Business Court before or after that date.

These amendments shall be promulgated by publication in the North Carolina Reports and posted on the Business Court's web site.

Ordered by the Court in Conference, this the 20th day of December, 2016.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of December, 2016.

J. BRYAN BOYD
Clerk of the Supreme Court

GENERAL RULES OF PRACTICE AND PROCEDURE FOR THE NORTH CAROLINA BUSINESS COURT

Amended and Effective January 1, 2017

RULE 1: PURPOSE AND SCOPE

1.1 Purpose.

These Rules should be construed and enforced to foster professionalism and civility; to permit the orderly, just, and prompt consideration and determination of all matters; and to promote the efficient administration of justice.

1.2 Scope.

These Rules govern every civil action that is designated as a mandatory complex business case or assigned to a Business Court judge under Rule 2.1 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure.

1.3 Integration.

These Rules are intended to supplement, not supplant, the Rules of Civil Procedure and the General Rules of Practice. To the extent these Rules conflict with local rules or standing orders from the county of venue, these Rules will govern.

1.4 Effective date.

These Rules take effect on January 1, 2017, and apply to all actions designated to the Court before or after that date.

1.5 Definitions.

(a) "The Court" refers to the North Carolina Business Court.

(b) "The General Rules of Practice" refers to the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure.

(c) "The Rules" refers to the Business Court Rules.

(d) "The Rules of Civil Procedure" refers to the North Carolina Rules of Civil Procedure.

RULE 2: MANDATORY BUSINESS COURT DESIGNATION

2.1 Designation.

(a) Form of notice.

The party seeking to designate an action as a mandatory complex business case must file a Notice of Designation as provided in N.C. Gen. Stat. § 7A-45.4. Appendix 1 to the Rules contains a Notice of Designation template.

(b) Method of service.

In addition to serving the Notice of Designation as required by section 7A-45.4(c), the designating party should e-mail the Notice of Designation to the Chief Business Court Judge, the Chief Justice of the Supreme Court of North Carolina, and, as practicable, all parties.

(c) Civil action number.

Before a party files a Notice of Designation in an action, the Clerk of Superior Court in the county of venue will assign a civil action number to the action. When an action is designated or assigned to the Court, the action retains that civil action number.

(d) Cost.

Within ten days of the assignment of an action to a Business Court judge, the party responsible for paying the cost described in N.C. Gen. Stat. § 7A-305(a)(2) must file a certification in the Court that the cost has been paid to the Clerk of Superior Court in the county of venue.

2.2 Opposing a Notice of Designation.

If a party files an opposition to a Notice of Designation pursuant to N.C. Gen. Stat. § 7A-45.4(3), then any other party may file a response to the opposition. The response must be filed within fifteen days of service of the opposition or as otherwise ordered by the Court. Unless the Court orders otherwise, the party that filed the opposition may not file a reply.

If the case is no longer designated as a mandatory complex business case, the action will proceed on the regular civil docket in the county of venue, although any party may seek to have the action designated as exceptional under Rule 2.1 of the General Rules of Practice.

2.3 Designation based on an amended pleading.

(a) Procedure.

If a party amends a pleading, and the amendment raises a new material issue listed in N.C. Gen. Stat. § 7A-45.4(a), any party may seek designation of the action as a mandatory complex business case within the time periods set forth in section 7A-45.4(d).

If the party that files the amended pleading seeks designation, the Notice of Designation must be made contemporaneously with the filing of the amended pleading.

If another party seeks designation based on the amended pleading, the Notice of Designation must be filed within thirty days of service of

the amended pleading. For proposed amended pleadings, the thirty-day period begins to run on the later of (a) the timely filing of the Court-allowed pleading or (b) three days after the entry of any order that deems the proposed amended pleading to be filed.

If, as a result of the amended pleading, the action falls within section 7A-45.4(b), the action must be designated to the Court under that section, and section 7A-45.4(g) will apply to any action if there is no designation.

(b) New eligibility for designation.

Rule 2.3(a) applies only to an action that had not previously qualified under section 7A-45.4(a) for designation to the Court. Parties added by subsequent pleadings, however, may designate an action to the Court in accordance with section 7A-45.4(d).

The Notice of Designation procedure should not be utilized in connection with an amended pleading for the purpose of interfering with or delaying ongoing or upcoming proceedings or where designation of the action as a mandatory complex business case would be inconsistent with the interests of justice given the status of the proceedings.

2.4 What constitutes designation.

For purposes of the Rules, an action is designated as a mandatory complex business case when the Chief Justice of the Supreme Court of North Carolina issues an order as described in N.C. Gen. Stat. §§ 7A-45.4(c) and (f). A party's filing of a Notice of Designation does not constitute designation of the action as a mandatory complex business case or effectuate the assignment of a case to the Court.

2.5 Designation under N.C. Gen. Stat. § 7A-45.4(a)(9).

When seeking designation based on N.C. Gen. Stat. § 7A-45.4(a)(9), if the plaintiff, thirdparty plaintiff, or petitioner lacks the consent of all parties, then the plaintiff, third-party plaintiff, or petitioner may file a conditional Notice of Designation contemporaneously with the complaint, third-party complaint, or petition for judicial review. The conditional Notice of Designation will be construed to comply with section 7A-45.4(d)(1). The plaintiff, third-party plaintiff, or petitioner will then have thirty days after service on all parties of the complaint, third-party complaint, or petition for judicial review to file a supplement to the conditional Notice of Designation that reflects consent by all parties to the Notice of Designation. A Notice of Designation filed by a plaintiff, third-party plaintiff, or petitioner under section 7A-45.4(d)(14) is not deemed to be complete until the supplement is filed.

RULE 3: FILING AND SERVICE

3.1 Mandatory electronic filing.

Except as otherwise specified in the Rules, all filings in the Court must be made electronically through the Court's electronic-filing system beginning immediately upon designation of the action as a mandatory complex business case by the Chief Justice of the Supreme Court of North Carolina or assignment to a Business Court judge pursuant to Rule 2.1 of the General Rules of Practice. Counsel who appear in the Court are expected to have the capability to use the electronic-filing system. Instructions for filing documents through the Court's electronic-filing system are available on the Court's website. Counsel should exercise diligence to ensure that the description of the document entered during the filing process accurately and specifically describes the document being filed.

3.2 Who may file.

A filing through the electronic-filing system may be made by counsel, a person filing on counsel's behalf, or a pro se litigant. Parties who desire not to use the electronic-filing system may file a motion for relief from using the system, but the Court will grant that relief for counsel only upon a showing of exceptional circumstances. A request by a pro se party to forgo use of the electronic-filing system will be determined on a good-cause standard.

3.3 Electronic identities.

Counsel who appear in the Court and pro se parties who are not excused from using the electronic-filing system must promptly obtain an electronic identity from the Court. An electronic identity consists of a username and password. Any person who has obtained an electronic identity must maintain adequate security over that identity.

3.4 Electronic signatures.

(a) Form.

A document to be filed that is signed by counsel must be signed using an electronic signature. A pro se party must also use an electronic signature on any document that the party is permitted to file by e-mail pursuant to Rule 3.2. An electronic signature consists of a person's name preceded by the symbol "/s/." An electronic signature serves as a signature for purposes of the Rules of Civil Procedure.

(b) Multiple signatures.

A filing submitted by multiple parties must bear the electronic signature of one counsel for each party that submits the filing. By filing a document with multiple electronic signatures, the lawyer whose electronic identity is used to file the document certifies that each signatory has authorized the use of his or her signature.

(c) Form of signature block.

Every signature block must contain the signatory's name, bar number, physical address, phone number, and e-mail address.

3.5 Format of filed documents.

All filings must be made in a file format approved by the Court. The Court maintains a list of approved formats on its website. Pleadings, motions, and briefs filed electronically must not be filed in an optically scanned format, unless special circumstances dictate otherwise. Proposed orders must be filed in a format permitted by the filing instructions on the Court's website. The electronic file name for each document filed with the Court must clearly identify its contents.

3.6 Time of filing.

If a document is due on a date certain, then the document must be filed by 5:00 p.m. Eastern Time on that date, unless the Court orders otherwise.

3.7 Notice of filing.

When a document is filed, the Court's electronic-filing system generates a Notice of Filing. The Notice of Filing is sent by e-mail to all counsel of record. Filing is not complete until issuance of the Notice of Filing. A document filed electronically is deemed filed on the date stated in the Notice of Filing.

3.8 Notice and entry of orders, judgments, and other matters.

The Court will transmit all orders, decrees, judgments, and other matters through the Court's electronic-filing system, which, in turn, will generate a Notice of Filing to all counsel of record. The issuance by the electronic-filing system of a Notice of Filing for any order, decree, or judgment constitutes entry and service of the order, decree, or judgment for purposes of Rule 58 of the Rules of Civil Procedure. The Court will file a copy of each order, decree, or judgment with the Clerk of Superior

Court in the county of venue. If a pro se litigant is permitted to forgo use of the electronic-filing system under Rule 3.2, the Court will deliver a copy of every order, decree, judgment, or other matter to that pro se litigant by alternative means.

3.9 Service.

(a) Effect of Notice of Filing.

After an action has been designated as a mandatory complex business case or otherwise assigned to the Court, the issuance of a Notice of Filing constitutes adequate service under the Rules of Civil Procedure of the filed document. Service by other means is not required unless the party served is a pro se party. Service of materials on pro se parties is governed by Rule 3.9(e). Documents filed with the Court must bear a certificate of service stating that the documents have been filed electronically and will be served in accordance with this rule.

(b) E-mail addresses.

Each counsel of record must provide the Court with a current e-mail address and maintain a functioning e-mail system. The Court will issue a Notice of Filing to the e-mail address that counsel has provided to the Court.

(c) Service of non-filed documents.

When a document must be served but not filed, the document must be served by e-mail unless (a) the parties have agreed to a different method of service or (b) the Case Management Order calls for another manner of service. Service by e-mail under this rule constitutes adequate service under Rule 5 of the Rules of Civil Procedure.

(d) Effect on Rule 6(e) of the Rules of Civil Procedure.

Electronic service made under the Rules through the electronic-filing system or by e-mail under Rule 3.9(c) is treated the same as service by mail for purposes of Rule 6(e) of the Rules of Civil Procedure.

(e) Service on pro se parties.

All documents filed with the Court must be served upon a pro se party by any method allowed by the Rules of Civil Procedure, unless the Court directs otherwise.

3.10 Procedure when the electronic-filing system appears to fail.

If a person attempts to file a document, but (a) the person is unable for technical reasons to transmit the filing to the Court; (b) the

document appears to have been transmitted to the Court, but the person who filed the document does not receive a Notice of Filing; or (c) some other technical reason prevents a person from filing the document, the person attempting to file the document must make a second attempt at filing.

If the second attempt fails, the person may continue further attempts to file or may (1) notify the Court of the technical failure by phone call to the judicial assistant for the presiding Business Court judge and (2) e-mail the document for which filing attempts were made to filinghelp@ncbusinesscourt.net. The e-mail must state the date and time of the attempted filings and a brief explanation of the relevant technical failure(s). The e-mail does not constitute efiling, but serves as proof of an attempt to e-file in order to protect a party in the event of an imminent deadline and satisfies the deadline, notwithstanding Rule 3.7, unless otherwise ordered. The e-mail should also be copied to counsel of record. The Court may ask the person to make another filing attempt.

For purposes of calculating briefing or response deadlines, a document filed electronically is deemed filed at the time and on the date stated in the Notice of Filing.

3.11 Filings with the Clerk of Superior Court.

Any material filed with the Court that is listed in Rule 5(d) of the Rules of Civil Procedure must also be filed with the Clerk of Superior Court in the county of venue within five business days of the date of the filing with the Court. Unless otherwise directed by the Administrative Office of the Courts, the Clerk of Superior Court in the county of venue maintains the official file for any action designated to the Court, and the Court is not required to maintain copies of written materials provided to it.

3.12 Appearances.

Counsel whose names appear on a signature block in a Court filing need not file a separate notice of appearance for the action. After making an initial filing with the Court, counsel should verify that their names are listed on the docket for the action on the Court's efiling system. Counsel whose names do not appear on that docket, but whose names should appear, should contact the judicial assistant for the presiding Business Court judge and request to be added. Out-of-state attorneys may be added to that docket only after admission pro hac vice to appear in the action.

RULE 4: TIME

4.1 Motions to extend time periods.

(a) Procedure.

After an action has been designated as a mandatory complex business case or assigned to a Business Court judge under Rule 2.1 of the General Rules of Practice, all motions to extend any time period prescribed or allowed by these Rules, by the Rules of Civil Procedure, or by court order must be filed with the Court. If the action has been designated as a mandatory complex business case but has not yet been assigned to a particular Business Court judge, then the motion must be submitted to the Chief Business Court Judge.

(b) Basis.

A motion to extend a time period must demonstrate good cause and comply with Rule 7.3.

(c) Effect.

The filing of a motion to extend time automatically extends the time for filing or the performance of the act for which the extension is sought until the earlier of the expiration of the extension requested or a ruling by the Court. If the Court denies the motion, then the filing is due or the act must be completed no later than 5:00 p.m. Eastern Time on the second business day after the Court issues its order, unless the Court's order provides a different deadline.

(d) Modifications by the Court.

The Court may modify any time period on its own initiative, unless a rule or statute prohibits modification of the time period.

(e) Relationship with Rule 6(b) of the Rules of Civil Procedure.

Nothing in the Rules precludes parties from entering into binding stipulations in the manner permitted by Rule 6(b) of the Rules of Civil Procedure.

4.2 Extensions of time that do not require a motion.

(a) Papers due within twenty days of designation.

If any statute, rule of procedure, Business Court Rule, or court order requires the filing or service of any paper fewer than twenty days after the designation of an action as a mandatory complex business case or the assignment of an action to a Business Court judge under Rule 2.1 of the General Rules of Practice, then the time for filing or service of that

paper is automatically extended to the twentieth day following the designation, unless a Business Court judge orders otherwise. This rule does not apply to time periods that, by rule or statute, cannot be extended and is subject to modification by Court order.

(b) Discovery responses.

The parties may agree, without a Court order, to extend any time period for responses to written discovery. A Court order is required, however, if a party seeks to modify any discoveryrelated deadline that has been established by a Court order. Rule 10.4(a) contains the standards and procedure for filing a motion to extend the discovery period or to take discovery beyond the limits set forth in the Case Management Order.

RULE 5: PROTECTIVE ORDERS AND FILING UNDER SEAL

5.1 Generally.

(a) Rule 5 applies to both parties and non-parties. References to "parties" in this rule therefore include non-parties.

(b) Parties should limit the materials that they seek to file under seal. The party seeking to maintain materials under seal bears the burden of establishing the need for filing under seal.

(c) This rule should not be construed to change any requirement or standard that otherwise would govern the issuance of a protective order.

(d) Parties are encouraged to agree on terms for a proposed protective order that governs the confidentiality of discovery materials when exchanged between or among the parties.

5.2 Procedures for sealed filing.

(a) Pursuant to a protective order.

The Court may enter a protective order under Rule 26(c) of the Rules of Civil Procedure that contains standards and processes for the handling, filing, and service of sealed documents. Proposed protective orders submitted to the Court should include procedures similar to those described in subsections (b) through (d) of this rule.

(b) In the absence of a protective order.

In the absence of an order described in Rule 5.2(a), any party that seeks to file a document or part of a document under seal must provisionally file the document under seal together with a motion for leave to file the document under seal. The motion must be filed no later than 5:00 p.m. Eastern Time on the day that the document is provisionally filed

under seal. The motion must contain information sufficient for the Court to determine whether sealing is warranted, including the following:

(1) a non-confidential description of the material sought to be sealed;

(2) the circumstances that warrant sealed filing;

(3) the reason(s) why no reasonable alternative to a sealed filing exists;

(4) if applicable, a statement that the party is filing the material under seal because another party (the "designating party") has designated the material under the terms of a protective order in a manner that triggered an obligation to file the material under seal and that the filing party has unsuccessfully sought the consent of the designating party to file the materials without being sealed;

(5) if applicable, a statement that any designating party that is not a party to the action is being served with a copy of the motion for leave;

(6) a statement that specifies whether the party is requesting that the document be accessible only to counsel of record rather than to the parties; and

(7) a statement that specifies how long the party seeks to have the material maintained under seal and how the material is to be handled upon unsealing.

(c) Until the Court rules on the sealing motion, any document provisionally filed under seal may be disclosed only to counsel of record and their staff until otherwise ordered by the Court or agreed to by the parties.

(d) Within five business days of the filing or provisional filing of a document under seal, the party that filed the document should file a public version of the document. The public version may bear redactions or omit material, but the redactions or omissions should be as limited as practicable. In the rare circumstance that an entire document is filed under seal, in lieu of filing a public version of the document, the filing party must file a notice that the entire document has been filed under seal. The notice must contain a non-confidential description of the document that has been filed under seal.

5.3 Role of designating party.

If a motion for leave to file under seal is filed by a party who is not the designating party, then the designating party may file a supplemental

brief supporting the sealing of the document within seven business days of service of the motion for leave. The supplemental brief must comply with the requirements in Rule 7. In the absence of a brief, the Court may summarily deny the motion for leave and may direct that the document be unsealed.

RULE 6: HEARINGS AND CONDUCT

6.1 Notice of hearing.

The Court will typically issue a notice of hearing prior to a hearing. The Court will usually issue the notice at least five business days prior to the hearing. The Court retains the flexibility to convene counsel informally if doing so would advance the interests of justice. A ruling on a motion heard after notice to the parties will not be subject to attack solely because a notice of hearing was not issued as provided by this rule.

6.2. Hearing procedures.

The Court may conduct pretrial hearings in person or by any technological means accessible to all parties in an action. Unless otherwise specified, all pretrial hearings will be held in the Business Court courtroom assigned to the presiding Business Court judge. Unless otherwise ordered, or unless the parties agree otherwise, any court reporter transcribing any pretrial hearing or conference will be present in the Business Court courtroom.

6.3 Conduct before the Court.

(a) Addressing the Court.

Counsel should speak clearly and audibly from a standing position behind counsel table or the podium. Counsel may not approach the bench without the Court's request or permission.

(b) Examination of witnesses and jurors.

Counsel must examine witnesses and jurors from a sitting position behind counsel table or standing from the podium, except as otherwise permitted by the Court. Counsel may only approach a witness for the purposes of presenting, inquiring about, or examining the witness about an exhibit, document, or diagram.

(c) Professionalism.

Participants in Court proceedings must conduct themselves professionally. Adverse witnesses, counsel, and parties must be treated with

fairness and civility both in and out of Court. Counsel must yield gracefully to rulings of the Court and avoid disrespectful remarks.

6.4 Contact with the Court.

(a) E-mail.

Any e-mails to a Business Court judge about a pending matter must copy at least one counsel of record for each party.

(b) Contact with Court personnel.

Counsel may contact the judicial assistants or law clerks of the Business Court judges to discuss scheduling and logistical matters. Neither counsel nor counsel's professional staff may seek advice or comment from a judicial assistant or law clerk on any matter of substance. Counsel should communicate with Business Court judges, law clerks, and judicial assistants with appropriate professional courtesy.

In the absence of exigent circumstances, and unless opposing counsel has consented otherwise, any written communication by counsel to Court personnel regarding a pending matter must include or copy at least one counsel of record for each party.

RULE 7: MOTIONS

7.1 Filing.

After an action has been designated as a mandatory complex business case or assigned to a Business Court judge under Rule 2.1 of the General Rules of Practice, the Business Court judge to whom the action is assigned will preside over all motions and proceedings in the action, unless and until an order has been entered under N.C. Gen. Stat. § 7A-45.4(e) ordering that the case not be designated a mandatory complex business case or the Chief Justice of the Supreme Court of North Carolina revokes approval of the designation.

7.2 Form.

All motions must be made in electronic form and must be accompanied by a brief (except for those motions listed in Rule 7.10). Each motion must be set out in a separate document. A motion unaccompanied by a required brief may, in the discretion of the Court, be summarily denied. This rule does not apply to oral motions made at trial or as otherwise provided in the Rules.

7.3 Consultation.

All motions, except those made pursuant to Rules 12, 55, 56, 59, 60, or 65 of the Rules of Civil Procedure, must reflect consultation with and the position of opposing counsel.

7.4 Motions decided on papers and briefs.

The Court may rule on a motion without a hearing. Special considerations thought by counsel sufficient to warrant a hearing or oral argument may be brought to the Court's attention in the motion or response.

7.5 Supporting materials and citations.

All materials, including affidavits, on which a motion relies must be filed with the motion or supporting brief. Materials that have been filed previously need not be re-filed, but the filing party should use specific references to the docket location of the previously filed materials to aid the Court. In selecting materials to be filed, parties should attempt to limit the use of voluminous materials. If service of process is at issue in any motion, proof of service must be submitted in support of the motion.

The filing party must include an index at the front of the materials. The index should assign a number or letter to each exhibit and should describe the exhibit with sufficient detail to allow the Court to understand the exhibit's contents.

When a brief refers to a publicly available document, the brief may contain a hyperlink to or URL address for the document in lieu of attaching the document as an exhibit. The filing party is responsible for keeping or archiving a copy of the document referenced by hyperlink or URL address.

When a motion or brief refers to any supporting material, the motion or brief must include a pinpoint citation to the relevant page of the supporting material whenever possible. Unless the circumstances dictate otherwise, only the cited page(s) should be filed with the Court in the manner described above.

If a motion or brief cites a decision that is published only in sources other than the West Federal Reporter System, Lexis System, commonly used electronic databases such as Westlaw or LexisNexis, or the official North Carolina reporters, then the motion or brief must attach a copy of the decision.

7.6 Responsive briefs.

A party that opposes a motion may file a responsive brief within twenty days of service of the supporting brief. This period is thirty days after service for responses to summary judgment motions and for responses to opening briefs in administrative appeals. If a party fails to file a response within the time required by this rule, the motion will be considered and decided as an uncontested motion.

If a motion has been filed without a brief before a case is designated as a mandatory complex business case, then the time period to file a responsive brief begins running only when the moving party files a supporting brief in the Court. A motion filed without a brief before a case is designated as a mandatory complex business case will not be considered by the Court unless and until the moving party files a supporting brief with the Court.

7.7 Reply briefs.

Unless otherwise prohibited, a reply brief may be filed within ten days of service of a responsive brief. A reply brief must be limited to discussion of matters newly raised in the responsive brief. The Court retains discretion to strike any reply brief that violates this rule.

7.8 Length and format.

Briefs in support of and in response to motions must be double-spaced and cannot exceed 7,500 words, except as provided in Rule 10.9(c). Reply briefs must also be double-spaced and cannot exceed 3,750 words. These word limits include footnotes and endnotes but do not include the case caption, any index, table of contents, or table of authorities, signature blocks, or any required certificates.

A party may request the Court to expand these limits but must make the request no later than five days before the deadline for filing the brief. Word limits will be expanded only upon a convincing showing of the need for a longer brief.

Each brief must include a certificate by the attorney or party that the brief complies with this rule. Counsel or pro se parties may rely on the word count of a word-processing system used to prepare the brief.

In the absence of a Court order, all parties who are jointly represented by any law firm must join together in a single brief. That single brief may not exceed the length limits in this rule.

All briefs must use a 12-point, proportional font, and one-inch margins.

7.9 Suggestion of subsequently decided authority.

In connection with a pending motion, a party may file a suggestion of subsequently decided authority after briefing has closed. The suggestion must contain the citation to the authority and, if the authority is not available on an electronic database, a copy of the authority. The suggestion may contain a brief explanation, not to exceed one hundred words, that describes the relevance of the authority to the pending motion. Any party may file a response to a suggestion of subsequently decided authority. The response may not exceed one hundred words and must be filed within five days of service of the suggestion.

7.10 Motions that do not require briefs.

Briefs are not required for the following motions:

(a) for an extension of time, provided that the motion is filed prior to the expiration of the time to be extended;

(b) to continue a pretrial conference, hearing, or trial of an action;

(c) to add parties;

(d) consent motions, unless otherwise ordered by the Court;

(e) to approve fees for receivers, special masters, referees, or court-appointed experts or professionals;

(f) for substitution of parties;

(g) to stay proceedings to enforce a judgment;

(h) to modify the case-management process pursuant to Rule 9.1(a), provided that the motion is filed prior to the expiration of the case-management deadline sought to be extended;

(i) for entry of default;

(j) for pro hac vice admission; and

(k) motions in limine complying with Rule 12.9.

These motions must state the grounds for the relief sought, including any necessary supporting materials, and must be accompanied by a proposed order.

7.11 Late filings.

Absent a showing of excusable neglect or as otherwise ordered by the Court, the failure to timely file a brief or supporting material waives a party's right to file the brief or supporting material.

7.12 Motions decided without live testimony.

Unless the Court orders otherwise, a hearing on a motion, including an emergency motion, will not involve live testimony. A party who desires to present live testimony must file a motion for permission to present that testimony. In the absence of exigent circumstances, the motion must be filed promptly after receiving notice of the hearing and may not exceed 500 words. After the motion is filed, the Court will either (a) issue an order that requests a response, (b) deny the motion, or (c) issue an order with further instructions. The opposing party is not required to file a response unless ordered by the Court. If the Court elects to conduct a telephone conference on the motion, then the Court may decide the motion during the conference.

7.13 Emergency motions prior to designation.

(a) Actions in which a Notice of Designation was filed when the action was initiated.

If a party seeks to have an emergency motion heard in the Court, the party should contact the Chief Justice of the Supreme Court of North Carolina promptly after filing the Notice of Designation and request expedited designation of the case as a mandatory complex business case. The party should also promptly contact the Court's Trial Court Coordinator and advise that the party seeks to have an emergency motion heard in the Court.

(b) Actions subsequently designated as mandatory complex business cases.

If a party has filed an emergency motion in an action before a Notice of Designation has been filed, and the action is later designated as a mandatory complex business case or assigned to a Business Court judge under Rule 2.1 of the General Rules of Practice, then the emergency motion will be heard by the Business Court judge to whom the action has been assigned as provided by N.C. Gen. Stat. § 7A-45.4(e). If, however, the emergency motion is heard by a non- Business Court judge prior to designation or assignment, then, barring exceptional circumstances, the Business Court judge will defer to the judge who heard the motion.

(c) Briefing.

When a party moves for emergency relief under Rule 7.13(a) or (b), the Court will, if practicable, establish a briefing schedule for the motion. A party that moves for emergency relief under Rule 7.13(a) must

file a supporting brief that complies with the Rules. The Court's briefing schedule for a Rule 7.13(a) motion will establish deadlines for a response and, in the Court's discretion, a reply. Unless the Court orders otherwise, the length restrictions in Rule 7.8 apply to all briefs filed under this rule.

RULE 8: PRESENTATION TECHNOLOGY

8.1 Electronic presentations favored.

The Court encourages electronic presentations, but only if the presentation meaningfully aids the Court's understanding of key issues. Counsel should limit the use of paper handouts at Court proceedings. Any paper handout that a party provides to the Court must also be provided to all parties, the court reporter, and the law clerk.

8.2 Courtroom technology.

Parties may bring their own electronic technology, including hardware, for presentation to the Court or may use the systems available in each Business Court courtroom. Parties are responsible for consulting in advance with courthouse personnel about security, power, and other logistics associated with the use of any external hardware. Counsel who plan to use the available courtroom technology must be familiar with that technology and must follow any rules established by the Court associated with that technology's use.

RULE 9: CASE MANAGEMENT

9.1 Case Management Meeting.

(a) General principles.

The case-management process described in this rule should be applied in a flexible, case-specific fashion. The Rules have been designed to encourage parties to identify and to implement the case-management techniques—including novel and creative ideas—that are most likely to support the efficient resolution of the case.

(b) Timing.

No later than sixty days after the designation of an action as a mandatory complex business case or assignment to a Business Court judge pursuant to Rule 2.1 of the General Rules of Practice, counsel must participate in a Case Management Meeting. The filing of an opposition to a Notice of Designation does not, absent a Court order, stay or alter this rule's requirements. Counsel for the first named plaintiff is responsible for contacting other counsel and scheduling the meeting.

A party may, by motion, request that the Court alter the process or schedule for the Case Management Meeting and Case Management Report. The motion must be supported by good cause, be filed as promptly as possible, and identify the reasons for the requested change. Any opposition to a motion filed under this rule must be filed within five days of service of the motion. The Court may schedule a status conference in advance of the Case Management Meeting if circumstances warrant.

(c) Topics.

Unless the Court orders otherwise, the Case Management Meeting must cover at least the following subjects:

(1) any initial motions that any party might file and whether certain issues might be presented to the Court for early resolution;

(2) the discovery topics described in Rules 10.3 through 10.8;

(3) a proposed deadline for amending pleadings and/or adding parties;

(4) a proposed deadline for filing dispositive motions;

(5) a proposed trial date;

(6) whether a protective order is needed;

(7) whether any law other than North Carolina law might govern aspects of the case, and, if so, what law and which aspects of the case;

(8) the parties' views on the timing of mediation, including any plans for early mediation, a mediation deadline, and any agreed-upon mediator(s);

(9) whether periodic Case Management Conferences with the Court would be beneficial and, if so, the proposed frequency of those conferences;

(10) whether the Case Management Conference should be transcribed;

(11) whether any matter(s) might be appropriate for a referee; and

(12) whether client attendance at the Case Management Conference would be beneficial.

Ultimately, the parties should discuss any matter that is significant to case management. The parties should review the template Case Management Report in Appendix 2 to the Rules for further guidance

about the Case Management Meeting. The template does not limit further topics that might be considered as appropriate to achieve an efficient and orderly disposition in light of the particular circumstances of an individual case.

(d) Discovery management.

The Rules envision a full discussion at the Case Management Meeting of the discovery issues described in Rules 10.3 through 10.8. If, because of the circumstances of the case, the parties need additional time after the Case Management Meeting to complete their discussion of discovery, then the parties should arrange to have a second meeting on any discovery issues that remain to be discussed. The second meeting should be held as soon as is practicable, but in no event later than thirty days after the Case Management Meeting.

9.2 Case Management Report.

The parties must jointly file a Case Management Report no later than the fifteenth day after the Case Management Meeting begins. The template Case Management Report in Appendix 2 to the Rules provides guidance for how to structure the report. Counsel for the first named plaintiff is responsible for circulating an initial draft of the report, for incorporating into the report the views of all other counsel, and for finalizing and filing the report. The report should state whether the parties have completed their discussion of the discovery topics described in Rules 10.3 through 10.8 and, if they have not, the issues that remain to be discussed and the likely date on which a second discovery meeting will occur. If the parties participate in a second discovery meeting, then the parties must file a supplement to the Case Management Report within ten days of the second discovery meeting.

A party that is not served with process until after the Case Management Meeting may file a supplement to the Case Management Report if the Court has not already issued a Case Management Order. A supplement must be filed within ten days of when a party makes its first appearance in the case.

9.3 Case Management Conference.

The Court retains discretion about when and whether to convene a Case Management Conference and whether more than one conference is needed. The Court may require representatives of each party, in addition to counsel, to attend any Case Management Conference. The Court will issue a notice of the conference in accordance with Rule 6.1. The notice will indicate whether a representative of each party will be

required to attend. The Court will conduct the conference in accordance with Rule 6.2.

Unless it orders otherwise, the Court will not hear substantive motions at a Case Management Conference. The conference will not be transcribed unless a party arranges for a reporter to transcribe the proceedings or unless the Court orders otherwise.

9.4 Case Management Order.

The Court will issue a Case Management Order. The order will address the issues developed in the Case Management Report and/or Case Management Conference, as well as any other issues that the Court deems appropriate. Any party may move to modify the terms of the Case Management Order on a showing of good cause, but may do so only after consultation with all other parties.

RULE 10: DISCOVERY

10.1 General principles.

The parties should cooperate to ensure that discovery is conducted efficiently. Courtesy and cooperation among counsel advances, rather than hinders, zealous representation.

10.2 Document preservation.

As soon as practicable, but no later than seven days before the Case Management Meeting described in Rule 9.1, counsel must discuss with their clients:

(a) which custodians might have discoverable electronically stored information (ESI);

(b) the sources and location of potentially discoverable ESI;

(c) the duty to preserve potentially discoverable materials; and

(d) the logistics, burden, and expense of preserving and collecting those materials.

These requirements do not supplant any substantive preservation obligations that might be established by other sources of law.

10.3 Discovery management.

Counsel are required, if possible, to fully discuss discovery management at the Case Management Meeting. As stated in Rule 9.1(c), the

parties may conduct a second meeting, no later than thirty days after the Case Management Meeting, to complete their discussion of discovery management. The topics to be discussed include those found in Rules 10.3 through 10.8.

Overall, Rules 10.3 through 10.8 are designed for the parties to set expectations, with reasonable specificity, about what information each party seeks and about how that information will be retrieved and produced. The parties should discuss at least the following topics:

(a) Proportionality.

Counsel should discuss the scope of discovery, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the burden and expense of the expected discovery compared with its likely benefit, the importance of the issues at stake in the litigation, and the importance of the discovery for the adjudication of the merits of the case.

(b) Phased discovery.

Counsel should consider whether phased discovery is appropriate and, if so, discuss proposals for specific phases.

(c) ESI.

Counsel should prepare an ESI protocol—an agreement between the parties for the identification, preservation, collection, and production of ESI. The ESI protocol will vary on a case-by-case basis, but the discussion about ESI should include at least the following subjects:

(1) the specific sources, location, and estimated volume of ESI;

(2) whether ESI should be searched on a custodian-by-custodian basis and, if so, (a) the identity and number of the custodians whose ESI will be searched, and (b) search parameters;

(3) a method for designating documents as confidential;

(4) plans and schedules for any rolling production;

(5) deduplication of data;

(6) whether any device(s) need to be forensically examined and, if so, a protocol for the examination(s);

(7) the production format of documents;

(8) the fields of metadata to be produced; and

(9) how data produced will be transmitted to other parties (e.g., in read-only media; segregated by source; encrypted or password protected).

Counsel should jointly prepare a written discovery protocol promptly after they complete their discovery-management discussions. The discovery protocol should not be filed with the Court unless otherwise ordered.

10.4 Presumptive limits.

(a) Discovery period.

The Rules do not discourage the parties from beginning discovery before entry of the Case Management Order, but the presumptive discovery period, including both fact and expert discovery, is seven months from the date of the Case Management Order. That period may be lengthened or shortened in consideration of the claims and defenses of any particular case, but any significantly longer discovery period will require good cause.

Each party is responsible for ensuring that it can complete discovery within the time period in the Case Management Order. In particular, interrogatories, requests for production, and requests for admission should be served early enough that answers and responses will be due before the discovery deadline ends.

Absent extraordinary cause, a motion that seeks to extend the discovery period or to take discovery beyond the limits in the Case Management Order must be made before the discovery deadline. The motion must explain the good cause that justifies the relief sought. The motion must also demonstrate that the parties have pursued discovery diligently.

(b) Written discovery.

Unless otherwise permitted by the Court, a party may serve no more than twenty-five interrogatories on each party. Each subpart of an interrogatory counts as a separate interrogatory for purposes of this limit. The same limit applies to requests for admission.

(c) Depositions.

A party may take no more than twelve fact depositions in the absence of an order by the Court. For purposes of counting depositions taken by any party, for depositions conducted pursuant to Rule 30(b)(6), each period of seven hours of testimony will count as a single deposition, regardless of the number of designees presented during that seven-hour period.

(d) Agreement, reduction, and modification of limits.

The Court encourages the parties to agree, where appropriate, on reductions to the presumptive limits stated above. The presumptive limits will be increased only upon a showing of good cause.

If the parties agree to conduct discovery after the discovery deadline, but the parties do not seek an order that allows the discovery, then the Court will not entertain a motion to compel or a motion for sanctions in connection with that discovery.

10.5 Privilege logs.

(a) Purpose.

This rule supplements Rule 26(b)(5) of the Rules of Civil Procedure.

(b) Form.

Parties are encouraged to agree on the form of privilege logs and on the date on which privilege logs will be served. The parties should select a format that limits unnecessary expense and burden of producing a privilege log. Each privilege log should be organized in a manner that facilitates a discussion among counsel on whether documents contain privileged or work-product material. The parties should discuss specifically (1) whether particular categories of documents—such as any attorney-client privileged communications or attorney work-product material generated after the action began, or communications on a certain subject—should be omitted from privilege logs; and (2) whether entries in the privilege log should be arranged by topic or category.

10.6 Agreements to prevent privilege and work-product waiver.

The Court encourages the parties to agree to an order that provides for the non-waiver of the attorney-client privilege or work-product protection in the event that privileged or workproduct material is inadvertently produced.

10.7 Depositions.

(a) Time limits.

Unless the parties agree otherwise, a deposition is limited to seven hours of on-the-record time. The Court may extend any seven-hour period for good cause.

(b) Conduct.

(1) Counsel should cooperate to schedule depositions.

(2) Counsel must not direct a witness to refrain from answering a question unless one or more of the following three situations applies: (i) counsel objects to the question on the ground that the answer is protected by a privilege or another discovery immunity, (ii) counsel proceeds immediately to seek relief under Rules 26(c) or 37(d) of the Rules of Civil Procedure, or (iii) counsel objects to a question that seeks information in contravention of a Court-ordered limitation on discovery.

(3) Objections should be succinct and state only the basis for the objection. The Court does not tolerate speaking objections.

(4) Counsel and any witness may not engage in private, off-the-record conferences while a question is pending, except to decide whether to assert a privilege, discovery immunity, or Court-ordered limitation on discovery.

(5) The Court may impose an appropriate sanction, including the reasonable attorney fees incurred by any party, based on conduct that impedes, delays, or frustrates the fair examination of a deponent.

(c) Exhibits.

(1) A copy of any document shown to a deponent must be provided to counsel for each party either before the deposition starts or at the same time that the document is given to the deponent.

(2) Deposition exhibits should be numbered consecutively throughout discovery without restarting numbers by the deposition being taken or by the party that introduces the exhibit. When there is the potential for simultaneous depositions, the parties should allocate a range of potential exhibit numbers among the parties. To the extent practical, once assigned an exhibit number, a document utilized during a deposition should retain that deposition exhibit number in all subsequent discovery.

(d) Rule 30(b)(6) depositions.

(1) This rule is designed to encourage parties to resolve disputes about the scope of Rule 30(b)(6) depositions.

(2) After a party serves a Rule 30(b)(6) deposition notice, the organization to which the notice is issued should present any objections to the noticing party within a reasonable time of service and sufficiently in advance of the deposition.

(3) Counsel for the noticing party and for the organization to which the notice was issued must then meet and confer in good faith to resolve any disputes over the topics for the deposition.

(4) If the parties cannot agree, then the dispute will be resolved under the procedures described in Rule 10.9.

(5) The parties should also discuss and attempt to agree on whether a Rule 30(b)(6) deponent may be asked questions about the deponent's personal knowledge. Absent an agreement to the contrary, any deposition of a Rule 30(b)(6) designee in his or her individual capacity should be taken separately from the Rule 30(b)(6) deposition.

(6) See Rule 10.4(c) for the manner of counting depositions taken under Rule 30(b)(6) of the Rules of Civil Procedure.

10.8 Expert discovery.

(a) Procedures.

The parties must attempt to agree on procedures that will govern expert discovery including any limits on the number of experts and/or the number of expert depositions. In the absence of agreement, the Case Management Report should list the parties' respective positions on expert discovery. The parties may elect to exchange disclosures only, or they may elect to exchange reports in addition to or instead of disclosures. The procedures may include, but are not limited to, the following:

(1) Expert reports.

If the parties elect to exchange expert reports as allowed by Rule 26(b)(4) of the Rules of Civil Procedure, then the parties are encouraged to agree that the name of each expert, the subject matter on which the expert is expected to testify, and the expert's qualifications be exchanged thirty days prior to service of the report.

(2) Timing and manner of disclosure.

If the parties elect not to exchange expert reports, then they are still encouraged to agree on a schedule for exchange of expert information in the form of expert disclosures. In the absence of an agreement, the Court will establish a sequence in the Case Management Order.

(3) Facts and data considered by the witness.

The parties should attempt to agree on whether and when they will provide copies of previously unproduced materials that an expert witness considers in forming his or her opinion.

(b) Expert depositions.

Unless the parties agree otherwise, each expert witness may be deposed by a party adverse to the party designating the expert. The expert witness is only subject to a single deposition at which all adverse parties may appear.

10.9 Discovery motions.

(a) Application.

This rule applies to motions under Rules 26 through 37 and Rule 45 of the Rules of Civil Procedure. References to "party" or "parties" in this rule include non-parties subject to subpoena under Rule 45 of the Rules of Civil Procedure.

(b) Pre-filing requirements.

(1) Telephonic consultation with presiding Business Court judge.

Before a party files a motion related to discovery, the party must initiate a telephone conference among counsel and the presiding Business Court judge about the dispute. To initiate this conference, a party must e-mail a summary of the dispute to the judicial assistant and law clerk for the presiding Business Court judge and to opposing counsel. The summary may not exceed seven hundred words; the certificate described in Rule 10.9(b)(2) does not count against this limit. Any other party may submit a response to the summary; the response may not exceed seven hundred words and must be e-mailed to the judicial assistant and opposing counsel within seven calendar days of when the initial summary was e-mailed. Word limits are to be calculated in accordance with Rule 7.8. No replies are allowed.

After the summary and any response(s) are submitted, the Court will either schedule a telephone conference with counsel to discuss the dispute, order the parties to file a motion and brief regarding the dispute or provide additional materials, or issue an order with further instructions. If the Court elects to conduct a telephone conference, then the Court may decide the parties' dispute during the conference.

(2) Certification of good-faith effort to resolve the dispute.

When a party requests a telephonic conference under Rule 10.9(b)(1), the party must also submit to the Court a certification that, after personal consultation and diligent attempts to resolve

differences, the parties could not resolve the dispute. The certificate must state the date(s) of the conference, which attorneys participated, and the specific results achieved. The certificate should say, if applicable, whether the parties discussed cost-shifting, proportionality, or alternative discovery methods that might resolve the dispute. This certificate may not exceed three hundred words and should state facts without argument.

(c) Briefs on discovery motions.

If, after the Court conducts a telephonic conference described in section (b)(1), the parties still cannot resolve their dispute or if the Court declines to rule on the dispute, then a party may file a discovery motion. The requirements of Rule 7 apply to any such motion, except that: (1) the Court may modify the briefing schedule and limits on briefs in its instructions after the Rule 10.9(b)(1) consultation; (2) unless the Court orders otherwise, the supporting brief and any responsive brief may each not exceed 3,750 words; and (3) reply briefs will only be permitted if the Court requests on its own initiative or grants a moving party leave to file a reply upon a showing of good cause.

(d) Cost-shifting requests.

If a party contends that cost shifting is warranted as to any discovery sought, then the party's brief should address estimated costs of responding to the requests and the proportionality of the discovery sought. Counsel's estimate must have a reasoned factual basis, and the Court may require that any such basis be demonstrated by affidavit.

(e) Depositions.

This rule does not preclude parties from seeking an immediate telephone ruling from the Court on any dispute that arises during a deposition that justifies such a conference with the Court.

RULE 11: MEDIATION

11.1 Mandatory mediation.

All mandatory complex business cases and cases assigned to a Business Court judge pursuant to Rule 2.1 of the General Rules of Practice are subject to the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions. Although the statewide mediation rules require participation in a mediation utilizing a certified mediator unless the Court orders otherwise on a showing of good cause, the parties may engage in multiple mediated settlement conferences before the same or different mediators.

11.2 Selection and appointment of mediator.

The parties should attempt to reach agreement on a mediator. The Case Management Report should contain either the parties' agreement or, in the absence of an agreement, each party's nominee of a certified mediator for Court appointment. If all parties cannot agree on a mediator, then the Court will appoint a mediator from the list of certified mediators maintained by the North Carolina Dispute Resolution Commission.

11.3 Report of mediator.

Within ten days of the conclusion of the mediation, the mediator must mail or e-mail a copy of his or her report to the Court, in addition to filing the report with the Clerk of Superior Court in the county of venue.

11.4 Notification of settlement.

The parties are encouraged to keep the Court apprised of the status of settlement negotiations and should notify the Court promptly when the parties have reached a settlement.

RULE 12: PRETRIAL AND TRIAL

12.1 Case-specific pretrial and trial management.

The Court may modify the deadlines and requirements in this rule as the circumstances of each case dictate.

12.2 Trial date.

The Court will establish a trial date for every case. The Court may establish that date in the Case Management Order or otherwise. The Court ordinarily will not set a trial to begin fewer than sixty days after the Court issues a ruling on any post-discovery dispositive motions.

Trial dates should be considered peremptory settings. Any party who foresees a potential conflict with a trial date should advise the Court no later than fourteen days after being notified of the trial date. In addition, after the Court sets a trial date, counsel of record should avoid setting any other matter for trial that would conflict with the trial date. Absent extraordinary and unanticipated events, the Court will not consider any continuance because of conflicts of which it was not advised in conformity with this rule.

12.3 Pretrial process.

The following chart sets forth standard pretrial activity with presumptive deadlines. As stated in Rule 12.1, the Court may modify any

or all of these deadlines and requirements as the circumstances in a case dictate:

45 days before pretrial hearing	Trial exhibits (or a list of exhibits identified by Bates number if the exhibits were exchanged in discovery) and witness lists served on opposing parties
30 days before pretrial hearing	Deposition designations served on opposing parties
21 days before pretrial hearing	Pretrial attorney conference Deposition counter-designations and objections to deposition designations served on opposing parties Supplemental trial exhibit and witness lists served on opposing parties
17 days before pretrial hearing	Objections to trial exhibits served on opposing parties
14 days before pretrial hearing	Motions in limine and briefs in support, if any, filed and served Proposed pretrial order filed and served
7 days before pretrial hearing	Responses to motions in limine filed and served
No later than 14 days before trial	Pretrial hearing
7 days before trial	Trial brief, if any, filed and served Proposed jury instructions filed and served Proposed findings of fact and conclusions of law, if necessary, filed and served Submit joint statement of any stipulated facts

12.4 Pretrial attorney conference.

Counsel are responsible for conducting a pretrial conference. At the conference, the parties should discuss the items listed in the Court's

form pretrial order. Lead trial counsel (and local counsel, if different) for each party must participate in the conference. The conference may be an in-person conference or conducted through remote means.

12.5 Proposed pretrial order.

Counsel are responsible for preparing a proposed pretrial order. Appendix 5 to the Rules contains a template proposed pretrial order. The parties are encouraged to use the form order to prepare their own order but may also deviate from the form order as the nature of the case dictates. The proposed order should generally include the following items:

(a) stipulations about the Court's jurisdiction over the parties and the designation and proper joinder of parties;

(b) a list of trial exhibits (other than exhibits that might be used for rebuttal or impeachment) and any objections to those exhibits;

(c) the timing and manner of the exchange of demonstrative exhibits or any proposed exhibits not produced in discovery including whether demonstrative exhibits will be used in opening statements;

(d) a list of trial witnesses, including witnesses whose testimony will be presented by deposition;

(e) a list of outstanding motions and motions that might be filed before or during trial;

(f) a list of issues to be tried, noting (if needed) which issues will be decided by the jury and which will be decided by the Court;

(g) the technology that the parties intend to use, including whether that technology will be provided by the Court or by the parties;

(h) whether the parties desire to use real-time court reporting and, if so, how the parties will apportion the costs of that reporting;

(i) any case-specific issues or accommodations needed for trial, such as use of interpreters, use of jury questionnaires, or measures to be employed to protect information that might merit protection under Rule 26(c)(vii) of the Rules of Civil Procedure;

(j) a statement that all witnesses are available and the case is trial-ready;

(k) an estimate of the trial's length; and

(l) a certification that the parties meaningfully discussed the possibility and potential terms of settlement at the pretrial attorney conference.

12.6 Deposition designations.

If a party desires to present deposition testimony at trial, then the party must designate that testimony by page and line number of the deposition transcript. A party served with deposition designations may serve objections and counter-designations; the objecting party must identify a basis for each objection.

All designations, counter-designations, and objections should be exhibits to the proposed pretrial order. In addition, the party that designates deposition testimony to which another party objects must provide the presiding judge with a chart in Microsoft Word format that lists (a) the testimony offered to which another party objects, (b) the objecting party, (c) the basis for the objection, and (d) a blank line on which the presiding judge can write his or her ruling.

12.7 Pretrial hearing.

The Court will conduct a pretrial hearing no later than fourteen days before trial. Lead counsel (and local counsel, if different) for each party must attend the hearing in person. The Court may order a party with final settlement authority to attend the pretrial hearing, but no party will be required to attend unless ordered by the Court. The pretrial hearing may include any matter that the Court deems relevant to the trial's administration, including but not limited to:

(a) a discussion of the items in the proposed pretrial order;

(b) argument and ruling on any pending motions and objections, including objections to exhibits and deposition designations included in the proposed pretrial order;

(c) the resolution of any disagreement about the issues to be tried;

(d) unique jury issues, such as preliminary substantive jury instructions, juror questionnaires, or jury sequestration;

(e) the use of technology;

(f) the need for measures to protect information under Rule 26(c)(vii) of the Rules of Civil Procedure; and

(g) whether any further consideration of settlement is appropriate.

12.8 Final pretrial order.

The Court will enter a final pretrial order.

12.9 Motions in limine.

Briefs regarding motions in limine are not required if the grounds for the motion are evidenced by the motion itself. Opening and response briefs may not exceed 3,750 words. Reply briefs will only be permitted in exceptional circumstances with the Court's permission or at the request of the Court. The Court may elect to withhold its ruling on a motion in limine until trial, and any ruling the Court may elect to make on a motion in limine prior to trial is subject to modification during the course of the trial.

12.10 Jury instructions.

(a) Timing.

When filing proposed jury instructions, a party must also e-mail a copy of the proposed jury instructions in Microsoft Word format to the judicial assistant for the presiding Business Court judge.

(b) Issues.

In addition to the form as provided below, the jury instructions must state the proposed issues to be submitted to the jury.

(c) Form.

(1) Every instruction should cite to relevant authority, including but not limited to the North Carolina Pattern Jury Instructions.

(2) Each party should file two different copies of its proposed instructions: one copy with the citations to authority, and one copy without those citations.

(3) Proposed instructions should contain an index that lists the instruction number and title for each proposed instruction.

(4) Each proposed instruction should be on its own separate page, should be printed at the top of the page, and should receive its own number. The proposed instructions should be consecutively numbered.

(5) If the parties propose a pattern jury instruction without modification to that instruction, then the parties may simply refer to the instruction number. If the parties propose a pattern instruction with any modification, then the parties should clearly identify that modification.

(d) Preliminary instructions.

The parties may further propose that the Court provide the jury preliminary instructions prior to the presentation of the evidence. In that event, the parties must provide the proposed form of any such preliminary instructions and the parties' proposal as to the time at which such preliminary instructions will be presented.

12.11 Proposed findings of fact and conclusions of law.

The Court may require each party in a non-jury matter to file proposed findings of fact and conclusions of law.

12.12 Trial briefs.

Unless ordered by the Court, a party may, but is not required to, submit a trial brief. A trial brief may address contested issues of law and anticipated evidentiary issues (other than those raised in a motion in limine). The trial brief need not contain a complete recitation of the facts of the case. A party may not file a brief in response to another party's trial brief unless the Court requests a response. Unless otherwise ordered by the Court, a trial brief is not subject to the word limits for briefs under Rule 7.

12.13 Stipulated facts.

If the parties intend to file a joint statement of any stipulated facts other than any stipulated facts listed in the proposed pretrial order, then the parties must file the statement before the trial begins. The statement should also explain when and how the parties propose that the stipulations be presented to the jury. If the parties cannot agree on when and how the stipulated facts should be presented to the jury, then the Court will decide this issue before jury selection.

RULE 13: REVIEW OF ADMINISTRATIVE ACTIONS

13.1 Generally.

This rule applies to the Court's review of a final agency decision, including cases brought under N.C. Gen. Stat. § 105-241.16 ("administrative appeals"). This rule does not apply to civil actions brought pursuant to N.C. Gen. Stat. § 105-241.17.

13.2 Case management.

Unless the Court orders otherwise, Rules 9 and 11 do not apply to administrative appeals.

13.3 Record in administrative appeals.

Within fifteen days of the date of the letter from the Office of Administrative Hearings submitting the official record in an administrative appeal to the Wake County Clerk of Superior Court, the parties must meet and confer regarding any further actions that may be required to prepare the appropriate record for use in the Business Court proceeding. Within twenty days of the parties' conference discussed in the prior sentence, the parties must either (a) file a stipulation that they agree to the contents of the record or (b) jointly submit a final record that, as appropriate, modifies the record submitted by the Office of Administrative Hearings. If the parties cannot agree on a final record, then the parties must notify the Court of the disagreement and seek the Court's assistance in resolving the disagreement.

13.4 Briefs.

The petitioner in an administrative appeal must file its brief no later than thirty days after the date that the parties file a stipulation that they are in agreement as to the contents of the record or the date the final record is submitted to the Court under Rule 13.3. The respondent may file its brief no later than thirty days after service of the petitioner's brief. The petitioner may file a reply brief no later than ten days after service of the respondent's brief. All briefs must comply with the formatting and length requirements of Rule 7.

13.5 Hearings.

The Court, in its discretion, may conduct a hearing on an administrative appeal after briefing is completed.

RULE 14: APPEALS

14.1 How an appeal is taken.

An appeal from an order or judgment of the Court is taken by filing a written notice of appeal with the Clerk of Superior Court in the county of venue. The notice of appeal must be filed within the time, in the manner, and with the effect provided by the controlling statutes and the North Carolina Rules of Appellate Procedure. The parties should promptly file a copy of the notice of appeal with the Court.

14.2 Orders and opinions issued by the Appellate Division.

If an appellate court issues an order or opinion in a case that is simultaneously proceeding (in whole or in part) in the Court, then the parties are encouraged to submit a copy of the order or opinion to the Court by e-mailing it to the law clerk for the presiding Business Court judge.

The parties are also encouraged to notify the law clerk for the presiding Business Court judge if the appellate process for an action has reached its conclusion. This notification allows the Court to close cases that are no longer being litigated.

14.3 Procedures on remand.

If an appellate court orders that a case on appeal be remanded to the Court for further proceedings, then—unless the Court instructs otherwise—the parties must confer within fifteen days of the issuance of the mandate pursuant to Appellate Rule 32 about the case-management issues that apply to the proceedings upon remand. The parties must submit a report to the Court within ten days of the meeting that proposes a case-management structure for the proceedings.

RULE 15: RECEIVERS

15.1 Applicability.

(a) This rule governs practice and procedure in receivership matters before the Court.

(b) The term "receivership estate," as used in this rule, refers to the entity, person, or property subject to the receivership.

15.2 Selection of receiver.

On motion or on its own initiative, and for good cause shown, the Court may appoint a receiver as provided by law.

(a) Qualifications.

A receiver must have sufficient competence, qualifications, impartiality, and experience to administer the receivership estate and otherwise perform the duties of the receiver.

(b) Motion to appoint receiver.

When a party moves the Court to appoint a receiver, the party should propose candidates to serve as receiver. The motion should explain each candidate's qualifications. The motion should also disclose how the receiver will be paid, including the proposed funding source. A proposed order describing the proposed receiver's duties, powers, compensation, and any other issues relevant to the proposed receivership must be filed with the motion to appoint a receiver. Non-movants may respond to the motion within twenty days of service of the motion. The Court may appoint one of the proposed receivers or, in its discretion, a different receiver. The Court may also propose or require a different fee arrangement for the receiver.

(c) Ex parte appointment of receiver.

The Court will not appoint a receiver on an ex parte basis unless the moving party shows that a receiver is needed to avoid irreparable harm. A receiver appointed on an ex parte basis will be a temporary receiver pending further order of the Court.

(d) Sua sponte appointment of receiver.

If the Court appoints a receiver on its own initiative, then any party may file an objection to the selected receiver and propose an alternative receiver within ten days of entry of the order appointing the receiver. The objection should contain the information listed in Rule 15.2(b) about the alternative proposed receiver.

(e) Duties, powers, compensation, and other issues.

When appointing a receiver, the Court will enter an order that outlines the receiver's duties, powers, compensation, and any other issues relevant to the proposed receivership. Appendix 2 to the Rules contains a non-exclusive list of provisions that might be appropriate for a receivership order.

15.3 Removal.

The Court may remove any receiver for good cause shown.

RULE 16: REFEREES

16.1 Appointment and removal.

At the Case Management Meeting, the parties must discuss the potential benefit of a referee and summarize their views in the Case Management Report. In addition to that discussion and report, any party may file a motion for the appointment of a referee pursuant to the Rules and to Rule 53 of the Rules of Civil Procedure. The motion should comply with Rule 53 and also contain the following:

(a) the proposed scope of the referee's authority and tasks;

(b) the grounds for reference under Rule 53(a), including, if any party has not joined in or consented to the motion, a statement of the circumstances that warrant compulsory reference pursuant to Rule 53(a)(2);

(c) the names and qualifications of any candidates that the Court should consider as a referee, as well as a statement as to whether the parties consent to each candidate;

(d) the referee's proposed compensation and the source of the compensation;

(e) any requests for special powers to be provided under Rule 53(e); and

(f) if any party has not joined in or consented to the motion, then a certification that counsel for the moving party has consulted with counsel for all non-moving parties and a statement of the position of any non-moving parties.

The Court may appoint a referee on its own motion as provided in Rule 53(a)(2). In appropriate cases when reference is not compulsory, the Court may recommend to the parties the use of a referee if the referee would aid judicial economy.

16.2 Discovery referees.

Counsel are encouraged to give special consideration to the appointment of discovery referees, particularly in cases expected to involve large amounts of electronically stored information or when there may be differing views regarding the use of keyword searches, utilization of predictive coding, or the shifting or sharing of costs associated with large-scale or costly discovery. The parties are encouraged to be creative and flexible in utilizing discovery referees to avoid unnecessary cost and motion practice before the Court.

16.3 Scope of referee's duties.

When appointing a referee, the Court will enter an order that outlines the referee's duties, powers, compensation, and any other issues relevant to the proposed work of the referee. Appendix 3 to the Rules contains a non-exclusive list of terms that might be appropriate for an order that appoints a referee.

16.4 Agreement to submit to referee's final decision.

When a referee issues a final report, the parties may agree to forgo judicial review of that report. This type of agreement must be embodied in a stipulation filed with the Court that (1) specifies the case, proceeding, claim, or issue to be submitted to the referee for final decision; (2) states that the parties to the stipulation waive the right to seek further judicial review of the referee's decision; and (3) recites that each party has consulted with counsel and agreed to the submission of the case, proceeding, claim, or issue to the referee for a final decision that will not be reviewable. For the stipulation to take effect, the Court must approve the stipulation.

STATE OF NORTH CAROLINA COUNTY OF _____ JOHN DOE, Plaintiff, v. ABC CORPORATION, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CIVIL ACTION NO.: APPENDIX 1: NOTICE OF DESIGNATION TEMPLATE

Pursuant to N.C. Gen. Stat. § 7A-45.4, [INSERT PARTY] seeks to designate the above captioned action as a mandatory complex business case. In good faith, and based on information reasonably available, [INSERT PARTY], through counsel, hereby certifies that this action meets the criteria for:

_____ Designation as a mandatory complex business case pursuant to N.C. Gen. Stat. § 7A-45.4(a), in that it involves a material issue related to:

_____ (1) Disputes involving the law governing corporations, except charitable and religious organizations qualified under N.C. Gen. Stat. § 55A-1-40(4) on the grounds of religious purpose, partnerships, and limited liability companies, including disputes arising under Chapters 55, 55A, 55B, 57D, and 59 of the General Statutes.

_____ (2) Disputes involving securities, including disputes arising under Chapter 78A of the General Statutes.

_____ (3) Disputes involving antitrust law, including disputes arising under Chapter 75 of the General Statutes that do not arise solely under N.C. Gen. Stat. § 75-1.1 or Article 2 of Chapter 75 of the General Statutes.

_____ (4) Disputes involving trademark law, including disputes arising under Chapter 80 of the General Statutes.

_____ (5) Disputes involving the ownership, use, licensing, lease, installation, or performance of

intellectual property, including computer software, software applications, information technology and systems, data and data security, pharmaceuticals, biotechnology products, and bioscience technologies.

_____ (6) Disputes involving trade secrets, including disputes arising under Article 24 of Chapter 66 of the General Statutes.

_____ (7) Contract disputes in which all of the following conditions are met:

(a) At least one plaintiff and at least one defendant is a corporation, partnership, or limited liability company, including any entity authorized to transact business in North Carolina under Chapter 55, 55A, 55B, 57D, or 59 of the General Statutes.

(b) The complaint asserts a claim for breach of contract or seeks a declaration of rights, status, or other legal relations under a contract.

(c) The amount in controversy computed in accordance with N.C. Gen. Stat. § 7A-243 is at least one million dollars ($1,000,000).

(d) All parties consent to the designation. [If all parties have not consented, indicate that the Notice of Designation is conditional pursuant to Rule 2.5.]

_____ Designation as a mandatory complex business case pursuant to N.C. Gen. Stat. § 7A-45.4(b), in that it is an action:

_____ (1) Involving a material issue related to tax law that has been the subject of a contested tax case for which judicial review is requested under N.C. Gen. Stat. § 105-241.16, or a civil action under N.C. Gen. Stat. § 105-241.17 containing a constitutional challenge to a tax statute.

_____ (2) Described in subsection (1), (2), (3), (4), (5), or (8) of N.C. Gen. Stat. § 7A-45.4(a) in which the amount in controversy computed in accordance with N.C. Gen. Stat. § 7A-243 is at least five million dollars ($5,000,000).

Briefly explain why the action falls within the specific categories checked above and provide information adequate to determine that the case has been timely designated (e.g., dates of filing or service of the complaint or other relevant pleading). If necessary, include additional information that may be helpful to the Court in determining whether this case is properly designated a mandatory complex business case.

Attach a copy of all significant pleadings filed to date in this action (e.g., the complaint and relevant pending motions).

[INSERT DATE AND SIGNATURE BLOCKS]

STATE OF NORTH CAROLINA COUNTY OF _____ JOHN DOE, Plaintiff, v. ABC CORPORATION, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CIVIL ACTION NO.: APPENDIX 2: CASE MANAGEMENT REPORT TEMPLATE

The undersigned counsel of record began the Case Management Meeting on [INSERT DATE] and submit this report on [INSERT DATE] as required by Business Court Rule 9.

1. Summary of the case.

Each party (or group of parties represented by common counsel) should summarize the dispute from its (or their) perspective. No summary by any party or group of parties may exceed 250 words. The parties may also agree on a joint summary not to exceed 500 words.

2. Initial motions.

This section of the report should list whether any party plans to file a motion for emergency relief, a motion to dismiss, or any other early-stage motion. The party that plans to file the motion may provide a short explanation of the basis for the motion. That party should also list the projected date on which the motion will be filed. The report should reference any proposed modification of the time requirements or word limits for briefing. This section should also discuss whether the parties have agreed on any deadlines for amending the pleadings or adding parties and what the impact of those deadlines would be.

3. Discovery.

This section should summarize the parties' agreement and/or competing proposals for discovery. The section should cover at least the following topics:

- a proposed discovery schedule;
- an ESI protocol;
- limits on written discovery and depositions;
- any agreements related to privilege logs;

- any agreement about the effects of the inadvertent waiver of attorney-client privilege or attorney work-product; and
- expert discovery.

One or more parties may also ask the Court in the report to postpone creating a discovery schedule until after the Court decides any initial motions, including but not limited to motions to dismiss.

This section should also state whether the parties have completed their full discussion of discovery management or whether they have scheduled a second discovery-management meeting. If the parties have scheduled a second meeting, then the report must indicate which topics remain for discussion at the second meeting and identify the time by which a further report must be filed with the Court.

4. Confidentiality.

The report should indicate which parties, if any, anticipate the need for a protective order. If the parties agree that a protective order should be entered but do not agree on the terms of that order, the report should explain the nature of the disagreement and any specific language in dispute.

5. Mediation.

The report must explain whether the parties agree to early mediation and any agreements reached to facilitate an early mediation. If the parties do not agree to early mediation, then the report must confirm that counsel have discussed with their client(s) the cost of litigation and the potential cost savings that may be realized by an early mediation.

In any event, the report must include a deadline for mediation (or competing proposals) and the name of the agreed-upon mediator. If the parties do not agree on a mediator, then the report should list each party's choice of mediator.

6. Special circumstances.

(a) Class allegations.

If the complaint includes class action allegations, then the report should summarize the parties' agreement and/or competing proposals for the timing, nature, and extent of class certification discovery, how and/or whether class and merits discovery should be bifurcated or sequenced, and a proposed deadline for the plaintiff(s) to move for class certification. In the event that multiple related class actions are pending, the parties must report their views on special efforts that should be undertaken and the time for doing so, such as the appointment of lead counsel, consolidation, or coordination with proceedings in other jurisdictions.

(b) Derivative claims.

If the complaint includes derivative claims, then the report should summarize the parties' positions on whether proper demand was made. The report should also describe any agreement and/or competing proposals on any special committee investigation, any stay of proceedings, or other issues regarding the derivative claims.

(c) Related proceedings.

If there are multiple related proceedings, then the parties should state their views on what efforts, including but not limited to consolidation or shared discovery, should be undertaken.

7. Referees.

The report should identify any matter(s) that might be appropriate for reference to a referee. The parties are specifically encouraged to think creatively about how the use of a referee might expedite the resolution of the case.

8. Potential cost and time requirements of litigation.

Counsel should certify that they have conferred with their respective clients and have given their clients a good-faith estimate of the potential cost and time requirements of the litigation.

9. Other matters.

The report should identify and discuss any other matters significant to case management.

[INSERT DATE AND SIGNATURE BLOCKS]

APPENDIX 3: POTENTIAL TERMS OF RECEIVERSHIP ORDER

This appendix contains potential terms for an order under Business Court Rule 15.2(e).

1. Duties.

(a) Acceptance of receivership.

The Court's order may identify a deadline for the proposed receiver to file an acceptance of receivership and give notice of the receiver's bond if required under North Carolina law or by order of the Court. The order may require that the acceptance be served on all counsel and certify that the receiver will:

(1) act in conformity with North Carolina law and rules and orders of the Court;

(2) avoid conflicts of interest;

(3) not directly or indirectly pay or accept anything of value from the receivership estate that has not been disclosed and approved by the Court;

(4) not directly or indirectly purchase, acquire, or accept any interest in the property of the receivership estate without full disclosure and approval by the Court; and

(5) otherwise act in the best interests of the receivership estate.

(b) Notice of appointment.

The Court's order may direct a deadline for the receiver to provide notice of entry of the order of appointment to any known creditor of the receivership estate and any other person or entity having a known or recorded interest in all or any part of the receivership estate.

(c) Inventory.

The Court's order may set a deadline for the receiver to file with the Court an itemized and complete inventory of all property of the receivership estate, the property's nature and possible value as nearly can be ascertained, and an account of all known debts due from or to the receivership estate.

(d) Initial written plan.

The Court's order may set a deadline for the receiver to file an initial written plan for the receivership estate. The order may require the plan to identify:

(1) the circumstances leading to the institution of the receivership estate;

(2) whether the goal of the receivership is to preserve and operate any business within the estate, to liquidate the estate, or to take other action;

(3) the anticipated costs likely to be incurred in the administration of the receivership estate;

(4) the anticipated duration of the receivership estate;

(5) if an active business is to be operated, the number of employees and estimated costs needed to do so;

(6) if property is to be liquidated, the estimated date by which any appraisal and sale by the receiver will occur, and whether a public or private sale is contemplated; and

(7) any pending or anticipated litigation or legal proceedings that may impact the receivership estate.

(e) Updated plans.

The Court's order may require the receiver to file updated plans on a periodic basis, such as every ninety days. The order may require that each updated plan summarize the actions taken to date measured against the previous plan, list anticipated actions, and update prior estimates of costs, expenses, and the timetable needed to complete the receivership.

(f) Periodic reports.

The Court's order may require the receiver to file periodic reports, such as every thirty days, that itemize all receipts, disbursements, and distributions of money and property of the receivership estate.

(g) Liquidation and notice.

The Court's order may provide terms relating to the liquidation of the receivership estate—including terms that require the receiver to afford reasonable opportunity for creditors to present and prove their claims pursuant to N.C. Gen. Stat. § 1-507.6. The order may also require the receiver, upon notice to all parties, to request that the Court fix a date by which creditors must file a written proof of claim and to propose to the Court a schedule and method for notice to creditors.

(h) Report of claims.

The Court's order may provide a deadline for the receiver to file a report as to claims made pursuant to N.C. Gen. Stat. § 1-507.7, with service on all parties and on all persons or entities who submitted a proof of claim. The Court's order may set out guidelines for the report, such as requiring recommendations on the treatment of claims (i.e., whether they should be allowed or denied (in whole or in part) and the priority of such claims) and setting a deadline for objections to the report.

(i) Final report.

The Court's order may require the receiver, before the receiver's discharge, to file a final written report and final accounting of the administration of the receivership estate.

2. Powers.

The Court may issue an order that sets forth the powers of the receiver, in addition to the powers and authorities available to a receiver under statutory and/or common law. The powers stated in the order may include the power:

- to take immediate possession of the receivership assets, including any books and records related thereto;
- to dispose of all or any part of the assets of the receivership estate wherever located, at a public or private sale, if authorized by the Court;
- to sue for and collect all debts, demands, and rents of the receivership estate;
- to compromise or settle claims against the receivership estate;
- to enter into such contracts as are necessary for the management, security, insuring, and/or liquidation of the receivership estate;
- to employ, discharge, and fix the compensation and conditions for such agents, contractors, and employees as are necessary to assist the receiver in managing, securing, and liquidating the receivership estate; and
- to take actions that are reasonably necessary to administer, protect, and/or liquidate the receivership estate.

3. Compensation and expenses.

(a) Timing of compensation application.

The Court's order may require a receiver that seeks fees to file an application with the Court and serve a copy upon all parties and all creditors of the receivership estate. The application may be made on an interim or final basis and must advise the parties and creditors of the receivership estate that any objection to the application must be filed within seven days of service of the notice.

(b) Substance of application.

The Court's order may require that a receiver's application for fees include a description in reasonable detail of the services rendered, time expended, and expenses incurred; the amount of compensation and expenses requested; the amount of any compensation and expenses previously paid to the receiver; the amount of any compensation and

expenses that the receiver has or will be paid by any source other than the receivership estate; and a disclosure of whether the compensation would be divided or shared with anyone other than the receiver.

(c) Notice of hearing on application.

The Court's order may require the receiver to notify all creditors of the receivership estate of the date, time, and location of any hearing that the Court sets on the receiver's fee application.

APPENDIX 4: POTENTIAL TERMS OF ORDER APPOINTING REFEREE

This appendix contains potential terms for an order under Business Court Rule 16.3.

1. Transcription.

The Court may order that, when a referee receives witness testimony:

- the testimony be transcribed by a court reporter and filed in the action pursuant to Rule 53(f)(3) of the Rules of Civil Procedure;

- any request to transcribe a proceeding be made at least fourteen days before the proceeding;

- if the referee or the Court requires transcription, then all parties to the proceedings share equally in the transcription costs; and

- if a request for transcription is not joined in by all of the parties to a case, then only those parties that request transcription will be responsible for transcription costs.

2. Reports and exceptions.

(a) Final written report.

The Court may order the referee to issue a final written report as described in Rule 53 of the Rules of Civil Procedure.

(b) Draft report.

The Court may require the referee to provide the parties with a report in draft form. The Court may allow parties to submit exceptions to the draft report to the referee within a particular deadline and to allow responses to the exceptions within a deadline.

(c) Exceptions to final report.

The Court may require that exceptions to a final report be heard exclusively by the Court. The Court may set a deadline for exceptions to final reports.

3. Compensation.

The Court may specify the terms of a referee's compensation. The Court may require that applications for advancements made pursuant to Rule 53(d) be made by the referee in writing and served on all parties. The Court may also set a deadline for any objections to the requested advancement.

STATE OF NORTH CAROLINA COUNTY OF _____ JOHN DOE, Plaintiff, v. ABC CORPORATION, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CIVIL ACTION NO.: APPENDIX 5: PROPOSED PRETRIAL ORDER TEMPLATE

Pursuant to Rule 16 of the North Carolina Rules of Civil Procedure and Rule 12.4 of theBusiness Court Rules, the parties participated in a pretrial conference on [insert date] and now submit this pretrial order.

1. Stipulations.

The parties should list stipulations on subject-matter jurisdiction, personal jurisdiction, joinder of parties, and any other salient legal and/or procedural issues on which they agree.

2. Exhibits.

The parties should attach their exhibit lists to the pretrial order. The parties should also cover at least the following topics related to exhibits:

- whether any party objects to the admission of any exhibit(s);
- whether any party objects to the authenticity of any exhibit(s); and
- the timing and manner of the exchange of demonstrative exhibits including whether demonstrative exhibits will be used in opening statements

3. Witnesses and deposition designations.

The order should contain each party's list of potential trial witnesses. The lists should identify witnesses whose testimony will be presented by deposition. The parties should also attach deposition designations, counter-designations, and related objections.

4. Motions.

The parties should list any outstanding motions and any motions that might be filed before or during trial. The list should include pending or anticipated motions in limine.

5. Issues.

The parties should list the issues to be tried, noting which issues the jury will decide and which issues the Court will decide. The parties should also describe any disagreement related to these matters.

6. Courtroom technology and other accommodations.

The parties should describe the technology that they intend to use during trial. For each technology, the parties should clarify who (the parties or the Court) will provide the technology and, if applicable, how the parties will apportion the cost of the technology. The parties should also list any case-specific accommodations needed for trial, as described in Rule 12.5(i).

7. Length and readiness.

The parties should estimate how long the trial will last. If the parties disagree on the estimate, then each party should give its own estimate. The parties should also state that all potential trial witnesses are available and that the case is trial-ready.

8. Settlement.

The parties should certify that they engaged in a meaningful settlement discussion— including the exchange of potential settlement terms—during the pretrial conference. The parties should immediately notify the Court in the event of a material change in settlement prospects.

[INSERT SIGNATURES OF ALL PARTICIPATING COUNSEL]

THE FOLLOWING ORDER, SIGNED BY THE COURT ON 24 OCTOBER 1988, WAS INADVERTENTLY OMITTED FROM PUBLICATION IN THE NORTH CAROLINA REPORTS.

ORDER ADOPTING
RULES OF CONTINUING JUDICIAL EDUCATION

WHEREAS a high level of competence among the members of the judiciary contributes substantially to the quality of justice administered in the courts of North Carolina, and

WHEREAS, by the adoption of Canon 3 of the Code of Judicial Conduct, this Court has required judges, as a duty of judicial office, to "maintain professional competence" in the law, and

WHEREAS continuing judicial education for judges is essential to the maintenance of satisfactory levels of professional competence in the judiciary necessary to fulfill the judiciary's obligation to the public and to maintain public confidence in the judiciary,

NOW, THEREFORE, pursuant to the inherent authority of the Supreme Court of North Carolina to administer the judicial affairs of the State and to prescribe standards of judicial conduct for the guidance of all members of the judiciary, the Supreme Court of North Carolina, in conference, does hereby officially adopt the following rules concerning continuing judicial education for members of the North Carolina judiciary.

Adopted by the Court in conference this 24th day of October, 1988.

JAMES G. EXUM, JR.
Chief Justice
Supreme Court of North Carolina
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 24th day of October, 1988.

J. GREGORY WALLACE
Clerk of the Supreme Court

RULES OF CONTINUING JUDICIAL EDUCATION

I. COVERAGE

These rules are applicable only to North Carolina District Court, Superior Court, and Court of Appeals Judges and to the Chief Justice and Associate Justices of the Supreme Court of North Carolina, including retired judges and justices qualified as emergency or recalled judges or justices.

Upon leaving judicial service, a judge or justice shall be bound by the rules of the Supreme Court of North Carolina for continuing legal education of members of the Bar.

Continuing legal education hours earned prior to entering judicial service and judicial education hours earned prior to leaving judicial service shall be recognized and accepted on a pro rata basis by the appropriate accrediting and reporting agency.

II. REQUIREMENTS

A. Every judge in the trial division shall, within the first year after appointment or election, attend a course of instruction or orientation for new judges provided by the Administrative Office of the Courts. Attendance will be counted as a part of the hours of instruction required for the biennium in which the instruction is received.

B. Each judge and justice of the trial and appellate division shall attend at least thirty (30) hours of instruction in one or more approved continuing legal or judicial education programs in each biennium;effective with the biennium beginning 1 July 1989 and ending 30 June 1991.

C. At least twenty (20) of the thirty (30) hours required shall be continuing judicial education courses designed especially for judges and attended exclusively or primarily by judges. All Superior Court Judges are expected to attend the scheduled Superior Court Judges Conferences and the programs there presented. All District Court Judges are expected to attend the scheduled District Court Judges Conferences and the programs there presented.

D. Judges participating as teachers, lecturers, discussion leaders, or panelists in an approved continuing judicial or legal education program shall receive five hours credit for each hour of actual presentation time. Presentation of the same material on

subsequent occasions shall accrue credit for the actual time of presentation only.

E. Continuing judicial education hours shall be computed by the following formula:

$$\frac{\text{Sum of the Total Minutes of Actual Instruction}}{60} = \text{Total Hours}$$

The instruction may be in no less than fifteen (15) minute segments. Only actual instruction shall be included in computing the total hours of instruction. The following shall not be included: introductory remarks, breaks, business meetings, keynote speeches, and speeches in connection with meals.

Except as otherwise provided in this subsection E and the preceding subsection D, computation for credit of continuing legal education courses shall be computed in accordance with Regulation 5 of the Board of Continuing Legal Education of the North Carolina State Bar.

III. ACCREDITED SPONSORS

A. Continuing legal education programs offered by the Conference of Superior Court Judges or the Conference of District Court Judges or others offered to judges by the Administrative Office of the Courts or the Institute of Government of the University of North Carolina at Chapel Hill are approved for credit as continuing judicial education under these rules.

B. All continuing legal education programs approved by the Board of Continuing Legal Education of the North Carolina State Bar are approved for credit as continuing legal education under these rules.

C. Programs offered for judges by any law school accredited by the American Bar Association and the following national providers of judicial education are approved for credit as continuing judicial education under these rules:

1. National Judicial College
2. American Academy of Judicial Education
3. National Council of Juvenile and Family Court Judges
4. American Bar Association
5. Institute for Court Management of the National Center for State Courts
6. Institute of Judicial Administration
7. National Institute of Justice
8. American Judges Association

D. Postgraduate law degree programs conducted by a law school accredited by the American Bar Association.

E. Any program not approved under A, B, C, or D above may be approved by the Chief Justice upon application by a judge who has attended or desires to attend the program. To be approved, a program must meet the following standards:

1. It must be an organized program of learning which contributes directly to the professional competency of a judge.

2. It must deal primarily with matter directly related to law or related fields or to the professional responsibility, administrative duties, or ethical obligations of a judge.

3. Instructors in the program must be qualified by practical or academic experience to teach in the topic or area of discipline covered by the course.

4. Thorough, high quality, written topic materials and/or outlines must be distributed to judges attending the program.

IV. REPORTING

A. The Administrative Office of the Courts is designated as the office in which all records, reports, and doc.uments pertaining to continuing judicial education shall be filed and compiled.

B. Each judge must report in writing to the Administrative Office of the Courts, no later than July 31 following the end of each year of an educational biennium, the continuing education programs he has attended. Reports may be made sooner after attendance, and the Administrative Office of the Courts will maintain a cumulative record of such reports for the submitting judges. One year after the beginning of each educational biennium, the Administrative Office of the Courts shall notify all judges and justices subject to these rules that reports are required and that they are due by the following July 31. If a program is other than a continuing judicial education program offered by the Conference of Superior Court Judges, the Conference of District Court Judges, or the Administrative Office of the Courts or the Institute of Government, the judge must attach a copy of the program brochure or other material which outlines the program presentation and identifies the instructors, unless the program is certified as having previously received approval of the Chief Justice, pursuant to

Section III.E. Forms for the report will be provided by the Administrative Office of the Courts.

C. As soon as practical after August 1 of the second year of each educational biennium, the Administrative Office of the Courts shall notify any judge or justice in writing of his or her delinquency. Any such delinquent judge or justice shall have sixty (60) days within which to comply with the requirements of these rules and notify the Administrative Office of the Courts of his or her compliance.

D. The Director of the Administrative Office of the Courts shall report to the Chief Justice the name of any judge or justice who does not meet the continuing judicial education requirements specified in these rules or who has not filed a timely report of his or her continuing judicial education activities, and the Chief Justice shall make such inquiry or investigation and take such action as he deems appropriate.

V. EXEMPTIONS

The Chief Justice of the Supreme Court shall have the authority to relieve any judge or justice of the requirement of meeting the minimum hours required by these rules for undue hardship by reason of disability or other cause.

VI. EXPENSES

The Administrative Office of the Courts shall fund the regular judicial conferences of the Judges of the Superior and District Court divisions and shall ensure that a sufficient number of hours of instructional material are provided to permit the judges of the trial division regularly attending thconferences to satisfy the requirements of this Order and shall provide reimbursement for expenses incurred in attending the conferences in accordance with its regular policies and practices.

For Judges and Justices of the Appellate Division, the Administrative Office of the Courts shall ensure the availability of a sufficient number of hours of instruction to satisfy the requirements of the Order either by providing and funding Appellate Court conferences or providing funding for alternative methods of satisfying such requirements in accordance with its regular policies and practices.

Judges and Justices attending continuing judicial education programs other than those presented at judicial conferences shall be reimbursed for their expenses in accordance with policies and practices established by the Administrative Office of the Courts, subject to the availability of funds.

Priority in allocation of funds by the Administrative Office of the Courts will be given to the regular judicial conferences of the Superior Court and District Court divisions and to other continuing judicial education programs co-sponsored by the Administrative Office of the Courts.

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

Case relied upon by Court of Appeals—inapposite—In its decision limiting the trial court's jurisdiction to enforce its own order under N.C. Rule of Civil Procedure 70, the Court of Appeals erroneously relied on an inapposite case from the N.C. Supreme Court—a case that involved the law of the case doctrine rather than a motion to enforce a court order. **Pachas v. N.C. Dep't of Health & Human Servs., 12.**

Claims dismissed—claims based on same conduct dismissed—Where the N.C. Supreme Court affirmed the trial court's dismissal of plaintiffs' antitrust claims, the Court also affirmed the dismissal of plaintiffs' unfair trade practices claims that were based on the same conduct. **Sykes v. Health Network Sols., Inc., 326.**

Claims dismissed—related Chapter 75 claims also dismissed—Where the N.C. Supreme Court affirmed the trial court's dismissal of plaintiffs' antitrust and unfair trade practices claims, the Court also affirmed the denial of declaratory relief to the extent that claim related to those Chapter 75 claims. **Sykes v. Health Network Sols., Inc., 326.**

Criminal record expunction—appeal by State—not provided in statute—Where petitioner was granted an expunction of records from a prior criminal conviction and from previously dismissed charges pursuant to N.C.G.S. §§ 15A-145.5 and 15A-146, the State did not have a right to appeal the order granting expunction. Neither N.C.G.S. § 15A-145.5 nor 15A-1445 provided the State a right to appeal. **State v. J.C., 203.**

Equally divided vote of Supreme Court—no precedential value—The N.C. Supreme Court, by an equally divided vote, affirmed the Business Court's dismissal of plaintiff's antitrust claims in a case arising from insurer conduct affecting chiropractic services. The Business Court's opinion as to those claims accordingly stood without precedential value. **Sykes v. Health Network Sols., Inc., 326.**

Jury verdict—invited error—The Supreme Court rejected defendant's argument that the jury's verdict finding him liable for securities fraud was contrary to law. Defendant requested the jury instruction of which he complained on appeal. **Piazza v. Kirkbride, 137.**

Objection below—constitutional issue—Rule 2—Defendant did not preserve for appeal the question of whether the search imposed by satellite-based monitoring was reasonable where defendant's objection below questioned the sufficiency of the evidence and did not clearly raise the constitutional issue. However, the State conceded that the trial court committed an error relating to a substantial right and the Court of Appeals did not abuse its discretion by invoking Appellate Rule 2. **State v. Bursell, 196.**

Preservation of issues—failure to raise issue at trial—no automatic preservation—An alleged violation of N.C.G.S. § 122C-266(a), concerning examination of an involuntarily committed patient by a physician, was not preserved for appellate review where respondent did not raise it during the district court hearing on her involuntary commitment. There was not automatic preservation of the issue because the statute did not require a specific act by a trial judge and did not place any responsibility on a presiding judge. **In re E.D, 111.**

WORKERS COMPENSATION—Continued

The superior court exercised its statutory discretion in ordering attorney fees to be paid to plaintiff's attorneys from the reimbursement for retroactive attendant care medical compensation. **Saunders v. ADP TotalSource Fi Xi, Inc., 29.**