NORTH CAROLINA REPORTS

VOLUME 385

SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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ALLISON J. RIGGS[2]

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SAMUEL J. ERVIN IV

Clerk
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Librarian
THOMAS P. DAVIS

Marshal
WILLIAM BOWMAN

[1] Resigned 4 September 2023. [2] Appointed 11 September 2023 and sworn in 13 September 2023.

ADMINISTRATIVE OFFICE OF THE COURTS

Director

Ryan S. Boyce

Assistant Director

Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Jennifer C. Peterson[3]
Niccolle C. Hernandez
Jennifer C. Sikes[4]

[3] Resigned 16 September 2024. [4] Appointed Assistant Appellate Division Reporter 23 September 2024.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
	R. Andrew Womble	Manteo
2	Wayland Sermons	Washington
3A	Marvin K. Blount III	Greenville
	Jeffery B. Foster	Greenville
6A	Brenda Branch	Halifax
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7A	Timothy W. Wilson	Rocky Mount
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9	John Dunlow	Oxford
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	Brian K. Wilks	Durham
	Shamieka L. Rhinehart	Durham
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3B	Joshua W. Wiley	New Bern
	Clinton D. Rowe	New Bern
4	Henry L. Stevens	Wallace
	Robert C. Roupe	Jacksonville
5	Phyllis M. Gorham[1]	Wilmington
	R. Kent Harrell[2]	Burgaw
	Frank Jones	Wilmington
8A	Imelda J. Pate	Kinston
8B	William W. Bland	Goldsboro
13A	C. Ashley Gore[3]	Whiteville
13B	Jason C. Disbrow	Southport
16B	James Gregory Bell	Lumberton
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	Third Division	
10	Paul C. Ridgeway	Raleigh
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	A. Graham Shirley	Raleigh
	Rebecca W. Holt	Raleigh
	Vinston M. Rozier	Raleigh
	Keith O. Gregory	Raleigh
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DISTRICT	JUDGES	ADDRESS
11B	Thomas H. Lock	Smithfield
	Paul A. Holcombe	Smithfield
12	James F. Ammons Jr.	Fayetteville
	Claire Hill	Fayetteville
	Gale M. Adams	Fayetteville
	George R. Hicks	Fayetteville
15A	D. Thomas Lambeth	Burlington
	Andy Hanford	Graham
16A	Stephan R. Futrell	Rockingham
	Dawn Layton	Rockingham
19B	James P. Hill	Asheboro
	W. Taylor Browne	Asheboro
19D	James M. Webb[4]	Southern Pines
	Michael A. Stone[5]	Laurinburg
20A	Kevin M. Bridges	Oakboro
	Patrick Nadolski	Mount Gilead
20B	Jonathan Perry	Monroe
	Matthew B. Smith	Monroe
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15B	R. Allen Baddour	Chapel Hill
	Alyson A. Grine	Chapel Hill
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17B	Angela B. Puckett	Westfield
18	R. Stuart Albright	Greensboro
	William Wood	Greensboro
	Lora C. Cubbage	Greensboro
	Stephanie L. Reese	High Point
	Tonia A. Cutchin	Greensboro
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19C	Michael S. Adkins	Salisbury
21	L. Todd Burke	Winston-Salem
	David L. Hall	Winston-Salem
	Eric C. Morgan	Kernersville
	Richard S. Gottlieb	Winston-Salem
	Aaron Berlin[6]	Winston-Salem
22A	Joseph Crosswhite	Statesville
	William Long	Statesville
22B	Lori Hamilton	Mocksville
	Robert A. Broadie	Lexington
23	Michael Duncan	Wilkesboro
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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
26	Carla Archie	Charlotte

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	Louis A. Trosch	Charlotte
	George Bell	Charlotte
	Reggie McKnight	Charlotte
	Matthew J. Osman	Charlotte
	Donald R. Cureton	Charlotte
	David H. Strickland	Charlotte
27A	David Phillips	Gastonia
	Justin N. Davis	Gastonia
27B	W. Todd Pomeroy	Lincolnton
	Sally Kirby-Turner	Shelby
28	Alan Z. Thornburg	Asheville
29A	J. Thomas Davis	Forest City
29B	Peter B. Knight	Hendersonville
30A	William H. Coward	Highlands
30B	Bradley B. Letts	Hazelwood

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Julianna T. Earp	Greensboro
Mark A. Davis	Raleigh
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Steven R. Warren	Asheville
Edwin Graves Wilson Jr.	Hillsborough

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W. Robert Bell	Charlotte
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Forrest Donald Bridges[9]	Shelby
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Alma Hinton	Roanoke Rapids
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Vance Bradford Long	Asheboro
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Jerry Cash Martin	Pilot Mountain
James W. Morgan	Shelby
Calvin Murphy	Charlotte
J. Richard Parker	Manteo
William R. Pittman	Raleigh
Mark Powell	Hendersonville
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Ronald E. Spivey	Winston-Salem
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Tanya T. Wallace	Rockingham

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J. Carlton Cole	Hertford
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
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Mary Ann Tally	Fayetteville
Anna Mills Wagoner	Salisbury
Ralph A. Walker Jr.	Raleigh
William Z. Wood Jr.	Lewisville

[1]Retired 31 December 2023. [2]Became Senior Resident Judge 1 January 2024. [3]Sworn in and became Senior Resident Judge 16 July 2023.
[4]Retired 31 October 2023. [5]Became Senior Resident Judge 1 November 2023. [6]Sworn in 1 January 2023. [7]Sworn in 16 October 2023.
[8]Sworn in 7 July 2023. [9]Sworn in 24 July 2023. [10]Sworn in 3 August 2023. [11]Resigned 25 November 2023. [12]Resigned 1 July 2023.
[13]Sworn in 14 August 2023. [14]Resigned 31 May 2022. [15]Died 31 October 2023.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	Edgar L. Barnes (Chief)	Manteo
	Amber Malarney	Wanchese
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	Keith B. Mason	Washington
	Michael Jason Williams[1]	Washington
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	Lee F. Teague	Greenville
	Wendy S. Hazelton	Greenville
	Daniel H. Entzminger	Greenville
	Mario Perez	Greenville
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	Debra L. Massie	New Bern
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	Christopher J. Welch	Jacksonville
	Mario M. White	Clinton
	William Shanahan	Jacksonville
	Robert H. Gilmore	Clinton
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	Richard Russell Davis	Wilmington
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	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson	Wilmington
	Lindsey L. McKee	Wilmington
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	Teresa R. Freeman (Chief)[3]	Roanoke Rapids
	Vershenia Johnson	Windsor
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8	William Charles Farris (Chief)	Wilson
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	Anthony W. Brown	Spring Hope
	Wayne S. Boyette	Tarboro
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	Joseph E. Brown III	Wilson
	William R. Solomon	Rocky Mount
	Alicia Slaughter[5]	Nashville

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	Annette W. Turik	Kinston
	Jonathon Sargeant	Kinston
	Justin L. Minshew	Goldsboro
	Christopher A. Rogerson	Goldsboro
10	Ned Wilson Mangum (Chief)[6]	Raleigh
	Margaret Eagles (Chief)[7]	Raleigh
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	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
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	James R. Black	Raleigh
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	Cynthia Baddour Kenney	Raleigh
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	Joy A. Jones	Smithfield
	Jason H. Coats	Smithfield
	Terry F. Rose	Smithfield
	Craig James	Smithfield
	Travis N. Wheeler	Smithfield
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14	Toni S. King (Chief)	Fayetteville
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	Cheri Siler-Mack	Fayetteville
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	Kevin Jones	Durham
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	Robert Bryan Norris[15]	Burlington
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	Gregory Bullard	Lumberton
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	Caroline Tomlinson-Pemberton	Greensboro
	Walter W. Baker III	Greensboro
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	Steve Grossman[17]	Concord
	Michael G. Knox	Concord
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	Jena P. Culler	Charlotte
	Elizabeth Thornton Trosch	Charlotte
	Tyyawdi M. Hands	Charlotte
	Gary Henderson	Charlotte
	Aretha V. Blake	Charlotte
	Faith Fickling-Alvarez	Charlotte
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	Jonathon R. Marvel	Charlotte
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	Rhonda Patterson	Charlotte
	Alyssa Levine	Charlotte
	Samantha Mobley	Charlotte
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	Matt Newton	Charlotte
	Roderick Davis	Charlotte
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	Chris Sease	Salisbury
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	Steve Bibey	Carthage
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	Yohan Namkung[22]	Carthage
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	Joseph J. Williams[24]	Monroe

DISTRICT	JUDGES	ADDRESS
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	Christopher Gray[25]	Monroe
	Megean C. Simpson[26]	Monroe
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	David Sipprell	Winston-Salem
	Theodore Kazakos	Winston-Salem
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	George M. Cleland	Winston-Salem
	Whit Davis	Winston-Salem
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	Kristen Kelly Broyles	Winston-Salem
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	Bryan A. Corbett	Statesville
	Thomas R. Young	Statesville
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	Jon Wade Myers	Lexington
	Jon W. Welborn	Lexington
	David S. Doherty	Lexington
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	Donna L. Shumate	Sparta
	Laura B. Luffman	Wilkesboro
35	Theodore Wright McEntire (Chief)	Spruce Pine
	Hal Gene Harrison	Spruce Pine
	Rebecca E. Eggers-Gryder	Boone
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	Clifton H. Smith[28]	Hickory
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	Wesley W. Barkley	Newton
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	Andrea C. Plyler	Hudson
	Scott D. Conrad	Newton
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	Barron Thompson	Asheboro
	Darren C. Allen	Asheboro
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	Angela G. Hoyle (Chief)[30]	Belmont

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39	Jeanette R. Reeves (Chief)	Shelby
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	Justin K. Brackett	Shelby
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	Brad Champion	Lincolnton
	Jamie Hodges	Lincolnton
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40	J. Calvin Hill (Chief)	Asheville
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	Julie M. Kepple	Asheville
	Andrea Dray	Asheville
	Ward D. Scott	Asheville
	Edwin D. Clontz	Candler
	Susan Marie Dotson-Smith	Asheville
41	Robert K. Martelle (Chief)	Rutherfordton
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	Michelle McEntire	Graham
	Corey J. MacKinnon	Marion
42	Kimberly Gasperson-Justice (Chief)	Hendersonville
	Gene B. Johnson	Hendersonville
	D. Abe Hudson	Hendersonville
	James Marshall	Hendersonville
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43	Roy T. Wijewickrama (Chief)	Waynesville
	Monica Hayes Leslie	Waynesville
	Donna Forga	Clyde
	Tessa S. Sellers[34]	Murphy
	Kaleb Wingate	Waynesville
	Justin B. Greene[35]	Bryson City
	Kristy L. Parton[36]	Bryson City

EMERGENCY JUDGES

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Jacqueline L. Brewer	Apex
Thomas M. Brittain Jr.	Etowah
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Deborah P. Brown	Mooresville
Joseph M. Buckner	Chapel Hill
Susan R. Burch[38]	Greensboro
William M. Cameron	Richlands

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F. Warren Hughes	Burnsville
Laurie L. Hutchins	Winston-Salem
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Carol A. Jones	Kenansville
A. Elizabeth Keever	Fayetteville
Michael K. Lands	Gastonia
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Harold Paul McCoy Jr.	Halifax
Lawrence McSwain[39]	Greensboro
Wayne L. Michael	Lexington
Regan A. Miller	Charlotte
Charles M. Neaves	Elkin
Thomas R.J. Newbern	Aulander
Ali B. Paksoy	Shelby
Addie H. Rawls	Clayton
Dennis J. Redwing	Gastonia
Sarah C. Seaton	Jacksonville
Joseph E. Setzer Jr.	Franklinton
Caron Stewart	Erwin
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Jerry Waddell	Bryson City
Fredrick B. Wilkins Jr.	Reidsville
Larry J. Wilson	Shelby

RETIRED/RECALLED JUDGES

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H. Thomas Church	Statesville
Albert A. Corbett Jr.	Smithfield
Linda Falls	Durham
Daniel Fredrick Finch	Oxford
Louis F. Foy Jr.[40]	Pollocksville
James R. Fullwood	Raleigh
Mark E. Galloway	Roxboro
Charles P. Gaylor III	Goldsboro
Lloyd M. Gentry	Pelham
Samuel G. Grimes	Washington
Joyce A. Hamilton	Raleigh
John H. Horne Jr.	Laurinburg
Jerry A. Jolly	Tabor City

JUDGES	ADDRESS
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Jacquelyn L. Lee	Four Oaks
William L. Long	Chapel Hill
James E. Martin	Greenville
Christopher McLendon[41]	Williamston
Fritz Y. Mercer Jr.	Summerfield
Gordon A. Miller	Winston-Salem
William M. Neely	Asheboro
Nancy C. Phillips	Elizabethtown
Anne B. Salisbury	Cary
Jan H. Samet[42]	Greensboro
J. Larry Senter	Raleigh
Margaret L. Sharpe	Greensboro
Charles M. Vincent	Greenville
Richard K. Walker	Hayesville
Owen H. Willis	Dunn

[1]Sworn in 3 November 2023. [2]Retired 31 December 2024. [3]Became Chief District Court Judge 1 January 2025. [4]Resigned 31 December 2023. [5]Sworn in 21 March 2024. [6]Retired 2 February 2024. [7]Became Chief District Court Judge 1 February 2024. [8]Sworn in 21 May 2024. [9]Resigned 19 July 2024. [10]Resigned 15 July 2023. [11]Retired 31 January 2024. [12]Became Chief District Court Judge 18 December 2023. [13]Resigned 31 November 2024. [14]Sworn in 1 March 2024. [15]Sworn in 20 March 2024. [16]Sworn in 21 December 2023. [17]Retired 29 February 2024. [18]Sworn in 10 May 2024. [19]Became Chief District Court Judge 1 May 2024. [20]Retired 29 February 2024. [21]Resigned 10 December 2023. [22]Sworn in 28 March 2024. [23]Retired 31 December 2023. [24]Retired 31 July 2024. [25]Sworn in 27 March 2024. [26]Sworn in 9 October 2024. [27]Sworn in 28 August 2024. [28]Resigned 31 December 2023. [29]Retired 29 February 2024. [30]Became Chief District Court Judge 1 March 2024. [31]Sworn in 15 May 2024. [32]Retired 31 December 2024. [33]Sworn in 30 May 2024. [34]Resigned 30 April 2024. [35]Sworn in 17 November 2023. [36]Sworn in 30 August 2024. [37]Retired 19 August 2024. [38]Retired 22 July 2024. [39]Retired 23 September 2021. [40]Retired Retired 8 August 2023. [41]Sworn in 1 November 2023. [42]Retired 29 February 2024.

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Kelsie Nicole Shipley ..... Knoxville, TN
Sheyenne Shropshire ..... Charlotte
William Shuford ..... Waynesville
Bryan Eric Shytle ..... Charlotte
Karen Elizabeth Siderovski ..... Winston-Salem
Consuela Simmons ..... Raeford
Peter Simms ..... Raleigh
Amika Singh ..... Cary
Raini Keaton Singleton ..... Greensboro
Joseph Andrew Singleton ..... Winston-Salem
Haley Nicole Sink ..... Thomasville
Ajai Dashea Smith ..... Durham
Destiny Sharell Smith ..... Durham
Conor Edward Smith ..... Greensboro
Halee Marie Smith ..... Charlotte
Sydney Christina Smith ..... Roseboro
Zachary Smith ..... Hampstead
Shakuan D. Smith ..... Charlotte
Christian Harrison Smith-Bishop ..... Pace, FL
Elizabeth Marie Snyder ..... Raleigh
Anna Katherine Carey Somberg ..... Moyock
Rebecca Lynn Sommers ..... Raleigh
Kathryn Spangler ..... Raleigh
Gordon Davie Speckhard ..... Greensboro
Caroline Spence ..... Durham
Taylor Kay Squires ..... Burlington
Elijah Thomas Stacks ..... Garner
Morgan Elizabeth Stacy ..... Terrell
Lauren Reid Stamey ..... Charlotte
Daniel Stanton ..... New Bern
John Steber ..... Sarasota, FL
Andrew John Stephenson ..... Willow Spring

Kirsten Colleen Stevenson ..... Chapel Hill
Brooke Stewart ..... Charlotte
Jacob Vinson Stewart ..... Raleigh
Christopher Steven Stock ..... Raleigh
Antoinette Stone ..... Brooklyn, NY
Caleb Verner Strawn ..... Charlotte
James Ennis Street ..... Charlotte
Faisal Sulman ..... High Point
Madison Laine Surry ..... Raleigh
Benjamin Turner Suslavich ..... Superior, WI
Lily Alice Talerman ..... Durham
Muneeba Shahid Talukder ..... Charlotte
McKenzie Taranto ..... Tallahassee, FL
Christopher Taulbee ..... Brevard
Lindsey Nicole Taulbee ..... Charlotte
Margaret Wallace Taviano ..... Charlotte
Caroline Elizabeth Taylor ..... Goldsboro
Charles Jacob Taylor ..... Wilson
Joseph Lucas Taylor ..... Wilson
Sydney Teng ..... Hickory
Hillary Teoyotl ..... Monroe
Rahwa Theodros ..... Charlotte
Steven Adam Thomas ..... Virginia Beach, VA
Jordan Milton Thomas ..... Henderson
Tierra Nicole Thompson ..... Waxhaw
Ashley Blaise Thompson ..... Greensboro
Claire Elizabeth Thompson ..... Greensboro
Kayla Tilley ..... Madison
Julia McDonald Tillman ..... Tampa, FL
Connor Tilson ..... Eldersburg, MD
Morgan Marie Tompkins ..... Randleman
Genesis Esperanza Torres ..... Raleigh
Ashley Eileen Treible ..... Chapel Hill
Louis Alfred Trosch III ..... Charlotte
Hayley Teresa Twing ..... Sylva
Jackson Scott Ussery ..... Elizabethtown
Grant Alexander VanHook ..... Franklin
Robert Maximilian Veith ..... Charlotte
Annelisse Danielle Velazquez Fernandez ..... Vandalia, OH
Tyler James Ventura ..... Raleigh
Jessica Vice ..... Charlotte
Cameron Stanford Vick ..... Albemarle
Melina Vanessa Villalobos ..... Durham
Teala Leung Volkamer ..... Charlotte
Megan Elizabeth Von Canon ..... Sanford
Austin Wyatt von Henner ..... Arden
Amanda Elizabeth Wagner ..... Raleigh
Benjamin David Waldman ..... Asheville
Mary Gallimore Walker ..... High Point
Virginia Ann Walker ..... Alexandria, VA

Stephen Jackson Walker ..... Cary
Liam Wall ..... Walla Walla, WA
Hunter Neal Walsh ..... Garner
Jenny Jieru Wang ..... Raleigh
Matthew Walter Warman ..... Greensboro
Claire Carson Washburn ..... Aberdeen
Adriana Nicole Washington ..... Raleigh
Joshua Waters ..... Raleigh
David McKinley Waterson III ..... Advance
Natalia Elise Watkins ..... Winston-Salem
Meagan Alexis Watson ..... Elizabeth City
Taylor Thomas Way ..... Raleigh
Jennifer Lynne Weigle ..... Reidsville
Robert Wesley Welborn Jr. ..... Greensboro
Sydney Welch ..... Durham
Richard Welfare ..... Wilson
Leah Marie Werker ..... Bradenton, FL
Kristyn Ryan Wescott ..... Cary
Kasey Amalia West ..... Charlotte
Sara Anne West ..... Raleigh
Erika Narissa Westbrook ..... Durham
Michael Anthony Westbrook ..... Charlotte
Sydney M. Wheeless ..... Benson
Jasmine Kaylin White ..... Kings Mountain
Leighton Whitehead ..... Raleigh
Landon Whitley ..... Charlotte
Jennifer Rose Whitmire ..... Raleigh
Amanda Marie Whitt-Downs ..... Apex
Barbara Ann Whittinghill ..... Cary
Ehren Taylor Wilder ..... Lexington, SC
Cameron Scott Williams ..... Belmont
Brianna Elizabeth Williams ..... Zebulon
Kendall Williams ..... Greenville
Brittany D. Willis ..... Greensboro
Elise Harris Wilson ..... Wilmington
Mary Stewart Wilson ..... Greensboro
Michael Stuart Wilson ..... Raleigh
Christopher Winokur ..... Troy, MI
Evan Womble ..... Durham
Paul Terry Wood ..... Durham
Madeleine Rose Wood ..... Mount Pleasant, SC
Caitlyn Marie Wood ..... Winston-Salem
Chandler Lee Woods ..... Burlington
Meaghan Harless Woodward ..... Charlotte
Reaghan Rose Wooster ..... Charlotte
Parker Watson Wooten ..... Kenly
Karsen Danyel Wright ..... Greensboro
Jonathan Pascal Wright ..... Raleigh
Anvitha Sai Yalavarthy ..... Duncan, SC
Susan Joy Yanagi ..... Matthews

Erica Yarborough ..... Cary
Lisa Marie Yarbrough ..... Winston-Salem
Anna Catherine Yarbrough ..... Greensboro
Meredith Paige Yates ..... High Point
Isaac Ybarra ..... Kannapolis
Jacob Austin Young ..... Advance
Mathias Aaron Young ..... Matthews
Nicholas Demetri Yurko ..... High Point
Nicholas Ryan Zanzot ..... Cary
Andrew Blake Zavaleta ..... Chapel Hill
Kaihua Tymon Zhou ..... Yorktown, VA
Cassandra Rachel Zietlow ..... Charlotte
Erin Elizabeth Clawson Zorn ..... Davidson

The following persons were admitted to the North Carolina State Bar by comity by the Board of Law Examiners in 2023 and have been issued a certificate by the Board.

Melanie Andrea Acuna ... Applied from the State of Maryland and the District of Columbia
Craig Theodore Ajmo Jr. ..... Applied from the State of Massachusetts
Matthew David Anderson ..... Applied from the State of Illinois
Mary Elizabeth Armistead ..... Applied from the State of New York
Natori Lyndsey Arrindell ..... Applied from the District of Columbia and the State of Tennessee
Corey Artim ..... Applied from the State of Ohio
Lindsay Freeman Avagliano ..... Applied from the State of New York
Schyler A. Bailey ..... Applied from the State of Maryland
Leigh Barnwell ..... Applied from the State of New York
Taylor Bartlett ..... Applied from the State of Georgia
Spencer Matthew Baxter ..... Applied from the State of Virginia
Glenn David Bell ..... Applied from the State of New York
Buck Stephen Beltzer ..... Applied from the State of Colorado
Michele Dawn Biegel ..... Applied from the State of Mississippi
Michael Binko ..... Applied from the State of New York
James Augustus Blalock III ..... Applied from the State of New York
Matthew Samuel Blumenthal ..... Applied from the State of Connecticut
Steven Lee Boening ..... Applied from the State of Texas
Danielle Marie Boram ..... Applied from the State of Massachusetts
Chad Albert Bowers ..... Applied from the State of Idaho
Catherine Mae Bowers ..... Applied from the State of Virginia
Joshua Nathan Breen ..... Applied from the State of Massachusetts
Carrick Charles Brooke-Davidson ..... Applied from the States of Texas and Virginia
Cortney D. Bryson ..... Applied from the State of Maryland
Joseph Lance Buckmaster ..... Applied from the State of Oregon
Erika J.S. Buell ..... Applied from the State of Massachusetts
Ananda Venkata Burra ..... Applied from the State of New York
Shatrasha LeighAnn Butler ..... Applied from the State of Missouri
Michael Caine ..... Applied from the State of Texas
Shatilla Shera Baesa-De Leon Cairns ..... Applied from the State of Massachusetts

George John Calcagnini ..... Applied from the State of New York
Kallie Anne Campbell ..... Applied from the State of New York
Lauren Michelle Carey ..... Applied from the State of Georgia
Tiffany Lauren Webber Carpenter ..... Applied from the State of Tennessee
Sarah K. Carpenter ..... Applied from the District of Columbia
Eugene Robert Cheval ..... Applied from the State of New York
Allison M. Chisolm ..... Applied from the State of Virginia
Vincent Albert Citro ..... Applied from the District of Columbia
Kelly Cline ..... Applied from the State of New York
Whytni Mishel Cline ..... Applied from the State of West Virginia
Brent Andrew Cockerham ..... Applied from the State of Texas
David Thomas Cohen ..... Applied from the State of New York
Glenn Mead Conway ..... Applied from the State of Connecticut
David Bahrs Cosgrove ..... Applied from the State of New York
Lisa Ann Cosolito ..... Applied from the State of New York
Andrew Caleb Covington ..... Applied from the District of Columbia
Merrida Powell Coxwell Jr. ..... Applied from the State of Mississippi
Ryan James Cudnik ..... Applied from the State of New York
Lance A. Daniels ..... Applied from the State of Kentucky
Zachary Thomas Davies ..... Applied from the State of Alaska
Joshua Chaim Delaney ..... Applied from the District of Columbia
Tia DeMedici ..... Applied from the State of West Virginia
Lisa Denig ..... Applied from the State of New York
David Martin Diaz ..... Applied from the State of Texas
Matthew Scott Dillahunty ..... Applied from the State of Texas
Gregory Alan Dodge ..... Applied from the State of Massachusetts
Kevin Donovan ..... Applied from the State of Massachusetts
Noor Kapoor Downing ..... Applied from the State of Pennsylvania
Brian Dufresne ..... Applied from the State of Kentucky
Leslie Ann Lunsford Dunn ..... Applied from the State of Georgia
Meagan Elizabeth Dziura ..... Applied from the State of Virginia
Andrew LeSage Ellis ..... Applied from the State of West Virginia
Natalie Renee Elms ..... Applied from the State of Texas
Matthew Esslinger ..... Applied from the State of Pennsylvania
Edward Denzell Faison ..... Applied from the State of New York
James Faunes ..... Applied from the State of Pennsylvania
Alicia Maria Saavedra Ferrante ..... Applied from the State of New Jersey
Lauren Fine ..... Applied from the State of Pennsylvania
Ammon John Ford ..... Applied from the State of Washington
William Fortunato ..... Applied from the State of Tennessee
James Zollie Foster ..... Applied from the State of Georgia
Alison Jean Foster ..... Applied from the State of Colorado
Gavin S. Frisch ..... Applied from the State of Massachusetts
Adam M. Galat ..... Applied from the State of Ohio
Vincent John Galluzzo ..... Applied from the District of Columbia
Daniel Davis Gamer ..... Applied from the State of New York
Sheela George ..... Applied from the States of New York and New Jersey
Laura Marie Gifford ..... Applied from the State of New Jersey
Jacquin Perron Gilchrist ..... Applied from the State of Texas and the District of Columbia
Jamie Scherr Gilmer ..... Applied from the State of Georgia

Amy Catharine Glantz ..... Applied from the State of Pennsylvania
Evan Seth Glasner ..... Applied from the State of New York
Jessica Halley Glitz ..... Applied from the State of Texas
Christopher Michael Golden ..... Applied from the State of Kansas
Alan Stuart Graf ..... Applied from the State of Oregon
Cameron Miller Green ..... Applied from the State of Oregon
Eleanore Godfrey Hargreaves ..... Applied from the State of Massachusetts
Nicholas Hartigan ..... Applied from the State of Georgia
Victoria Lynn Hartmann ..... Applied from the State of Massachusetts
Erroll James Haythorn ..... Applied from the State of New Jersey
Ariel Loree Hedgepeth ..... Applied from the State of Virginia
Evan Henderson ..... Applied from the State of Oklahoma
Susanna Emily Henry ..... Applied from the State of Massachusetts
Jessica Hill ..... Applied from the State of Georgia
Chrissy Tiffany Hill-Allison ..... Applied from the State of Arizona
Andrew David Himmel ..... Applied from the State of New York
Ayelet Hirschkorn ..... Applied from the State of New Jersey
Jarret Paul Hitchings ..... Applied from the State of Pennsylvania
Genevieve Holmes ..... Applied from the State of Georgia
Craig Alan Hoovler ..... Applied from the State of Virginia and the District of Columbia
Randall J. Hurlburt ..... Applied from the District of Columbia
Christopher Hyner ..... Applied from the District of Columbia
Remington A. Jackson ..... Applied from the State of Ohio
Kyle John Jacob ..... Applied from the State of Illinois
Marcela Jenkins ..... Applied from the State of Maryland
Slaven Jesic ..... Applied from the States of New York and Maryland
Emily Sullivan Bateman Jessup ..... Applied from the District of Columbia
Nathaniel Benjamin Jones ..... Applied from the State of Texas
Hamilton Jordan ..... Applied from the State of Tennessee
Lisa Nam Mi Ju ..... Applied from the State of New York
Jeffrey Austin Kahn ..... Applied from the State of New York
Shannon Blaze Kathrein ..... Applied from the State of Massachusetts
Matthew Benjamin Keller ..... Applied from the State of New York
Michael Brooks Kent Jr. ..... Applied from the State of Georgia
Robert Scott King ..... Applied from the State of New York
Marc Frederick Wallace Kirkland ..... Applied from the State of Texas
Molly Ranae Kiser ..... Applied from the State of Virginia
Katharine Krottinger ..... Applied from the State of Texas
Jerry Kugelmas ..... Applied from the State of New York
Brett David Land ..... Applied from the State of Texas
Joseph Ronald Lanser ..... Applied from the State of Illinois
Brittany Noel Latour ..... Applied from the State of New York
Adam J. Levitt ..... Applied from the State of Illinois
Russell Warren Lewis IV ..... Applied from the State of Tennessee
Molly Catherine Long ..... Applied from the State of Georgia
Stephen David Lott ..... Applied from the State of Illinois
Amber N. Lukowicz ..... Applied from the State of Illinois
Louis Lusk ..... Applied from the State of Georgia
Joshua Dale Lynch ..... Applied from the State of Wyoming
Amina Michelle Mack ..... Applied from the State of Pennsylvania

LICENSED ATTORNEYS

Matthew Maguire ..... Applied from the State of Massachusetts
Berlinda Mallebranche ..... Applied from the State of New York
Timothy Patrick Malloy ..... Applied from the State of Pennsylvania
Amanda Harris Manning ..... Applied from the State of New York
Ari Hillel Marcus ..... Applied from the State of New Jersey
William Shane Margulis ..... Applied from the State of Missouri
Dustin Marlan ..... Applied from the States of Michigan and Massachusetts
Ryan Kendrick Martinez ..... Applied from the State of Georgia
Kristen Mayer ..... Applied from the State of Ohio
Nicholas Ryan Mayfield ..... Applied from the State of Illinois
John Erin McCabe ..... Applied from the State of Kentucky
William Cagney McCormick ..... Applied from the State of Texas
Amy Elizabeth McDonnell ..... Applied from the District of Columbia
Kenneth Lloyd McElwee ..... Applied from the State of New Jersey
JoAnna McFadden ..... Applied from the State of New York
William McLeod McIntosh Jr. ..... Applied from the State of Georgia
Rebecca Lynne Melone ..... Applied from the State of Virginia
Julia Ann Merritt ..... Applied from the State of Georgia
Shawn M. Mihill ..... Applied from the State of Virginia
Christopher Rafael Milton ..... Applied from the States of Texas and Michigan
Nicholas Anthony Mirra ..... Applied from the State of Virginia
Alex Mitchell ..... Applied from the State of Georgia
Eric Mogy ..... Applied from the State of Tennessee
Sally Jean Moore ..... Applied from the State of Virginia
Suzanna Marie Meyers Morales ..... Applied from the State of New York
Sarah Loretta Mottern ..... Applied from the State of Pennsylvania
Kristin Kathleen Mullins ..... Applied from the State of Connecticut
William Sean Munnerlyn ..... Applied from the State of Ohio
Jonathan Mureen ..... Applied from the State of Texas
Michael Thomas Murphy ..... Applied from the State of Pennsylvania
Jason Alexander Murphy ..... Applied from the State of New York
Leslie Muse ..... Applied from the State of Tennessee
Megan M. Neal ..... Applied from the State of New York
Tammy Lynn Neil ..... Applied from the State of Texas
Paul Craig Neimeyer ..... Applied from the State of Virginia
Brittany Raia Newman ..... Applied from the District of Columbia
Nadia Esther Nickerson ..... Applied from the State of Georgia
Kelsey I. Nix ..... Applied from the State of New York
Sarah Elise Nudelman ..... Applied from the State of New York
Amanu Nwaomah ..... Applied from the State of Illinois
Megan Marie O'Dell ..... Applied from the State of Ohio
Morenike Omole ..... Applied from the State of Maryland
Adriel Daniel Orozco ..... Applied from the State of New Mexico
Deborah Helene Beyer O'Toole ..... Applied from the State of Massachusetts
Angela Pergrem Owens ..... Applied from the State of Kentucky
Stephen Robins Pacicco ..... Applied from the State of New Jersey
Michael Pagan ..... Applied from the State of Missouri
Matthew Paris ..... Applied from the State of Georgia
Steven Chase Parker ..... Applied from the State of Georgia
Lisa Ann Pavlik ..... Applied from the State of Ohio

Mayson Gilreath Pearson ..... Applied from the State of Texas
John Philip Harris Pennington ..... Applied from the District of Columbia
Deidra Penny ..... Applied from the State of Texas
Christopher Pey ..... Applied from the State of New York
Karin Sue Phalen .....Applied from the State of Illinois
Michael G. Philipp .....Applied from the State of Illinois
Geoffrey Polk .....Applied from the State of Illinois
Janice Powers ..... Applied from the State of New York
Susan Bender Price ..... Applied from the State of Ohio
Jonathan Morgan Prytherch ..... Applied from the States of New York and New Jersey
Harry Robert Purkey Jr. ..... Applied from the State of Virginia
Michael Randall Puterbaugh ..... Applied from the State of Ohio
Victoria Reading ..... Applied from the State of Arizona
Tyler James Replogle .....Applied from the State of Illinois
Joshua L. Rogers ..... Applied from the State of Mississippi
Barbara Ellen Rosenblatt ..... Applied from the State of Virginia
Jordan Bernard Rosenhaus ..... Applied from the State of New York
William Brandon Ross ..... Applied from the State of Colorado
Spring Rebekah Rowell ..... Applied from the State of Texas
Michael Rubin ..... Applied from the State of New York
Gary JohnPatrick Ruckelshaus ..... Applied from the State of New Jersey
Todd Russell ..... Applied from the State of New Hampshire
Pouria Saidi ..... Applied from the State of New York
Matthew Wayne Saliba ..... Applied from the State of New York
Michael Saltaformaggio ..... Applied from the State of Mississippi
Jennifer Lynne Santucci ..... Applied from the State of Massachusetts
James Daniel Scharville ..... Applied from the State of Ohio
Jonathan Schulman ..... Applied from the State of New York
James Russell Segars III ..... Applied from the State of Mississippi
Dennis Richard Self III ..... Applied from the State of New York
Sean Alexander Semmler .....Applied from the State of Maryland and the District of Columbia
Daniel Sevcik ..... Applied from the States of Minnesota and Wisconsin
Kelsey Shamblin ..... Applied from the State of New Jersey
Kevin D. Sharp ..... Applied from the State of Virginia
Gursharon K. Shergill ..... Applied from the State of New York
Johnna Lee Shumate .....Applied from the State of West Virginia
Matthew Smith ..... Applied from the State of New York
Courtney Bradford Smith ..... Applied from the State of Mississippi
Mattson Taylor Smith ..... Applied from the State of Colorado
Kyle Smith ..... Applied from the State of Pennsylvania
Charlotte Warren Smith ..... Applied from the State of New York
Paul Jeffrey Spence .....Applied from the State of West Virginia
Garth Avery Spencer ..... Applied from the State of New York
Alan Bradley Spencer ..... Applied from the State of Virginia
Matthew Charles Stegman ..... Applied from the District of Columbia
Brian Louis Stekloff ..... Applied from the District of Columbia
Tyler Patrick Stevens ..... Applied from the State of New York
Reem Subei ..... Applied from the State of Ohio
Jenny Grus Sugar ..... Applied from the State of New York

Anne Katherine Sutton ..... Applied from the State of Illinois
Jessica Ann Swauger ..... Applied from the District of Columbia and the State of Virginia
Kevin Szu-Tu ..... Applied from the State of New York
Clay Talley ..... Applied from the States of Texas and Kentucky
Thomas Calvin Taylor ..... Applied from the State of Georgia
Samuel Wesley Taynton ..... Applied from the State of Massachusetts
Elizabeth Tharakan ..... Applied from the States of New York and Colorado
Philip Thomas ..... Applied from the State of Mississippi
Casandra Leann Thomson ..... Applied from the State of Illinois
Jeffrey Scott Thurnher ..... Applied from the State of Virginia
Ian Edward Vance ..... Applied from the State of Virginia
Karina Alexandra Velez ..... Applied from the State of Virginia
Joseph Vellon ..... Applied from the State of Maryland
Jason Matthew Vogel ..... Applied from the State of New York
Jordan Landrum Von Bokern ..... Applied from the District of Columbia
Zara Akram Wallace ..... Applied from the State of Virginia
Elgin Kenneth Walley Jr. ..... Applied from the States of Mississippi and Texas
James Michael Warner ..... Applied from the State of Texas
Joshua Patrick Warrum ..... Applied from the State of New York
Lauren Nicole Watson ..... Applied from the State of Oklahoma
Paul Eldon Weathington ..... Applied from the State of Georgia
Carla Josephine Weaver ..... Applied from the District of Columbia
Christopher Brian Wencker ..... Applied from the State of Pennsylvania
Jaynell White ..... Applied from the District of Columbia
Christine Karla Wienberg ..... Applied from the State of New York
Shane Williams ..... Applied from the State of New Jersey
Andrew Michael Willinger ..... Applied from the State of New York
Neidra Wilson ..... Applied from the State of New Jersey
Lloyd Wilson ..... Applied from the States of Utah and New York
Robin Mains Wilson ..... Applied from the State of Ohio
Gordon Mitchell Wolcott ..... Applied from the State of Virginia
Thomas Colin Wooldridge ..... Applied from the State of Georgia
Nicholas John Xanthopoulos ..... Applied from the State of Minnesota
Brennan Walter Young ..... Applied from the State of New York
Brian Clodio Zaldivar ..... Applied from the States of Missouri and Illinois
Robert David Zaslow ..... Applied from the State of Connecticut
Daniel Peter Zazzali ..... Applied from the State of New Jersey
Katherine Elizabeth Zdrojeski ..... Applied from the State of New York
Jessalyn Hershinger Zeigler ..... Applied from the State of Tennessee
Chen Zhang ..... Applied from the State of New York

The following persons were admitted to the North Carolina State Bar by transfer by the Board of Law Examiners in 2023 and have been issued a certificate by the Board.

Kelsey Rae Abbey ..... Applied from the State of Texas
Danielle Nicole Allyn ..... Applied from the State of New York
Clayton Armstrong ..... Applied from the District of Columbia

Thomas Tyler Astralla ..... Applied from the State of New York
Grace M. Babcock ..... Applied from the State of South Carolina
Reid Kinkead Barber ..... Applied from the State of Tennessee
Kamri Barber ..... Applied from the State of South Carolina
David Anthony Batista ..... Applied from the State of New Jersey
Connor Bentley Bauknight ..... Applied from the State of South Carolina
Robert Andrew Beaver .....Applied from the State of Oregon
Daniel Beck ..... Applied from the State of South Carolina
Lindsey Marie Behnke ..... Applied from the State of South Carolina
Ruth Rachel St. Louis Bernard ..... Applied from the State of Connecticut
Grace Gardner Brown ..... Applied from the State of South Carolina
Nathan Adam Bruccoliere ..... Applied from the State of South Carolina
William Edward Bucha Jr. ..... Applied from the State of New York
Coburn Bellelo Burroughs ..... Applied from the State of Texas
Alicia Clinton Carvajal Carvajal ..... Applied from the State of South Carolina
Mackenzie Catanzaro ..... Applied from the State of South Carolina
Tamisha Claude .....Applied from the State of Massachusetts
Andrew Wallace Cleary ..... Applied from the State of South Carolina
Hailey Cleek ..... Applied from the District of Columbia
Andre Jamar Dominique Coaxum ..... Applied from the State of South Carolina
Douglas Eugene Conant .....Applied from the State of West Virginia
Fleta Christina Cousin-Sabra .....Applied from the State of Maine
Renee Cox ..... Applied from the State of Colorado
Victoria Langley Creta .....Applied from the State of West Virginia
Christopher Stevens Criner .....Applied from the State of Maine
Alexander Crofford ..... Applied from the State of New York
Edward Hall Cross .....Applied from the State of Oregon
Margaret King Davis ..... Applied from the State of Arkansas
Amelia Mary Daynes ..... Applied from the State of Wyoming
Graham Dean ..... Applied from the State of New York
Courtney Elizabeth Dec ..... Applied from the State of New York
John Dempsey ..... Applied from the State of South Carolina
Sophia Evonne Dieckhaus ..... Applied from the State of New Jersey
Erin N. Diekema .....Applied from the State of Maine
Shannon Marie Dillehay ..... Applied from the State of South Carolina
Joshua Vincent Dingle ..... Applied from the District of Columbia
Matthew Thomas Doran .....Applied from the State of Illinois
Morgan Doughty ..... Applied from the State of Pennsylvania
Kelton Reed Ekblad ..... Applied from the State of Utah
Kerry Anne Elliston ..... Applied from the State of New York
Jasmine Alexandra Farmer ..... Applied from the State of South Carolina
Taylor Marie Farrier ..... Applied from the State of New York
Caroline Lanier Savage Felten ..... Applied from the State of South Carolina
Darby Marie Festa ..... Applied from the State of New Jersey
Matthew Richard Flinchbaugh ..... Applied from the State of Texas
Annette FormyDuval ..... Applied from the State of Maryland
Katherine Patricia Franck ..... Applied from the State of New York
Hayley Renae Frey ..... Applied from the State of Tennessee
Zachery Galyon ..... Applied from the State of Missouri
Eric Enfield Gerarde ..... Applied from the State of Connecticut

Carly Kathryn Gillingham ..... Applied from the State of Massachusetts
Matthew George Giordano ..... Applied from the State of Alabama
Alexandra Cassidy Glunt ..... Applied from the State of South Carolina
Danielle Lee Gonzalez ..... Applied from the State of Colorado
Chad Alan Haight ..... Applied from the State of New York
Lewis Hunter Hallowell ..... Applied from the State of Texas
Sydney Hamer ..... Applied from the State of South Carolina
James Hankins III ..... Applied from the State of Alabama
Katherine Hanley Schofield ..... Applied from the State of Nebraska
Lacy Ann Hansen ..... Applied from the State of Tennessee
Robert Lawton Harper ..... Applied from the State of South Carolina
Michelle Nicole Hart ..... Applied from the State of South Carolina
Madison Taylor Hawkins ..... Applied from the State of South Carolina
Shelby Catherine Herbkersman ..... Applied from the State of South Carolina
Jhasilyn Heyward ..... Applied from the State of Tennessee
Mark Hinds ..... Applied from the State of South Carolina
Matthew Aaron Hughes ..... Applied from the State of South Carolina
Megan Renee Izzo ..... Applied from the District of Columbia
Ethan Lee Jedziniak ..... Applied from the State of South Carolina
Christian Jones ..... Applied from the State of Montana
Christopher Joseph Jones ..... Applied from the State of New York
John Leggett Kellam ..... Applied from the State of Texas
Ravit Keren ..... Applied from the State of New Jersey
Gavin Floyd King ..... Applied from the State of Alabama
Mary Stuart King ..... Applied from the State of South Carolina
Kayla Elizabeth King-Heyer ..... Applied from the State of Massachusetts
Jackson Marshall Klug ..... Applied from the State of Massachusetts
Alec James Kosminskas ..... Applied from the State of Illinois
Alysha Lynn Kronz ..... Applied from the State of Pennsylvania
Toni Laneve ..... Applied from the State of South Carolina
Emily Rose Larrabee ..... Applied from the State of Pennsylvania
Arielle Na'Rae Larsen..... Applied from the State of South Carolina
Emily Lary ..... Applied from the State of South Carolina
Ryli Wallace Leader ..... Applied from the State of Alabama
Marisa Ann Leib-Neri ..... Applied from the State of Iowa
Constantina Leodis ..... Applied from the State of New York
Melvin Kaye Lewis II ..... Applied from the State of South Carolina
Weston Liefer ..... Applied from the State of South Carolina
Robert Clyde Limehouse III ..... Applied from the State of South Carolina
Iyanuloluwa Oluwaseyi Lipede ..... Applied from the State of Texas
Brett Aaron Lonadier ..... Applied from the State of South Carolina
Amy K. Lyon ..... Applied from the State of New Jersey
Jonathan Maddalone ..... Applied from the State of New York
Corey Alexandria Maguire ..... Applied from the State of Arizona
Gerald Donovan Malloy ..... Applied from the State of South Carolina
Shawn Robert Marcie ..... Applied from the State of Tennessee
Jacob Christopher Martin ..... Applied from the District of Columbia
Ryan Dean Martin ..... Applied from the State of South Carolina
Jarryd Martin ..... Applied from the State of Indiana
Katherine Heil Mills ..... Applied from the State of South Carolina

Caroline Elizabeth Milosevich ..... Applied from the State of Texas
Jordan Alexander Mock ..... Applied from the State of New York
Mary Harriet Moore ..... Applied from the State of South Carolina
Tara Haylee Morris ..... Applied from the State of South Carolina
Jeffrey Marc Nall ..... Applied from the State of Ohio
Kayla Napolitano ..... Applied from the State of Tennessee
William Bryant Neal ..... Applied from the State of South Carolina
Jack Novak ..... Applied from the State of Vermont
Richard O'Connell ..... Applied from the State of New York
Il-Woong Oh ..... Applied from the State of Alabama
Robert Heath Owen ..... Applied from the State of South Carolina
James William Palanica ..... Applied from the State of South Carolina
Savannah Danielle Parker ..... Applied from the State of Massachusetts
Geoffrey V. Paschke ..... Applied from the State of South Carolina
Caitlin Machell Pevey ..... Applied from the State of New Mexico
Tyler William Pewitt ..... Applied from the State of New Jersey
Irena Pia ..... Applied from the State of Washington
Michael R. Picornell ..... Applied from the District of Columbia
Graham Pitman ..... Applied from the State of South Carolina
Daniel Lawrence Pollitt ..... Applied from the State of Colorado
Andrew James Powers ..... Applied from the State of New York
Richard Henry Quarles ..... Applied from the State of Oregon
Hector Alejandro Quesada ..... Applied from the State of New York
Alison Caroline Raffety ..... Applied from the State of South Carolina
James Ray ..... Applied from the State of Texas
Montana York Reiser ..... Applied from the State of South Carolina
William Richter ..... Applied from the State of South Carolina
Joshua Keith Rifkin ..... Applied from the State of New Jersey
John Connor Roberts ..... Applied from the State of South Carolina
Sarah Lucille Robinson ..... Applied from the State of South Carolina
Rebecca Leigh Robison ..... Applied from the State of New Hampshire
Michelle Elizabeth Rodenburg ..... Applied from the State of Minnesota
Austin Drake Rogers ..... Applied from the State of West Virginia
Misty Sharee Ryan ..... Applied from the District of Columbia
Robert Brandon Salter ..... Applied from the State of Missouri
Tyler Jarrett Sanderlin ..... Applied from the State of South Carolina
Victoria Santiago ..... Applied from the State of Ohio
Nicholas Otto Santos ..... Applied from the State of Ohio
Cody Britton Saunders ..... Applied from the State of Maryland
Sabrina Ali Shah ..... Applied from the State of New York
Austin Moses Sheheen ..... Applied from the State of South Carolina
Rieko Holland Shepherd ..... Applied from the State of Massachusetts
Garrett Miller Simpson ..... Applied from the State of South Carolina
Alston Rivers Slay ..... Applied from the State of South Carolina
Kal Smith ..... Applied from the State of Maryland
Nicole Marie Smith ..... Applied from the State of New York
Thatcher Smith ..... Applied from the State of Tennessee
William Dunn Smith ..... Applied from the State of South Carolina
Luz A. Solano-Florez ..... Applied from the District of Columbia
Justin T. Somelofske ..... Applied from the State of Rhode Island

Katharyn Sophia ..... Applied from the State of South Carolina
Julia Grace Soprano ..... Applied from the State of South Carolina
Jennifer Joan Steiner ..... Applied from the State of South Carolina
Roger Matthew Stevens ..... Applied from the State of South Carolina
Wendy Lee Steward ..... Applied from the State of Colorado
Byron James Stewart ..... Applied from the State of Maryland
Joseph Bradley Studemeyer ..... Applied from the State of South Carolina
Carlee Ann Taber ..... Applied from the State of South Carolina
William Scott Talbert ..... Applied from the State of South Carolina
Bradley Garret Taylor ..... Applied from the State of Colorado
Jordan Stephen Thayer ..... Applied from the State of South Carolina
Katheryn Thompson ..... Applied from the State of South Carolina
Laura Emily Tomaszewski ..... Applied from the State of Arizona
Trevor Barrington Tomlinson ..... Applied from the State of Maryland
Lindsey Umin ..... Applied from the State of Texas
Lindsay Erin Van Noy ..... Applied from the State of Alabama
Daniel Vander Woude ..... Applied from the State of New Jersey
Elizabeth Butler VonCannon ..... Applied from the State of South Carolina
Adam Voron ..... Applied from the State of Arizona
Charles Waddle ..... Applied from the State of West Virginia
Sarah Wallace ..... Applied from the State of Missouri
Mark Nolan Webb ..... Applied from the State of South Carolina
Cindy Pamela West ..... Applied from the District of Columbia
Elizabeth Grace Weyerman ..... Applied from the State of Alabama
Justin Wayne Wilbanks ..... Applied from the State of Tennessee
Trevor William Wilkinson ..... Applied from the State of Ohio
Chelsea Mildred Williams ..... Applied from the District of Columbia
Hunter Dyan Williams ..... Applied from the State of South Carolina
Elizabeth Kathryn Williams ..... Applied from the District of Columbia
Joshua Dafydd Xerri ..... Applied from the State of Texas
Vishnu Yogendran ..... Applied from the State of Maryland
Blaine J. Zern ..... Applied from the State of Illinois
Andrew Benat Zuckerman ..... Applied from the State of New York
William Robert Zwicharowski ..... Applied from the State of New Jersey

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

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

No. 306A20

Filed 1 September 2023

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

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

Justice MORGAN concurring.

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

Justice EARLS dissenting.

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

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

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

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

BARRINGER, Justice.

I. Background

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

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

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

II. Standard of Review

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

III. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

N.C.G.S. § 150B-51(c) (2021).

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

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

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

Justice MORGAN concurring.

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

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

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

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

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

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

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

Justice EARLS dissenting.

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

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

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

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

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

I. Legal Background

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

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

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

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

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

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

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

II. **Standard of Review**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. **Application**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. **Conclusion**

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

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

No. 334A21

Filed 1 September 2023

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

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

Justice EARLS dissenting.

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

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

Anne Bleyman for defendant-appellant Sindy Lina Abbitt.

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

MORGAN, Justice.

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

I. Background

A. Factual and trial history

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. No second name was stated by counsel.

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

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

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

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

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

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

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

Defendants did not present any evidence at trial.

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

B. In the Court of Appeals

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

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

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

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

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

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

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

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

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

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

II. Analysis

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

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

A. Arguments of defendants

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

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

B. Statutory and caselaw

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

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

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

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

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

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

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

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

C. Application of law to the facts of this case

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

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

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

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

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

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

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

III. Conclusion

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

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

AFFIRMED.

Justice EARLS dissenting.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATE OF NORTH CAROLINA
v.
WENDY DAWN LAMB HICKS

No. 136PA22

Filed 1 September 2023

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

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

Justice DIETZ concurring.

Justice BERGER joins in this concurring opinion.

Justice MORGAN dissenting.

Justice BARRINGER joins in this dissenting opinion.

Justice BARRINGER dissenting.

Justice MORGAN joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 283 N.C. App. 74 (2022), reversing a judgment entered on 12 December 2019 by Judge V. Bradford Long in Superior Court, Randolph County, and remanding for a new trial. Heard in the Supreme Court on 25 April 2023.

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

Marilyn G. Ozer for defendant-appellee.

EARLS, Justice.

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

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

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

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

I. Background

A. Evidence at Trial

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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2. Specifically, Ms. Hicks testified:

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

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

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

B. Procedural History

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

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

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

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

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

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

II. Sufficiency of the Evidence

A. Self-Defense and the Aggressor Doctrine

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

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

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

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

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

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

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

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

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

B. Application to this Case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Conclusion

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

REVERSED.

Justice DIETZ concurring.

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

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

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

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

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

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

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

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

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

Justice BERGER joins in this concurring opinion.

Justice MORGAN dissenting.

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

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

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

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

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

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

Justice BARRINGER joins in this dissenting opinion.

Justice BARRINGER dissenting.

I. Background

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

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

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

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

II. Analysis

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

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

N.C.G.S. § 14-51.2(b) (2021).

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

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

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

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

N.C.G.S. § 14-51.2(c) (2021).

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

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

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

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

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

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

III. Conclusion

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

Justice MORGAN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
JEREMY JOHNSON

No. 197PA20-2

Filed 1 September 2023

Justice EARLS dissenting.

Justice MORGAN joins in this dissenting opinion.

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

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

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

Elizabeth Simpson for Emancipate NC, amicus curiae.

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

PER CURIAM.

AFFIRMED.

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

Justice EARLS dissenting.

I. Introduction

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

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

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

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

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

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

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

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

II. Background

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Standard of Review

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

IV. Legal Framework for Selective Enforcement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Prima Facie Standard of Proof

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

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

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

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

I respectfully dissent.

Justice MORGAN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
DAVID McKOY

No. 71A22

Filed 1 September 2023

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

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

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

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

James R. Glover for defendant-appellant.

ALLEN, Justice.

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

I. Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Analysis

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

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

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

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

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

A. Scope of Appellate Review

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

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

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

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

B. Opening the Door

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

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

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

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

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

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

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

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

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

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

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

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

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

C. No Reversible Error

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

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

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

> evidentiary error does not necessitate a new trial unless the erroneous admission was prejudicial. The same rule applies to exclusion of evidence. Evidentiary error is prejudicial when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. Defendant bears the burden of showing prejudice.

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

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

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

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

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

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

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

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

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

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

III. Conclusion

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

AFFIRMED.

STATE OF NORTH CAROLINA
v.
JONATHAN DOUGLAS RICHARDSON

No. 272A14

Filed 1 September 2023

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13. Criminal Law—capital murder prosecution—preservation issues

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

Justice BERGER concurring.

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

Justice EARLS concurring in part and dissenting in part.

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

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

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

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

Justice MORGAN delivered the opinion of the Court.

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

Justice EARLS concurred in part and dissented in part.

MORGAN, Justice.

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

I. Factual and Procedural Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10. Deoxyribonucleic acid.

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

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

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

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

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

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

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

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

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

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

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

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

B. Legal proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Appearance of impropriety

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

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

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

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

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

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

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

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

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

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

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

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

B. Admissibility of photographic evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

. . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Testimony from Dr. Richard Barbaro regarding bite marks

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25. See footnote 22.

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

E. Expert testimony about whether Taylor was tortured

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

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

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

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

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

1. Precedent regarding the applicable version of Rule 702

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

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

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

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

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

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

2. Testimony about torture from McNeal-Trice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Torture testimony from Cooper

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Defendant's statements at Johnston Memorial Hospital

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

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

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

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

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

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

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

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

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

On 24 February 2014, the trial court entered an "Order Denying Defendant's Second Motion to Suppress Statements," incorporating the findings of fact and conclusions of law contained in the trial court's first order denying defendant's original motion to suppress and including additional findings of fact about defendant's interactions with Butler, beginning with defendant bringing Taylor into the emergency room and continuing through defendant's attempt to leave the hospital, Butler's actions in physically putting defendant into an exam room, and her keeping defendant there until Snipes and Whitley entered the room with defendant and closed the door as described above. The trial court also found the following facts:

> 13. At no time was Butler acting at the behest of or as an agent of law enforcement office[r]s.
>
> 14. The uniformed law enforcement officers who approached Butler at the door of treatment room 5 did not know about or acquiesce in her conduct or give prior approval to her actions.

The order also included the following conclusions of law:

> 1. Butler's actions were those of a private person and did not constitute an arrest of defendant

or a seizure of his person within the meaning of the Fourth Amendment.

2. None of Butler's actions triggered defendant's *Miranda* rights and they did not transform the officers' subsequent questioning of defendant in the hospital emergency treatment room into a custodial interrogation.

3. None of Butler's actions rendered defendant's statements to the officers in the hospital emergency room involuntary.

4. None of defendant's federal or state constitutional rights were violated by Butler's actions.

In reviewing a suppression order, an appellate court must determine whether competent evidence supports the trial court's findings of fact, and whether those findings of fact in turn support the trial court's conclusions of law, which are reviewed de novo. *Williams*, 362 N.C. at 632–33. Here, defendant does not challenge any of the trial court's findings of fact as unsupported by the evidence presented at the hearings, but citing *Stansbury v. California*, 511 U.S. 318 (1994), he contends that in the second order denying defendant's motion to suppress his statements made at the hospital, "the trial court failed to address 'how a reasonable person in [defendant's] position would perceive his or her freedom to leave.' " Among the relevant circumstances here, defendant identifies: (1) medical staff believed that defendant had committed a serious crime; (2) defendant was unable to get through the locked doors which led to the lobby and the hospital exit without the assistance of hospital staff; (3) Butler physically placed defendant in a room, stood in the doorway blocking his exit, and prevented him from leaving if he tried; (4) hospital staff contacted law enforcement to report that defendant had committed a serious crime; (5) Butler made clear to defendant that she would not permit him to leave the room; and (6) once the law enforcement officers arrived, they entered the room, closed the door, and began to question defendant without informing defendant that he had the option of leaving or providing him with *Miranda* warnings.

A criminal suspect must be advised of his pertinent constitutional rights before being "questioned while in custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 445; *see also State v. Buchanan*, 353 N.C. 332, 336 (2001) (stating that *Miranda* safeguards were "conceived to protect an individual's Fifth Amendment right against self-incrimination in the inherently compelling

context of custodial interrogations by police officers"). The relevant inquiry under *Miranda* is more narrow than the broad "free to leave" test employed to determine whether a person has been seized within the meaning of the Fourth Amendment. *Buchanan*, 353 N.C. at 339; *see also Howes v. Fields*, 565 U.S. 499, 509 (2012) (stating that "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*," which only applies where "the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*" (citation omitted)).

"Both the United States Supreme Court and this Court have held that *Miranda* applies *only* in the situation where a defendant is subject to custodial interrogation." *State v. Barden*, 356 N.C. 316, 337 (2002) (citations omitted) (emphasis added). "Custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody . . . .' " *Illinois v. Perkins*, 496 U.S. 292, 296 (1990) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). When considering statements challenged under *Miranda*, a court must consider "whether, based on the totality of the circumstances, there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Hammonds*, 370 N.C. 158, 162 (2017) (extraneity omitted). When considering "the circumstances surrounding the interrogation," the question for a court is not whether an individual being questioned actually felt that he or she was being restrained, but rather an objective inquiry, to wit: "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* at 162–63 (extraneity omitted).

Circumstances which may be considered include "the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning," *Howes*, 565 U.S. at 509 (citations omitted), as well as whether there was a police officer "standing guard at the door, [or] locked doors," *Buchanan*, 353 N.C. at 339, whether the defendant was told he was not under arrest, *State v. Waring*, 364 N.C. 443, 471 (2010), *cert. denied*, 565 U.S. 832 (2011), and whether law enforcement officers raised their voices, threatened the defendant, or made promises to him, *State v. Garcia*, 358 N.C. 382, 397 (2004). Regardless of which of these or other circumstances apply in a particular case, no single factor controls under the *Miranda* analysis. *Hammonds*, 370 N.C. at 167.

In light of the limitations on *Miranda*'s intent and reach as noted in *Buchanan* and *Howes*, statements made to private individuals

unconnected with law enforcement are generally admissible so long as they were made freely and voluntarily. *State v. Etheridge*, 319 N.C. 34, 43 (1987). An exception to this rule is if the private citizen was acting as an instrument or agent of the State which could bring an interrogation by a private citizen within the ambit of *Miranda*. *Etheridge*, 319 N.C. at 44. Each of the cases cited by the State at the second suppression hearing pertains to such situations. For example, in *Illinois v. Perkins*, the case initially cited by the prosecutor during the second suppression hearing,

> [a]n undercover government agent was placed in the cell of respondent Perkins, who was incarcerated on charges unrelated to the subject of the agent's investigation. Respondent made statements that implicated him in the crime that the agent sought to solve. Respondent claims that the statements should be inadmissible because he had not been given *Miranda* warnings by the agent. We hold that the statements are admissible. *Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement.

496 U.S. 292, 294 (1990). In explaining its decision, the Court noted that

> [t]he warning mandated by *Miranda* was meant to preserve the privilege during "incommunicado interrogation of individuals in a police-dominated atmosphere." [*Miranda*, 384 U.S.] at 445. That atmosphere is said to generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.

Id. at 296. Thus, "[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Id.* (quoting *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984)). The same holding is found in the North Carolina cases cited by the State during the second suppression hearing. *See Holcomb*, 295 N.C. at 611–12 (holding that "dialogue between [the] defendant and his uncles at the sheriff's office [where defendant was in custody] which resulted in his assistance in finding the murder weapon [did not] constitute[ ] a 'custodial interrogation' which was conducted without the warnings or procedural safeguards required by *Miranda*" because the uncles were not acting as

agents of the State); *Powell*, 340 N.C. at 686–87 (holding that there was no *Miranda* violation where the defendant's incriminating telephone call from prison to two non-law enforcement parties was recorded by those parties "for personal reasons" and those parties then turned the recording over to the police); *Johnson*, 29 N.C. App. at 143–44 (finding no *Miranda* violation where a witness who worked as a radio dispatcher for the local police department testified about the defendant's confession to the witness while the witness was visiting her relative who happened to be defendant's cellmate); *Perry*, 50 N.C. App. at 542 (holding that "[w]hen taking a bail jumper into custody, a bail bondsman is not acting as a law enforcement officer or as an agent of the state in any regard . . . and [t]hus, there was no obligation on the part of the bail bondsman to give *Miranda* warnings"); *Conrad*, 55 N.C. App. at 65 (finding that *Miranda* was not offended where a juvenile defendant asked to speak to a magistrate with whom the defendant "had worked . . . in the past [when the magistrate had been] a juvenile officer"). We do not find any of these cases applicable in defendant's case, however, because as defendant correctly notes, "[i]n every one of the authorities cited by the State to the trial court, the contested issue was not 'custody' per se, but the private or official character of the person to whom contested statements were made." The statement which defendant challenges here was not made to Butler, a private citizen, but rather to Whitley and/or Snipes, who were law enforcement officers acting in their official capacities at the time.

Instead, defendant begins his appellate argument by stating that, "Butler conducted a legal citizen's detention, then surrendered custody of [defendant] to Whitley and Snipes," such that "a reasonable person in [defendant's] position would not have felt free to leave at any time during questioning by Lt. Whitley and Det. Snipes. There was a restraint on [defendant's] freedom associated with formal arrest." Defendant cites N.C.G.S. § 15A-404 ("Detention of offenders by private persons"), which permits a private party to detain another of whom there is probable cause to believe has committed "[a] felony" or "[a] crime involving physical injury to another person" "in a reasonable manner considering the offense involved and the circumstances of the detention." N.C.G.S. § 15A-404(b)(1), (3), and -404(c) (2021). The only references to law enforcement officers in the statute are in subsection (d)—"The detention may be no longer than the time required for the earliest of the following: (1) The determination that no offense has been committed [and] (2) Surrender of the person detained to a law-enforcement officer as provided in subsection (e)"; and in subsection (e)—"A private person who detains another must immediately notify a law-enforcement officer

and must, unless he releases the person earlier as required by subsection (d), surrender the person detained to the law-enforcement officer." N.C.G.S. § 15A-404(d), (e) (2021). We agree with defendant that Butler's actions here would appear to have constituted a "citizen's detention" under express terms of the statute; we also recognize that this Court has opined that "the ordinary meaning of the word 'detain,' and the meaning we believe our legislature intended when it enacted [N.C.]G.S. 15A-404, is 'To hold or keep in or as if in custody.' " *State v. Wall*, 304 N.C. 609, 615–16 (1982) (quoting Webster's Third New International Dictionary 616 (1976)).

Neither *Wall*, which concerned a convenience store worker who chased a shoplifter out of the store, fired into an automobile the thief entered, and killed another occupant of the car, *id.* at 615, nor any of the few other cases citing this statute, are useful as regards the substantive issue presented here, namely, how a citizen's detention under N.C.G.S. § 15A-404 implicates *Miranda* concerns when the citizen "surrender[s] the person detained to a law-enforcement officer." *See*, *e.g.*, *State v. Gaines*, 332 N.C. 461, 475 (1992) (citing, *inter alia*, the statute in question and stating that "[a] uniformed law enforcement officer is expected under his duty to use the powers a private security guard does not possess, i.e., the power to enforce the law and to arrest where necessary"); *State v. Ataei-Kachuei*, 68 N.C. App. 209 (1984) (discussing the statute in relation to a defendant, the owner of an ice cream company, who shot and killed an employee whom, in the defendant's telling, was attempting to quit his job and abscond without settling up his debts to the defendant); *Caldwell v. Linker*, 901 F. Supp. 1010 (M.D.N.C. 1995) (discussing a teacher who was briefly detained by school officials upon refusing to return keys to the school); *State v. Gilreath*, 118 N.C. App. 200 (1995) (discussing the interplay between the statute in question and self-defense law); *State v. Beal*, 181 N.C. App. 100 (2007) (discussing the statute in question in conjunction with false imprisonment jurisprudence).

While the interplay between a citizen's detention of a suspected criminal, the citizen's subsequent "surrender" of the detainee to law enforcement officers, and incriminating statements thereafter made to law enforcement officers by the suspected criminal before he or she has received the required *Miranda* warnings appears to be a matter of first impression in North Carolina,[34] as noted above, the standard

34. Nor does caselaw from other jurisdictions concerning *Miranda* and citizen's arrests shed light on the specific situation here. *See*, *e.g.*, *Estelle v. Smith*, 451 U.S. 454, 467 (1981) (holding that a psychiatrist performing court-ordered pretrial psychiatric examination of a defendant in custody was required to provide a *Miranda* warning as an "agent of

of review for motions to suppress evidence is well established, and in our view, the trial court's 24 February 2014 "Order Denying Defendant's Second Motion to Suppress Statements" fails to make findings of fact which would address the essence of defendant's argument: that Butler's actions as a private person, not an agent of the State, constituted a detention of defendant and that the circumstances of her detention and subsequent "surrender" of defendant to the Sheriff's Department officers, when considered along with the factors surrounding the officers' questioning of defendant, created a situation where a reasonable person would not have felt able to leave and thus resulted in "a restraint on freedom of movement of the degree associated with a formal arrest." *See Hammonds*, 370 N.C. at 162 (quoting *Buchanan*, 353 N.C. at 339).

Neither of the trial court's orders denying defendant's motion to suppress his statements made at the hospital include crucial findings of fact that would be helpful in resolving this argument from defendant, although the trial court did make findings that Butler was not an agent of the State and that law enforcement officers were not aware of Butler's actions in detaining defendant when they questioned him in the exam room.[35] Accordingly, the trial court's second suppression order did not include findings of fact that would support its conclusions that "[n]one of Butler's actions triggered defendant's *Miranda* rights and they did not transform the officers' subsequent questioning of defendant in the hospital emergency treatment room into a custodial interrogation"; "[n]one of Butler's actions rendered defendant's statements to the officers in the hospital emergency room involuntary"; and "[n]one of defendant's federal or state constitutional rights were violated by Butler's actions."[36]

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the State"); *Hood v. Commonwealth*, 448 S.W.2d 388, 391 (Ky. 1969) ("rejecting the proposition that *Miranda* applies to a citizen's arrest lies in the fact that the ordinary citizen, not being a police officer, would not have the faintest notion concerning the matter of advising of rights"); *State v. La Rose*, 174 N.W.2d 247, 248 (Minn. 1970) ("hold[ing] that the exclusionary rule adopted in the *Miranda* case has no application with respect to [statements made by a detainee to the citizen detainer during] a citizen's arrest"); *State v. Kelly*, 294 A.2d 41 (N.J. 1972) (holding that *Miranda* did not apply during a citizen's arrest situation); *In re Deborah C.*, 635 P.2d 446 (Cal. 1981) (discussing the application of *Miranda* to store detectives).

35. We are mindful that defendant, while stating his argument at the second suppression hearing with sufficient clarity, had no caselaw to cite in support thereof, and that the State cited a number of cases which, as discussed previously, concerned *Miranda*'s application to statements made to private parties and were thus inapposite. Thus, the trial court's mistaken focus on whether Butler was acting as an agent of the State is understandable.

36. None of the cases cited by the State on appeal line up convincingly with those here where defendant, when attempting to leave the hospital was confronted with a locked door and was then physically forced into a room by a private citizen who repeatedly

Where the admission of evidence violates a defendant's constitutional rights, the burden shifted to the State to demonstrate beyond a reasonable doubt that the admission was harmless. *See* N.C.G.S. § 15A-1443(b) (2021) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt."). Defendant argues that he was prejudiced by the admission of his statement made to Snipes at the hospital because "[t]he State was then able to use [the] statement to argue in closing at the guilt phase that he was guilty of murder by torture because the wounds inflicted on [Taylor] were 'all punishment. The shaking was punishment by his own admission' "; "[Taylor] was picking at her scabs and he whipped her for it"; and "Doctor [Schwartz-Watts, defendant's mental health expert witness] said that [defendant] didn't know anything about those bites. Really? He didn't know anything about the bites. You're still going with the [cousin] story."

The State contends that it can meet the burden of showing harmless error beyond a reasonable doubt here because

> [t]he only inculpatory admission contained in defendant's statement to law enforcement in the emergency room was that he whipped Taylor with a power cord when she used the bathroom in his bed. The admission did not remotely touch the bulk of overwhelming evidence which showed defendant murdered Taylor by torture over a period of ten days. And although

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cursed defendant, stated in no uncertain terms that she would not permit him to leave, and stood in the doorway to prevent defendant from departing until law enforcement officers arrived. The State's brief contains the following citations: "*See*, *e.g.*, *Waring*, 364 N.C. at 471 . . . (holding the defendant was not in custody where he voluntarily agreed to accompany detectives to the police station; the defendant was told he was not under arrest and was never restrained; he was frequently left alone in the interview room with the door unlocked; the officers never raised their voice, threatened the defendant, or made him promises; and once he implicated himself in the murder, the interview ended and he was read his *Miranda* rights); *Garcia*, 358 N.C. at 397 . . . (no custody where the defendant was twice informed he was not under arrest; was free to move about unescorted to get a drink from the water fountain; was interviewed by a plain-clothed, unarmed officer with the interview room door closed; no party raised their voice, the defendant was not threatened, and no promises were made); *State v. Sweatt*, 333 N.C. 407 . . . (1993) (where the defendant was in the hospital because of his own intentional actions, there was an absence of a guard posted outside of his door, and lack of any overt actions by police officers indicated that defendant was not in custody when interviewed at the hospital); *accord State v. Alston*, 295 N.C. 629, 632 . . . (1978) (incriminating statements made in response to general on-the-scene police questioning, such as "what happened" when the defendant walked into the emergency room, are admissible)."

> he now argues such an admission was "unduly prejudicial," defendant himself vigorously attempted to get similar statements admitted into evidence during his case-in-chief that he made . . . to his own mental health expert.

In allowing the admission of defendant's statements to Schwartz-Watts, his mental health expert witness, as the basis of her opinion, the trial court noted that his statements to Schwartz-Watts were "substantially similar" to the statement he made to Detective Snipes when he was at the hospital. Schwartz-Watts was permitted to testify that she spoke to defendant about his crimes in order to determine whether any mental illness was related to his acts against Taylor. Pertinent to the consideration of prejudice to defendant from the admission of defendant's statement to Snipes at the hospital, Schwartz-Watts testified about several statements that defendant made to her: that defendant said "in regards to her head injury that [Taylor] had been picking scabs and [defendant] was shaking her and when he shook her that her head hit the door"; that defendant "put all the marks on [Taylor] because she peed in the bed"; and that defendant "reported whipping [Taylor] with the cord . . . the day before he cut the power cord into pieces. I don't know if that was that evening when he shook her and she then was picking the scabs and he grabbed her again." In light of this testimony from defendant's witness, we see no possible prejudice in the admission of the statement defendant made to Snipes at the hospital to the extent the challenged statement touched upon defendant's admissions that he shook Taylor and struck her head on a door due to Taylor picking at scabs, that defendant caused "all the marks on" Taylor's body because Taylor had urinated in the bed, or that defendant had whipped Taylor with an electrical cord, possibly due to further picking at scabs. To the extent that defendant objects to the State's argument during closing arguments that such injuries were inflicted "as punishment," that detail would seem to be exculpatory regarding the charge against defendant of murder by torture, in that murder by torture implicates pain and suffering inflicted in order for the defendant to achieve sadistic gratification from the pain and suffering, while injuries inflicted in even an ill-conceived and overzealous attempt to discipline or punish a child for perceived misbehavior might not qualify as torture.

Finally, the "[cousin] story" remark by the prosecutor which defendant notes as prejudicial in connection to the bites covering Taylor's body appears to refer to defendant's claim in the challenged statement that the bites had been inflicted by one of Taylor's cousins, who was also a young child. The intent of this remark by the prosecutor appears

to have been to suggest that defendant had lied to his mental health expert witness when he said he knew nothing about the source of the more than five dozen bites on Taylor's body, some of which involved the removal of flesh. Schwartz-Watts testified that defendant had "denied" the bite marks, but then clarified that she did not "recall [defendant] saying anything about the bite marks." The challenged statement was also referenced, without objection from defendant, during the following exchange between the prosecutor and Schwartz-Watts:

> Q. Now, I know that you reported what he said he told the detective, but in reading the detective's report he never admitted to putting all the marks on Taylor; is that correct?
>
> A. That's correct.

In light of the extensive testimony from multiple witnesses regarding those human bite wounds—which, as already discussed, was properly admitted—that the bites had been inflicted by an adult rather than by a child during the ten-day period when Taylor was in the sole custody of defendant and when she was never in the presence of any other person, much less her cousin, the passing remark by the State was plainly harmless beyond a reasonable doubt.

In sum, any alleged error in the admission of the statement defendant made to the law enforcement officer at Johnston Memorial Hospital was harmless beyond a reasonable doubt in light of (1) the fact that all of the information which defendant has identified as potentially prejudicial was placed before the jury by defendant's own witness and (2) because of the overwhelming evidence of defendant's guilt as set forth above in the statement of facts. *State v. Morgan*, 359 N.C. 131, 156 (2004).

G. Cumulative prejudice from alleged evidentiary errors

[7] Defendant next argues that "[t]he combined effect of the inadmissible evidence influenced the jury toward passion and prejudice, compounding the prejudice of each single instance," citing *Hembree*, 368 N.C. at 20 ("Regardless of whether any single error would have been prejudicial in isolation, we conclude that the cumulative effect of these three errors deprived defendant of a fair trial."). This Court's precedent provides that even where "none of the trial court's errors, when considered in isolation, [a]re necessarily sufficiently prejudicial to require a new trial, the cumulative effect of the errors [may] create[ ] sufficient prejudice to deny [a] defendant a fair trial." *State v. Canady*, 355 N.C. 242, 246 (2002); *see also State v. Wilkerson*, 363 N.C. 382, 426 (2009)

("Cumulative errors lead to reversal when taken as a whole they deprive[ ] the defendant of his due process right to a fair trial free from prejudicial error." (extraneity omitted)). We are not persuaded by defendant's argument.

In *Hembree*, the defendant was charged with two unrelated murders, for each of which he was tried separately. 368 N.C. at 5–6. At the trial discussed in *Hembree*, defendant admitted that he had been present when the victim died after the two had used cocaine together and that he had disposed of her body; thus, "[t]he principal contested issue of fact at trial was the cause of [the victim's] death," whether murder or "cocaine toxicity." *Id.* at 14. The Court concluded that, in one of the murder trials, "the trial court [had] committed three errors: first, by allowing admission of an excessive amount of the [second] murder evidence under Evidence Rule 404(b), including more than a dozen photographs of [the second victim's] burnt body; second, by allowing [the second victim's] sister . . . to testify about [the second victim's] good character; and third, by allowing the prosecution to argue without basis to the jury that defense counsel had in effect suborned perjury." *Id.* at 9. The Court held that defendant was entitled to a new trial because "the cumulative effect of [those errors] deprived him of a fair trial." *Id.*

In reaching this result, the Court first "note[d] the particular dangers presented by Rule 404(b) evidence. . . . [S]uch evidence can be misused, especially by allowing the jury to convict the accused for a crime not actually before it." *Id.* at 13 (citations omitted). The State had presented this Rule 404(b) evidence regarding the alleged second victim "on seven of the eight days it offered evidence" at the guilt–innocence phase of the defendant's trial, and the Court "conclude[d] that the decision to allow the State to present so much evidence about the [second] murder stretched beyond the trial court's broad discretion." *Id.* at 14, 16. The Court then found that the testimony from the second victim's sister about the second victim's good character was plainly irrelevant at defendant's trial for the alleged murder of a different victim, and therefore "any probative value the testimony might have had was substantially outweighed by the danger of unfair prejudice." *Id.* at 16. In regard to closing arguments, the Court determined that

> [t]he State argued to the jury, not only that [the] defendant had confessed truly and recanted falsely, but that he had lied on the stand in cooperation with defense counsel. Whether or not [the] defendant committed perjury, there was no evidence showing that he had done so at the behest of his attorneys.

> Accordingly, we hold that the prosecutor's statements to this effect were grossly improper, and the trial court erred by failing to intervene *ex mero motu*.

Id. at 20. "Regardless of whether any single error would have been prejudicial in isolation, [the Court] conclude[d] that the cumulative effect of these three errors deprived defendant of a fair trial." *Id.*

The State contends that, in regard to cumulative error, the case at bar is more analogous to *Wilkerson*. The defendant in *Wilkerson*, who sold drugs illegally, was convicted of, *inter alia*, two counts of first-degree murder. 363 N.C. at 391. On appeal, the Court identified four errors in defendant's capital trial: (1) the admission of a police report of the arrest of one of defendant's drug sources which "was admitted for the purpose of establishing [the source's] cellular telephone number, . . . the same number [the] defendant dialed while hiding . . . immediately after the" murders, which the Court concluded was hearsay; (2) the admission of "opinion testimony concerning [one of the victim's] reputation for peacefulness"; (3) the admission of hearsay testimony from the drug source's wife "that her husband sold drugs to defendant in their back bedroom"; and (4) the failure of the trial court to intervene *ex mero motu* in response to the prosecutor's personal vouching for the veracity of one of the State's witnesses during closing arguments. *Id.* at 419, 426. After "review[ing] the record as a whole and, after comparing the overwhelming evidence of [the] defendant's guilt with the evidence improperly admitted, [the Court] conclude[d] that, taken together, these errors did not deprive defendant of his due process right to a fair trial." *Id.* at 426.

Before this Court, defendant states that his "defense at both phases of trial [was] that he was not guilty of the most serious charges, and should not receive a death sentence, because his actions with regard to Taylor were influenced heavily by his dysfunctional upbringing" and represents that

> the excessive manner and display of photographs, presented as professional witnesses exclaimed about their personal horror, multiplied the prejudice of each photo and each witness. Then Drs. Barbaro, McNeal-Trice, and Cooper gave unreliable opinions, unmoored from any reliable research or science, about bite marks and torture. Their opinions were replete with gratuitous, graphic commentary, inappropriate in a court of law where someone's life is being

> determined. Combined, they spent hours repeatedly describing gruesome injuries while displaying color photographs of injuries in a display excessive in size and scope by any prior standard. And as they narrated the photographs, they gave opinions prejudicially dictating to the jury how it should decide the case on guilt and on sentence.
>
> The prejudice to [defendant] increased even further when the trial court allowed the State to present statements he made to law enforcement without the necessary *Miranda* warnings. The State used [defendant's] un-*Mirandized* statements against him in closing argument to impugn his mental health experts and the defense theories at both phases of trial.

As we have opined above, the only evidence that we have determined was clearly erroneously admitted at defendant's trial consisted of the brief display to the jury of State's Exhibit 26, a full-body photograph of Taylor taken at Johnston Memorial Hospital, which was properly published to the jury during the testimony of other medical professionals, but which was unnecessarily shown during the testimony of nurse Butler. We have also stated that some portions of testimony from law enforcement and medical expert witnesses about their emotional reactions to seeing Taylor's injuries may have been improper, although we found the challenged evidence was not prejudicial. Finally, we determined that the trial court's order denying defendant's second motion to suppress the statement defendant made to law enforcement officers at Johnston Memorial Hospital was erroneous in that it failed to adequately address defendant's argument in favor of suppression. However, the potentially inculpatory evidence contained in that statement was admitted through one of defendant's own witnesses, such that there was no prejudice whatsoever in the trial court's error.

We find the facts here easily distinguishable from those in *Hembree*, where it was unclear whether the victim had died by murder or as a result of her ingestion of cocaine, and the State spent the majority of its case-in-chief introducing evidence of an unrelated murder. The uncontradicted evidence in this case tended to show that defendant: (1) had a history of physically disciplining Taylor; (2) volunteered to take care of Taylor while Reyes was away although they were living in a one-room outbuilding that lacked a kitchen, bathroom, or running water; (3) within an hour of gaining total control of Taylor purchased materials to install a padlock on the outbuilding to prevent Taylor from being able to open

the only door of the structure from the inside; (4) over the next ten days was the only person who had access to Taylor; (5) left Taylor, who turned four during the ten-day period, alone and locked inside the outbuilding on multiple occasions while defendant worked and made purchases; (6) refused his grandmother's offer to help care for Taylor once the grandmother learned that the child had been left alone with defendant; (7) brought Taylor to a hospital emergency room in a hypothermic and near-death condition with her body revealing at least 144 separate injuries that appeared to have been inflicted at different points over a ten-day period and some of which were badly infected, including signs of vaginal and anal sexual trauma, numerous lacerations apparently from the electrical cord—in some of which tiny pieces of metal wire were embedded, more than five dozen bite marks—some of which involved the removal of flesh, and head trauma which had rendered Taylor's brain function minimal and ultimately led to her death; (8) first lied about the cause of Taylor's head injury being a fall from jumping on a bed; and (9) later admitted to whipping Taylor with an electrical cord and shaking her in a manner that caused the child's head to strike a door inside the outbuilding for soiling the inflatable mattress Taylor slept on with defendant. In light of this overwhelming evidence that defendant intentionally inflicted all of these injuries to Taylor over an extended period of time and caused the child great pain and suffering, as well as being responsible for her death, the minimal points of evidence which were even arguably admitted in error, even considered cumulatively, did not prejudice defendant by depriving him of a fair trial. We cannot agree with defendant that the erroneous repeated showing of a single photograph of Taylor's body as she appeared when defendant brought her to the hospital and the testimony of witnesses that they found seeing the child's extraordinarily numerous and severe injuries emotionally upsetting, even taken together, had a meaningful impact on the jury's determinations at either the guilt–innocence or sentencing phase of trial. Accordingly, defendant's argument regarding cumulative prejudice is overruled.

H. Defendant's claims of intentional discrimination in jury selection

Defendant next argues the trial court erred in addressing defendant's assertions that the prosecutor in his case used the State's peremptory challenges against jurors in a manner that was discriminatory as to both race and gender in violation of the federal and state constitutions. We disagree.

"[A] prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related

to his view concerning the outcome' of the case to be tried," subject to constitutional restrictions. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (quoting *United States v. Robinson*, 421 F. Supp. 467, 473 (Conn. 1976), mandamus granted *sub nom. United States v. Newman*, 549 F.2d 240 (2d Cir. 1977)). In the capital case at bar, the State and defendant were each able to use up to eighteen peremptory challenges during jury selection. *See* N.C.G.S. § 15A-1217(a), (c) (2021). When the State indicated it would exercise its fifth peremptory strike to remove prospective juror Cubia Massey,[37] a Black woman, the defense objected, arguing the strike was impermissibly based on Massey's race and gender.

After the venire was excused from the courtroom, defendant first emphasized that the State had peremptorily struck two of three (~67%) Black prospective jurors who had not been challenged for cause, while the State had only struck three of sixteen (~19%) white jurors. Defendant then asserted that one of the appropriate considerations upon a *Batson* challenge is "the particular strike rates of the particular prosecutors involved," offering an affidavit (the MSU affidavit) that was from two academic researchers who had studied jury selection in North Carolina capital cases tried between 1990 and 2009 and that had been offered in various Racial Justice Act[38] appeals, which defendant purported showed that the prosecutor who stated that he planned to strike Massey had, in four prior capital cases, disproportionately excused Black jurors using peremptory challenges. The State objected to admission of the MSU affidavit, characterizing it as "one of the most ridiculous studies [he had] seen in [his] entire life," as well as challenging its relevance. Defendant noted that "patterns and practices of the individual prosecutors" in a case have been held relevant under *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The trial court, after framing the prosecutor's objection as being based on hearsay grounds, sustained that objection but held open the question of whether the affidavit might later be included "in the record for possible appellate review."

Following defendant's argument that the State's proposed strike of Massey was impermissibly race-based and the State's response, defendant turned to the issue of gender-based peremptory challenges, stating

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37. The transcript notes the prospective juror's name as Cubia McLean-Massey, but the juror stated that she preferred to use the surname "Massey" during voir dire. In this opinion, we refer to Ms. Massey in the manner she requested.

38. Defendant was clear at trial that he was not making any claim under the Racial Justice Act in regard to his jury challenges as discussed here.

> I was just going to also point out that under—that is our argument concerning the *Batson* challenge. As far as gender, . . . there have been seven male jurors [and the State has] struck one with a strike rate of 14.28 percent. There have been twelve women who have reached that stage and they have struck four.

(Italics added.) After those brief remarks by defendant, the trial court asked the State to respond "to the prima facie showing issue," in regard to both race- and gender-based juror strikes. The State remarked, "First of all, I would also say that, well, I disagree with that on the gender issue, *Batson*. We'll deal with that at the appropriate time." (Italics added.)

The State then made several points, first appearing to challenge defendant's strike rate evidence by suggesting that the *Batson* challenges as to racially discriminatory strikes were coming too early in the jury selection process for the statistical strike rate to be sufficient to meet the prima facie burden, with the prosecutor noting that if the first potential juror who is questioned is struck and also happens to be Black, then the strike rate for Black jurors at that point would be one hundred percent of Black jurors. The prosecutor then pointed out that defendant is white, that the victim was white and of "El Salvador[an]" background, and that "most, if not all, [of] the key witnesses in this case are either . . . from El Salvador or white." The State noted "questions about [Massey's] job, . . . [Massey's] issues with the death penalty and so forth." Finally, the State noted that it had struck the first potential juror who was Black but had accepted the second prospective juror who was Black, and asserted that in light of all of these circumstances, the State's use of a peremptory challenge to strike the third Black potential juror was insufficient to establish the required prima facie showing under *Batson*.

With respect to gender, the prosecutor then stated,

> I would also want to say, if they intend, and I'm going to do some research on it, but if [the defense] intend[s] to make an issue and try to say *Batson* applies to gender, then we will be — I can go ahead and put the [c]ourt and [d]efense on notice that we will begin challenging reverse *Batson* issue [sic] as far as gender also, because they are repeatedly removing male jurors in this case, and so if that's where – an issue we're going to go to, we'll have — we'll put everybody on notice of that, because that is a common — and you go back in history, that is a

> common issue that comes to rise from the [d]efense in these cases, so we'll address that as appropriate.

(Italics added.) The State then referred again to the racial discrimination issue and asked the trial court to deny defendant's motion.

The trial court overruled both defendant's *Batson* and *J.E.B.* objections, stating,

> All right, I do believe that the appellate opinions in this State indicate that a numerical or statistical analysis of a prosecutor's use of peremptory strikes could be helpful to the [c]ourt in ruling on a prima facie decision, a prima facie showing decision, but that such analysis is not dispositive. The Court has carefully reviewed and considered the voir dire process in this case thus far, and has considered its observations of the prosecutors' conduct and method of voir dire.
>
> The [c]ourt does find that the prosecutors' statements and questions during voir dire, whether asked by [either prosecutor], have been consistent and evenhanded throughout. The [c]ourt does not find that any of the statements and questions have been racially motivated thus far. And the [c]ourt does rule that [d]efendant, at this time, has failed to establish a prima facie showing of either racial or gender discrimination in its use of peremptory challenges.

The trial court then gave the State an opportunity to offer any race-neutral or gender-neutral reasons for its use of a peremptory challenge against Massey for the record, but the State declined to do so, stating that "the record is clear."

1. Racial discrimination in jury selection

[8] The North Carolina court system has a well-documented problem with Black citizens being disproportionately excluded from the fundamental civil right to serve on juries. *See, e.g.*, *State v. Robinson*, 375 N.C. 173, 181 (2020) (noting a trial court's "meticulously detailed findings . . . that race was a significant factor in the decisions of prosecutors to exercise peremptory challenges to strike African-American jurors . . . [across] the State of North Carolina" in capital trials). In this case, according to defendant: (1) "when . . . trial counsel objected to the State's peremptory strike of a prospective Black juror, and supported

the objection with evidence showing the prosecutor had a history of disproportionately removing Black jurors in capital cases, the trial court categorically refused to consider the evidence"; (2) "the trial court failed to make specific findings, as this Court's precedent requires, about the statistical evidence of discrimination that [defendant] raised"; (3) "when considering whether [defendant] established a prima facie case of discrimination, rather than applying the correct legal standard that asks only whether a defendant produced sufficient evidence to make an arguable claim, the trial court focused on whether the prosecutors' comments were facially 'evenhanded' or 'racially motivated' " which is "not the test at the prima facie stage"; and (4) "the trial court concluded erroneously that [defendant] failed to establish a prima facie case of discrimination even though the State had struck 67% of the Black jurors at the time the objection was raised, and where the prosecutor had a history of disproportionately removing Black jurors over the course of four other capital trials."

The race-based exclusion of jurors violates both the state and federal constitutions. *See* N.C. Const. art. I, § 26 (prohibiting exclusion "from jury service on account of sex, race, color, religion, or national origin"); *see also* N.C. Const. art. I, § 19 (guaranteeing "the equal protection of the laws"). In *Batson*, the United States "Supreme Court deemed purposeful discrimination in jury selection to be an equal protection violation." *State v. Bennett*, 374 N.C. 579, 592 (2020) (citing *Batson*, 476 U.S. at 88–89). An objecting party will prevail if it can demonstrate that a peremptory strike was "motivated in substantial part" by an improper factor. *Foster v. Chatman*, 578 U.S. 488, 514 (2016). When a *Batson* challenge is raised during jury selection, the trial court must engage in a three-step inquiry:

> First, the party raising the claim must make a prima facie showing of intentional discrimination under the totality of the relevant facts in the case. Second, if a prima facie case is established, the burden shifts to the State to present a race-neutral explanation for the challenge. Finally, the trial court must then determine whether the defendant has met the burden of proving purposeful discrimination.

State v. Waring, 364 N.C. 443, 474–75 (2010) (extraneity omitted). Here, only the first prong of the *Batson* analysis is at issue, to wit: whether defendant made "a prima facie showing of intentional discrimination" by the prosecutor. *Id.*

"Step one of the *Batson* analysis, a *prima facie* showing of racial discrimination, is not intended to be a high hurdle for defendants to cross." *State v. Hoffman*, 348 N.C. 548, 553 (1998). Thus, "a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005). At the prima facie stage of its analysis, the question is not "whether a prosecutor has actually engaged in impermissible purposeful discrimination at the first step of the *Batson* inquiry because '[t]he inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.' " *Bennett*, 374 N.C. at 599 (quoting *Johnson*, 545 U.S. at 172). Instead, "the burden on a defendant at this stage is one of production, not of persuasion." *State v. Hobbs*, 374 N.C. 345, 351 (2020).

Among the relevant facts which a trial court should consider in their totality at the prima facie stage are

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

State v. Quick, 341 N.C. 141, 145 (1995). Statistical analyses of peremptory challenge patterns, while "not necessarily dispositive" of whether a defendant has succeeded in making out a *prima facie* case, show that such evidence "can be useful in helping . . . the trial court determine whether a prima facie case of discrimination has been established." *State v. Barden*, 356 N.C. 316, 344 (2002). Other relevant factors must be considered by a trial court, including historical evidence of racial discrimination in a jurisdiction. *Hobbs*, 374 N.C. at 351. In sum, to establish a prima facie case at the first stage of a *Batson* inquiry, a defendant must offer sufficient evidence which may be drawn from a wide range of factors from which the trial court can infer racial discrimination in jury selection, and the trial court has substantial discretion in reaching such a determination.

For this reason, when a trial court rules that a defendant has failed to establish a prima facie case of racial discrimination during jury selection, that ruling is accorded deference upon appellate review and will not be disturbed unless it is "clearly erroneous." *State v. Augustine*, 359 N.C. 709, 715 (2005), *cert. denied*, 548 U.S. 925 (2006). Appellate courts must be "mindful that trial courts, given their experience in supervising *voir dire* and their ability to observe the prosecutor's questions and demeanor firsthand, are well qualified to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination." *State v. Taylor*, 362 N.C. 514, 527 (2008) (quotation marks and citation omitted), *cert. denied*, 558 U.S. 851 (2009).

In this case, many of the typical factors suggested by applicable precedent—namely, those that concern the racial identification of the defendant, the victim, and key witnesses—are absent or muted. Defendant is white, Taylor was apparently white and of an El Salvadoran background, and the primary witnesses appear, upon the record, to be white and/or of El Salvadoran background. Moreover, race does not appear to have been a motivation or relevant aspect in the crimes alleged or in their prosecution. Further, upon resolving defendant's *Batson* challenge, the trial court opined that "the prosecutors' statements and questions during voir dire . . . have been consistent and evenhanded throughout. The [c]ourt does not find that any of the statements and questions have been racially motivated thus far." Defendant does not present any arguments to the contrary regarding these factors. Instead, defendant contends that the trial court erred because it

> refused to consider the prosecutor's race-based strike history across cases[;] applied an incorrect legal standard when deciding whether the prima facie case was met[;] failed to make specific findings about the statistical evidence[; a]nd . . . failed to appreciate that the statistical racial disparity in this case, in tandem with the prosecutor's multi-case track record of disproportionately excluding Black jurors, combined to establish a prima facie showing.

Considering defendant's argument regarding the MSU affidavit, which defendant averred showed a multi-case pattern of racially disparate juror strike rates for one of the State's two prosecutors in this case, we agree that this Court has held that "a court *must* consider historical evidence of discrimination in a jurisdiction" if it has been admitted. *Hobbs*, 374 N.C. at 351 (emphasis added) (citing *Miller-El v. Cockrell*,

537 U.S. at 346; *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019)). However, nothing in *Hobbs* touches upon the *admissibility* of evidence of historical strike patterns.

The trial court here decided to exclude the MSU affidavit because the State was not able to cross-examine the affiants or the authors of the research from which the MSU affidavit was drawn, using the term "hearsay" to describe the affidavit. According to defendant, "[e]videntiary rules do not strictly govern *Batson* proceedings," citing *Foster* and *State v. Jackson*, 322 N.C. 251 (1988)—cases which defendant asserts shed light on his argument here. We find these cases to be inapposite and unhelpful in our consideration of defendant's argument regarding whether the trial court clearly erred in exercising its discretion by declining to admit the MSU affidavit at the first stage of *Batson*—the determination of whether defendant established a prima facie case of racial discrimination.

In *Foster*, for example, a post-conviction *Batson* case, the "parties agree[d] that [the defendant had] demonstrated a prima facie case, and that the prosecutors ha[d] offered race-neutral reasons for their strikes." 578 U.S. at 500. Thus, the Supreme Court "address[ed] only *Batson*'s third step, . . . [which] turns on factual determinations, [where], 'in the absence of exceptional circumstances,' [appellate courts] defer to state court factual findings unless [the appellate courts] conclude that they are clearly erroneous." *Id.* (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). The evidence in question in *Foster* was "a 'certif[ied] . . . true and correct copy of 103 pages of the State's case file' " from the defendant's trial, which Foster had received in response to an open records request. *Id.* (alterations in original). Applying a deferential review to the State's challenge of the trial court's decision to admit the portion of the State's case file in the defendant's case, the Supreme Court upheld the trial court's decision to "admit[ ] the file into evidence, reserving 'a determination as to what weight the Court is going to put on any of [it]' in light of the objections urged by the State," some of which were potentially hearsay-based. *Id.* at 501. While the Supreme Court then stated that it could not

> accept the State's invitation to blind ourselves to [the file's] existence. We have "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S., at 478. . . . As we have said in a related context, "[d]etermining whether

> invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). At a minimum, we are comfortable that all documents in the file were authored by *someone* in the district attorney's office. Any uncertainties concerning the documents are pertinent only as potential limits on their probative value.

Id. at 501 (third and fourth alterations in original). We find *Foster* distinguishable because that appeal concerned: (1) the third—and ultimate—stage of a *Batson* inquiry, as opposed to the stage one prima facie inquiry at issue in this case; (2) the deferential review of a trial (or hearing) court's decision to *admit* challenged evidence as part of a *Batson* claim as opposed to such a court's decision to *exclude* offered evidence; and (3) evidence specific to the jury selection in the defendant's own trial as opposed to an analysis of historical jury strikes across other trials involving a prosecutor in defendant's trial here. In sum, *Foster* does not address the admissibility of evidence at the prima facie stage of a *Batson* hearing during jury selection and unsurprisingly does not explicitly state that rules of evidence do not apply in *Batson* determinations.

Similarly, in *Jackson*, this Court considered the trial court's ultimate determination after a post-trial full *Batson* proceeding, not upon a first stage, prima facie sufficiency argument raised during trial. 322 N.C. at 254. Applying the deference just discussed, the Court opined, that the Court "might not have reached the same result as the superior court but giving, as we must, deference to its findings, we hold it was not error to deny the defendant's motion for mistrial." *Id.* at 257. Specifically, in considering "the quashing of the subpoenas to . . . the prosecutors in the case," the Court held that

> a defendant who makes a *Batson* challenge does not have the right to examine the prosecuting attorney. In balancing the arguments for and against such an examination, we believe the disruption to a trial which could occur if an attorney in a case were called as a witness overbears any good which could be obtained by his testimony. We do not believe we should have a trial within a trial. The presiding judges are capable of passing on the credibility of prosecuting attorneys without the benefit of cross-examination.

Id. at 257–58. As with *Foster*, this case does not bar a trial court's use of the rules of evidence and evidentiary concepts such as hearsay from serving as guidance in *Batson* hearings, does not pertain to prima facie *Batson* determinations, and employs a deference to the decisions of the trial court rather than providing this Court with a precedential basis to reverse a trial court's discretionary evidentiary determination.

We find defendant's citations to *Waring*, 364 N.C. at 487, and *State v. Smith*, 352 N.C. 531, 540 (2000), cases that defendant asserts demonstrate that "[t]his Court has repeatedly affirmed trial court denials of *Batson* objections by relying on the prosecutor's assertion at trial that the juror had a criminal record," equally unavailing. Neither of those cases involved review of the trial court's decision to exclude hearsay evidence upon the proffer of an affidavit at the prima facie stage of a *Batson* inquiry. In *Waring*, the prosecutor, at the second stage of the test set forth in *Batson*, noted as one race-neutral reason among several for striking a Black prospective juror "that she had been charged with a felony and both her jury questionnaire and [voir dire] testimony concerning the disposition of the charges were inconsistent with the 'AOC records.' " 364 N.C. at 487. This Court did not address any "hearsay" concerns in its decision, because no such objection was apparently made as to the "AOC records," but rather the defendant there had argued that the reason was pretextual because similar consultation of "AOC records" was not done in connection to white jurors. *Id.* at 489–90.

In *Smith*, the defendant "contend[ed] the jury selection was flawed" at his trial, in part because "he did not have equal access to the criminal records of prospective jurors." 352 N.C. at 539. The trial court then accepted the State's race-neutral reason for excusing one potential juror—that the juror appeared to have lied about her previous criminal history on her jury questionnaire—without any consideration of hearsay concerns. *Id.* at 540. However, the record in that case does not indicate that the defendant made any objection to the evidence in question on hearsay grounds and thus it is unsurprising that the trial court, and this Court on appellate review, simply addressed the non-hearsay arguments brought forward as error. *See id.* at 540–41.

We acknowledge the lack of any precedent which categorically provides that the rules of evidence may not be employed in the discretion of a trial court during the prima facie stage of a *Batson* challenge during jury selection and therefore decline to create such an exception to the general applicability of the evidentiary rules during trial proceedings based on the facts presented here with regard to the MSU affidavit. *See, e.g.*, *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 362 ("Affidavits are

generally inadmissible as evidence during trial, as they are an inherently weak method of proof, prepared without notice and without opportunity for cross[-]examination."), *cert. denied*, 314 N.C. 117, *cert. denied*, 474 U.S. 981 (1985). In light of the broad discretion given to trial courts at the first stage of a *Batson* inquiry and the great deference that we must give such determinations on appellate review, we do not perceive clear error in the trial court's decision to sustain the State's hearsay objection to the MSU affidavit.

We therefore must look at the factors properly before the trial court here at the prima facie stage of defendant's *Batson* challenge based upon the State's alleged racially discriminatory use of peremptory strikes at the point when defendant lodged his objection: (1) it was relatively early in the jury selection process and only three Black prospective jurors had been individually questioned; (2) strike statistics showed that the State had struck Black potential jurors at a higher rate than white prospective jurors; (3) there were no apparent racial concerns raised by the racial and ethnic backgrounds of defendant, Taylor, or any of the key witnesses in this case; and (4) "the prosecutors' statements and questions during voir dire . . . [did not appear to be] racially motivated." In other words, the only evidence before the trial court at the prima facie stage tending to suggest potential discrimination consisted of the disparate strike rates of Black and non-Black potential jurors. But, such statistical analyses of peremptory challenge patterns, while "useful in helping . . . the trial court determine whether a *prima facie* case of discrimination has been established," are "not necessarily dispositive." *Barden*, 356 N.C. at 344. Giving the appropriate deference to the trial court's ruling, we do not believe that defendant has established that the trial court's decision was "clearly erroneous." *Augustine*, 359 N.C. at 715; *see also Taylor*, 362 N.C. at 527 (cautioning that reviewing courts should be "mindful that trial courts, given their experience in supervising *voir dire* and their ability to observe the prosecutor's questions and demeanor firsthand, are well qualified to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination" (extraneity omitted)).

Defendant next cites *Hobbs* in support of his argument "that a trial court commits error requiring remand when it fails to 'explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges . . . ' and fails to explain 'how or whether [the defendant's evidence was] evaluated.' " 374 N.C. at 358–59. The *Hobbs* decision, however, explicitly noted that its analysis was *not* regarding the prima facie prong under *Batson*, that issue being moot

at the point when the *Hobbs* appeal reached this Court, but rather addressed the ultimate determinations by the trial court upon its consideration of the State's race-neutral reasons for its peremptory strikes against Black prospective jurors. *Id.* at 355–57. Defendant cites no precedent requiring specific findings of fact by the trial court in holding that defendant failed to make a prima facie case under *Batson* and the Court has in fact expressly rejected the argument that findings are required at the prima facie stage. *See State v. Williams*, 343 N.C. 345, 359 (1996) (upholding trial court's ruling from bench, over argument that further findings were required, that "there hasn't been a prima facia [sic] showing"). In any event, the trial court, from the bench, here identified the factors it considered in concluding that defendant had not met its burden of production.

Relatedly, defendant takes issue with the trial court's statement that none of "the statements and questions [by the State during voir dire] have been racially motivated" as evidence that the trial court was erroneously "jumping ahead" in the *Batson* process to the third stage of that analysis. This assertion by defendant is unpersuasive as the State had not at that point (and in fact never did) offer race-neutral reasons for its peremptory strikes—the process of stage two under *Batson*—because the trial court quite clearly noted that it was opining about defendant's prima facie showing. Further, whether the prosecutor had asked questions or made statements during voir dire that suggested racial discrimination is specifically identified in *Quick* as an appropriate factor for consideration at this point in the evaluation of a *Batson* challenge. *Quick*, 341 N.C. at 145 (listing "questions and statements of the prosecutor which tend to support or refute an inference of discrimination" as a factor to be considered at the prima facie stage of a *Batson* hearing). It is thus clear that the trial court's statements were not regarding any determination of purposeful discrimination, but rather, as the trial court stated, were about defendant's prima facie challenge. We therefore reject this part of defendant's argument.

In sum, we hold that defendant has not shown clear error by the trial court in regard to its determination that defendant failed to establish a prima facie case of racial discrimination at the point when his *Batson* challenge was raised.

2. Defendant's J.E.B. *claim*

[9] Defendant next contends that he is entitled to a new trial, or in the alternative, for remand to the trial court for a new hearing, because the State's strike of potential juror Massey—a Black woman whose excusal

was discussed above in regard to defendant's racial discrimination *Batson* argument—was also impermissibly based upon her gender. We disagree.

The exclusion of jurors based upon gender is barred by both the state and federal constitutions. *See* N.C. Const. art. I, § 26 (prohibiting exclusion "from jury service on account of sex, race, color, religion, or national origin"); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994) ("Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause . . . ."); *see also* N.C. Const. art. I, § 19 (also guaranteeing "the equal protection of the laws"). "Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *J.E.B.*, 511 U.S. at 140. Specifically, "[s]triking individual jurors on the assumption that they hold particular views simply because of their gender is practically a brand upon them, affixed by the law, an assertion of their inferiority." *Id.* at 142 (extraneity omitted).

In considering an objection to the proposed strike of jurors based on gender, a trial court applies the same three-prong analysis set forth in *Batson*. *See State v. Maness*, 363 N.C. 261, 271–72 (2009). Thus, a party lodging an objection to a juror strike alleged to have been made based upon gender must "make a *prima facie* showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike." *State v. Call*, 349 N.C. 382, 403 (1998) (quoting *J.E.B.*, 511 U.S. at 144–45). We review such determinations for clear error. *See State v. Barnes*, 345 N.C. 184, 210, *cert. denied sub nom.*, *Chambers v. North Carolina*, 522 U.S. 876 (1997), and *cert. denied*, 306 U.S. 666 (1998).

As with a challenge under *Batson* raising racial discrimination, relevant factors to be considered when determining whether a prima facie case of gender-based discrimination in jury selection has been shown include:

> the gender of the defendant, the victim and any key witnesses; questions and comments made by the prosecutor during jury selection which tend to support or contradict an inference of gender discrimination; the frequent exercise of peremptory challenges to prospective jurors of one gender that tend[s] to establish a pattern, or the use of a disproportionate number of peremptory challenges against venire members of one gender; whether the State exercised

> all of its peremptory challenges; and the ultimate gender makeup of the jury.

Call, 349 N.C. at 403–04. A trial court's ruling on an objection asserting that a peremptory strike was discriminatory is reviewed for clear error. *Snyder*, 552 U.S. at 477, 487; *Bennett*, 374 N.C. at 592.

At the point during jury selection when the State proposed to strike Massey, the State had used its peremptory strikes to remove four of twelve (33%) female prospective jurors and one of seven (14%) male prospective jurors. Defendant first asserts that this "numerical pattern alone raised an inference of discrimination." When Massey was challenged, sixteen potential jurors were still eligible to serve, eleven women and five men. The State had previously used its peremptory challenges on three female prospective jurors and one male prospective juror. Five jurors had been seated at that point: one man and four women. Given that twice as many female potential jurors were available as male potential jurors, and in light of the composition of the jury as it existed in part at the point of defendant's *Batson* challenge, we cannot see "clear error" in the trial court's ruling on this ground alone.

Defendant's only other argument of error by the trial court regarding gender-based discrimination is based upon statements by one of the prosecutors in response to defendant's challenge:

> I would also want to say, if they intend, and I'm going to do some research on it, but if [the defense] intend[s] to make an issue and try to say *Batson* applies to gender, then we will be – I can go ahead and put the [c]ourt and [d]efense on notice that we will begin challenging reverse *Batson* issue [sic] as far as gender also, because they are repeatedly removing male jurors in this case, and so if that's where — an issue we're going to go to, we'll have — we'll put everybody on notice of that, because that is a common – and you go back in history, that is a common issue that comes to rise from the [d]efense in these cases, so we'll address that as appropriate.

(Italics added.) Defendant asserts that these remarks indicate "that the prosecutor did not know *J.E.B.* prevented him from removing jurors based on gender, and that he felt free to do so . . . [and t]he second comment shows the prosecutor was striking women to counterbalance his (inaccurate) belief that the defense was disproportionately striking men." We cannot adopt defendant's suggested interpretation of these

statements by one of the prosecutors at defendant's trial. Even if we were to agree with defendant that, in the first statement, this prosecutor was expressing a complete lack of familiarity with precedent making clear that gender-based juror strikes are prohibited, the prosecutor's alleged ignorance on that point does not itself indicate that he was seeking to strike Massey or had struck other jurors based on gender. A prosecutor could theoretically be unaware of such caselaw and still actually proceed in jury selection without any gender-based discriminatory intent. Further, we read the prosecutor's second remark as simply suggesting that it might potentially make a *Batson* objection against the defendant for gender-based discrimination in juror selection.

Defendant asks the Court to take judicial notice of the prosecutor's statements which are part of a different case, part of which is pending in this Court. Defendant contends that these statements are pertinent to this prosecutor's intent in excusing female prospective jurors. We decline defendant's invitation because here we are reviewing the trial court's ruling on defendant's prima facie challenge to the strike of Massey for clear error, and the trial court here did not have the benefit of the appellate filings in other cases involving the prosecutor here. Accordingly, we find no error in the trial court's ruling related to defendant's attempt to establish a prima facie case of gender-based discrimination.

I. Excusal of jurors for cause

[10] Defendant next argues that the trial court improperly excused prospective jurors Steven Pierce and Slade Long for cause, violating defendant's constitutional right to a fair and impartial jury. Specifically, defendant contends that

> Pierce said he believed in the death penalty for some cases, and said he could consider both death and life sentences. His hesitation in personally imposing a death sentence was morally appropriate and did not show he was substantially impaired. . . . Long used drugs in his youth but had been clean for 27 years. His expression of empathy for people addicted to drugs did not render him incapable of being fair in this case. Further, the trial court erred in denying defense counsel the opportunity to question . . . Long.

Both the United States Constitution and the North Carolina Constitution guarantee capital defendants have a right under the United States Constitution to trial by an impartial jury. *Wainwright v. Witt*, 469 U.S. 412, 416 (1985) (citing Sixth and Fourteenth Amendments);

State v. Crump, 376 N.C. 375, 381 (2020) (citing N.C. Const. art. I, § 24). The standard for determining when a potential juror may be excluded for cause is whether his or her views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *State v. Davis*, 325 N.C. 607, 622 (1989) (quoting *Wainwright*, 469 U.S. at 424).

A juror may not be excused for cause simply for "voic[ing] general objections to the death penalty or expressed conscientious or religious scruples against its infliction," *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968), and even "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law," *Lockhart v. McCree*, 476 U.S. 162, 176 (1986). A prospective juror may be excused for cause, however, if his or her views on capital punishment would serve to "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 424 (footnote omitted). The North Carolina General Assembly has codified these constitutional principles in subsection 15A-1212(8) of the General Statutes. *See* N.C.G.S. § 15A-1212(8) (2021) (providing that a challenge for cause to an individual juror may be made by any party on the ground that the juror, "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina").

"[E]xcusals for cause may properly include persons who equivocate or who state that although they believe generally in the death penalty, they indicate that they personally would be unable or would find it difficult to vote for the death penalty." *State v. Simpson*, 341 N.C. 316, 342–43 (1995); *see also State v. Jones*, 355 N.C. 117, 122 (2002) (holding no abuse of discretion in allowing the State's challenge for cause based on "the equivocating nature of her responses" regarding whether the prospective juror could impose a death sentence which led the trial judge to conclude that she "would be unable to faithfully and impartially apply the law in this case"); *State v. Greene*, 351 N.C. 562, 567–68 (no abuse of discretion where the prospective juror gave conflicting responses including that (1) it would be hard for him to impose the death penalty because of his religious beliefs, and (2) he could follow the law and vote for the death penalty but it would be against what he believed), *cert. denied*, 531 U.S. 1041 (2000); *State v. Yelverton*, 334 N.C. 532, 544 (1993) (no abuse of discretion in excusing a juror where he answered that he could follow the trial court's instructions, but also "steadfastly indicated

reluctance or uncertainty as to his ability to carry out [his] duties as a juror" in regards to imposing a death sentence (alteration in original)); *State v. Bowman*, 349 N.C. 459, 471 (1998) (holding no abuse of discretion in excusing a juror because she clearly stated that she felt her personal beliefs might affect her consideration of the death penalty for the defendant and her responses were at best equivocal, in comparison, and "the trial court gave ample opportunity to both sides to explore and elicit [her] views"), *cert. denied*, 527 U.S. 1040 (1999); *Davis*, 325 N.C. at 624 (finding no abuse of discretion where prospective juror's answers "reveal that he wanted to follow the law, but thought his views on capital punishment would interfere with the performance of his duties during the sentencing phase").

"Challenges for cause in jury selection are matters in the discretion of the court and are not reviewable on appeal except for abuse of discretion." *State v. Kennedy*, 320 N.C. 20, 28 (1987). This is so because the trial judge "has the opportunity to see and hear the juror on voir dire and to make findings based on the juror's credibility and demeanor, to ultimately determine whether the juror could be fair and impartial." *Id.* at 26. Because a prospective juror's biases may not always be provable with unmistakable clarity, reviewing courts must "defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially." *State v. Brogden*, 334 N.C. 39, 43 (1993) (quoting *Davis*, 325 N.C. at 624); *see also State v. Walls*, 342 N.C. 1, 33 (1995) ("Based on the superior vantage point of the trial court, its decision as to whether a juror's views would substantially impair the performance of his duties is to be afforded deference."), *cert. denied*, 517 U.S. 1197 (1996).

In addition, "[a] defendant has no absolute right to question or to rehabilitate prospective jurors before or after the trial court excuses such jurors for cause." *Warren*, 347 N.C. at 326. In capital cases, the trial court is vested with discretion to regulate and supervise jury selection. *Gibbs*, 335 N.C. at 26. "[W]here the record shows the challenge is supported by the prospective juror's answers to the prosecutor's and court's questions, absent a showing that further questioning would have elicited different answers, the court does not err by refusing to permit the defendant to propound questions about the same matter." *Id.* at 35. Whether to allow a defendant an opportunity to rehabilitate a prospective juror challenged for cause also lies within the trial court's discretion. *State v. Stephens*, 347 N.C. 352, 366 (1997), *cert. denied*, 525 U.S. 831 (1998).

1. Prospective juror Pierce

During the voir dire, after confirming that Pierce did not know any of the parties, possible witnesses, or attorneys involved in the case and had no media or other exposure to the crimes with which defendant was charged, after the prosecutor described the offenses with which defendant was charged, the prosecutor turned to questions about Pierce's "thoughts about the death penalty." Pierce's initial response was:

> That's difficult, because I'm a Christian. I value life, both physically and spiritually. I read in the Bible that God does submit the death penalty at times. And I have thought about already the possibilities; the Judge had mentioned it. If it came down to it, my — my thoughts are that I would go with the facts presented and look at the situation, with much prayer, I would make a call [based on] the evidence put before me, the arguments. As far as capital punishment, I'm still — I have a hard time with it. Am I totally against it? I'm not sure. And that's my honest answer.

The prosecutor followed up by asking whether Pierce felt he could "personally be a part of [the capital sentencing] process," and the following exchange occurred:

> MR. PIERCE: I do not know. That's a good question. I've thought about it. I just do not know. That would be hard. I value life, like I said.
>
> [PROSECUTOR]: And we all do. I mean, we — we understand that. And we all do value life. So —
>
> MR. PIERCE: With that said, I value life on both sides, the one who lost their life, too. There's more than one affected.
>
> [PROSECUTOR]: Now, do you feel like that you might have some moral or religious — based upon your religious or moral beliefs that you might have some real problems with doing that; that it might cause you some personal — your conscience some personal trouble?
>
> MR. PIERCE: No. And I'll say that because I have a relationship with the Lord, and I will be talking to him about it, and I will make a decision on how he leads me.

The prosecutor then clarified that Pierce would need to apply "man's law" in the case and asked, "Do you feel like [the death penalty] is an appropriate sentence in some cases?" and Pierce responded, "I would have to say yes. Again, it's difficult. It's difficult." Pierce went on to explain, "The only reason—the only reason I would say yes is because—because I believe in an eternity as well. Although someone could have a short life here, they could have an eternal life; will have eternal life." He further noted that he had held "reservations about the death penalty" for "twenty-five or thirty years" based upon his reading of the Bible. Pierce did agree that "the sentence of death . . . is a necessary law." The prosecutor then asked Pierce whether, if the State had proved its capital case against defendant beyond a reasonable doubt, he could "personally" vote for a death sentence for defendant. Pierce replied, "It's hard." When the prosecutor pressed Pierce about whether his "religious beliefs and . . . personal convictions . . . may substantially impair [his] ability to" impose the death penalty in defendant's case and Pierce first stated, "Oh, it definitely makes it—I mean, it affected my decision, obviously, to be able to make the decision, I mean—"; and then responded to the question being posed again by saying, "It would—there is a potential, I'm going to tell you, because it's hard. It's definitely difficult." Pierce went on to say, "I wouldn't be able to—and it would be hard for me to separate the—my beliefs . . . in making the decisions that I make. I know it would be better for y'all if I were able to . . . give you a yes-or-no answer." Eventually, in response to being asked yet again about the impact Pierce's religious convictions might have on his ability to follow the law, he affirmed, "It would not impair my ability to follow the law, but it would be very difficult." But when the prosecutor asked Pierce a final time about the same issue, Pierce responded:

> MR. PIERCE: I guess the best answer is there is a potential for that. I don't think I can say yes or no. If I were firm in my conviction of whether the death penalty was okay for me as a Christian, then I could say yes or no, but I have not settled that conviction in my heart. And there's—I mean, there's—obviously, you've realized by now there's a potential. I hate to keep going in circles, I know.
>
> [PROSECUTOR]: It's okay. So what I'm hearing from you, and you correct me if I'm wrong, is that there is this personal religious conscientious conviction that you have that could potentially impair your ability to render a sentence of death, even

though the State has proven the case beyond a reasonable doubt?

MR. PIERCE: That would be correct.

[PROSECUTOR]: So—and it's hard, and I get that. And that's sort of what we're getting at, if you are that person—

You need to be honest, you know, honest about it, and I know that you are being honest. Obviously, you are a very honest man.

—is that if that is the case, that you—that that personal conviction substantially impairs your ability to come into this courtroom and announce a sentence of death to this [d]efendant, then that means that you would not be—it would not be appropriate for you to sit on the jury. And so do you feel like that that is the case?

MR. PIERCE: I'll have to say yes.

[PROSECUTOR]: And so, you know, you are going to be instructed that you have to follow the law; that, you know, it would be your obligation to follow the law, that you would swear an oath to do that. And I know that that's important to you. Following the law is important to you and seeing that the process works. I mean, that's why we have this part of the process, the voir dire process. We talk to people about whether or not they will be able to do that, even if it's your strongest desire to do that, I understand, to follow the law and follow the Court's instruction. And there's nothing wrong with being honest and saying that, "Because of my personal beliefs regarding the death penalty, I would be substantially impaired in doing that."

And so I just want to make sure that I understand you correctly, that even though you strongly believe that you have a duty to follow the law, that you would be substantially impaired when it came to coming in and announcing the death penalty, a sentence of death, even though the State had met its burden. Am I understanding you correctly?

> MR. PIERCE: There is a potential for that. And the problem is the difference between God's law and man's law. And I do want to abide by man's law. If it came down to it, if I had to choose between God's and man's, I'm going to go with God's.
>
> . . . .
>
> [PROSECUTOR]: It's going to impair—yes, impair your ability.
>
> MR. PIERCE: There's very good potential. I'll just say yes.

The State then moved to excuse Pierce for cause, but the trial court denied that motion. After the prosecutor again asked Pierce "the ultimate question is, after thinking about it, after understanding that there is this process, do you feel like if the State proves its case beyond a reasonable doubt in both phases, that your ability to come—because of your beliefs and convictions, that your ability to come into this courtroom and announce a sentence of death would be substantially impaired?" Pierce replied, "Yes," and the trial court then gave the defense an opportunity to question Pierce before making its decision regarding an excusal for cause.

In his exchanges with defense counsel, Pierce agreed several times that he was "struggling" with the question of the death penalty. Defense counsel explained the jury's role in deciding the presence of aggravating and mitigating circumstances and then weighing them before the death sentence can be recommended in capital cases where a guilty verdict has been reached on a first-degree murder charge. Defense counsel then asked Pierce if he could follow the trial court's instructions on those issues, and Pierce replied

> I could listen to his instructions and follow what he said. The problem would come down to if the circumstances had been all weighed out and [d]efendant was found guilty and it came down to administering the death penalty, I would have difficulty. I would have difficulty with that. It's difficult.

The trial court then questioned Pierce briefly, asking whether he could "return a sentence of death against a defendant," and Pierce then responded that he was "struggling." The following exchange then occurred:

> THE COURT: . . . . What we're trying to determine, if you can answer the question for us, is whether or

> not you as a juror could return a sentence of death against a defendant found guilty of first[-]degree murder, if you were convinced beyond a reasonable doubt under the facts and the law that the penalty of death was the appropriate punishment.
>
> MR. PIERCE: I know you're asking me to decide right now. And if I had to decide right now, I would probably say no.
>
> THE COURT: So is it fair to say, then, that based upon your religious or moral convictions, that you believe your ability to return a sentence of death against a defendant found guilty of first[-]degree murder would be substantially impaired even if you were convinced beyond a reasonable doubt under the facts and the law that death was the appropriate punishment?
>
> MR. PIERCE: That is correct.

At that point, Pierce was excused from the courtroom and the parties engaged in a discussion with the trial court about the State's request to excuse the potential juror for cause. The trial court acknowledged defendant's

> observations about the intelligence and thoughtfulness of this juror. It does appear to the [c]ourt, based upon the totality of his answers, that his beliefs concerning the penalty of death are such that that is a matter of his conscience. Those feelings would interfere with or substantially impair his ability to return a sentence of death against [d]efendant even if he were convinced beyond a reasonable doubt under the law and the facts that the penalty of death was the appropriate punishment and should be imposed.

The trial court then allowed the State's challenge for cause.

We see no abuse of discretion here. "Based on the superior vantage point of the trial court," given its ability to see and hear the voir dire of prospective juror Pierce, we afford deference to "its decision as to whether a juror's views would substantially impair the performance of his duties." *Walls*, 342 N.C. at 33. Even before Pierce directly agreed at least three times that his religious convictions could or would substantially impair his ability to impose the death penalty where it was

warranted under law, he stated multiple times that it would be "difficult" or "very difficult" for him to vote to impose the death penalty, said that he was "struggling" with the question, and said that between "God's law and man's law," he would have to follow God's law. In light of the extended amount of time the trial court provided to the parties for an opportunity to discuss with Pierce his obviously sincere and deeply thoughtful concerns regarding capital punishment, we cannot say that the trial court's decision to excuse Pierce for cause was the result of an unreasoned or arbitrary decision.

2. Prospective juror Long

On voir dire, once the State turned to the issue of the death penalty, Long initially expressed that he had

> a little problem with my faith as far as being able to actually — I watch a lot of shows where people get twenty years and down the road, they're found innocent and stuff like that. I feel like — I'd feel guilty if I put an innocent man to death, or even locked him up for life. I've just got issues with that.

Long also expressed concerns about life sentences and long delays before death sentences are carried out. Long then stated that he was "not totally opposed to" capital punishment. When Long was asked if he "believe[d] it's a necessary law that we have the death penalty as a potential punishment in some first[-]degree murder cases," Long responded "That's a hard one for me as a human being, being the judge on someone's life." When the question was repeated, Long added, "It's in the Bible, and I study it every day, that if a man kills another man, then his penalty — I mean, there's — if you go back in the Old Testament, there were safe — safe towns they had because sometimes there were accidents. But if they were going with death, they didn't waste no time, they just stoned them." The State then asked Long if he "could be part of the legal machinery, be part of the process that might bring about the death penalty in this particular case if the evidence was appropriate," and Long responded, "It's possible. I mean, I just — I didn't expect this." When the prosecutor clarified that the question was not specific to defendant's case but rather was whether Long could hypothetically "be part of the process that . . . might ultimately bring about the death penalty," Long affirmed, "Yes, I believe I could." Yet as the State continued to speak with Long about the issue of imposing the death penalty, Long raised concerns about the sufficiency of evidence. The voir dire of Long was continued to the following day.

The following morning, the State turned to other issues and Long stated that he was self-employed as a finish carpenter, was hoping to get a new project soon, and was deeply in debt, but he did not previously reveal this information because he "didn't want to be a complainer" when the trial court had questioned the entire venire about hardships. Long noted a legal proceeding of some type regarding a builder who "went under." When the prosecutor turned to the theories of first-degree murder that the State had alleged in defendant's case—felony murder and murder by torture—Long volunteered information about being charged and found "guilty of torturing and killing an animal" in connection with the unintentional killing of "[a] scarlet macaw parrot" in California when Long was nineteen years old. Long further stated that he had missed restitution payments which resulted in his being "locked . . . up." Long emphasized that he "got accused of torturing," although Long represented that he was only trying to "wing" the bird to catch it so that he could sell it.

Thereafter, the prosecutor and Long had the following exchange:

> [PROSECUTOR]: Well—and again, I'm not trying to put any words in your mouth or anything about this, but I want to ask you, do you—you mentioned that you have actually been prosecuted and convicted for being—what they described as torturing an animal, convicted of that some time ago, but do you—that, and I guess you also mentioned, seriously, about the issues with your financial situation that you're the main—almost the only breadwinner in your family; is that correct?
>
> MR. LONG: Yes, sir.
>
> [PROSECUTOR]: Do you feel like the—let me ask you, the fact that you have—what you went through, and we're talking about torture in this case, do you feel like that would in any way affect your ability to sit on this jury and fairly consider these issues, or do you feel like that might influence—your past history, that that might influence you?
>
> MR. LONG: I was in another murder trial, too.
>
> [PROSECUTOR]: Were you charged?
>
> MR. LONG: No. My best friend I grew up with, we was out in Barstow, California, at a party joint

where they had a lake where everybody went to, and someone stole his cassette tape, and he went over to the van next to it where we were camped at, and pulled it off the guy's dash, and we were twenty-four at the time, me and my buddy, Jim, we grew up ever since we—

[PROSECUTOR]: Right. I'm not trying to cut you off—

MR. LONG: I had to go sit through the whole thing of a murder trial.

[PROSECUTOR]: Was your buddy the one charged?

MR. LONG: My buddy was the one that got killed. The other—the nineteen-year-old boy killed him in a fistfight, which I never thought it would have happened, but just a—just appeared—I thought it was going to be a little fistfight.

[PROSECUTOR]: Right. Have you had any other—any other dealings with the court system or law, either yourself or someone close to you?

MR. LONG: I've been—I'm twenty-seven years straight now. I got saved that night, accepted Jesus Christ as my Lord and Savior in California. I had a ten-year heroin addiction. I started that drug when I was sixteen years old, and by the time I was nineteen, I was shooting up every day, so I've been in and out of—usually I'm not on this side.

[PROSECUTOR]: And I appreciate it, and I'm happy to see that you—twenty-seven years you've been clean and straight.

MR. LONG: Right.

[PROSECUTOR]: Did you have any other criminal charges against you while you were in California?

MR. LONG: I had eight petty thefts, stealing for my habit. And then I got pulled, I don't know how many times. The detectives knew me when they see me driving the road. They would just pull me over

> and then they would go ahead and take a magnifying glass, check me, identify fresh marks, and then they would haul me off to jail, and I'd have to sign a promise to appear. I mean, I spent a lot of time in these places back then.

The State then asked whether Long "had any experience of either yourself, a close family member, a close friend, with either child abuse, or child sexual abuse, or domestic violence in your life? And you can just say yes or no at this point." The following discussion then ensued:

> MR. LONG: Yes.
>
> [PROSECUTOR]: Okay. But that's something—was it more back in your previous—sometime now or back—or was it—
>
> MR. LONG: Well, it was after I moved out here, a pretty similar case to this right here.
>
> [PROSECUTOR]: Do what, now?
>
> MR. LONG: Pretty similar case to what I think this case is.
>
> [PROSECUTOR]: Okay. Similar to this case, what you think the case is? And is that—was that involving—who was the person that was involved?
>
> MR. LONG: It was a good friend I went to junior high and high school with.
>
> [PROSECUTOR]: And they were charged with something like a sex or child sexual case?
>
> MR. LONG: Well, shook the baby to death.
>
> [PROSECUTOR]: Just sort of—I'm sorry.
>
> MR. LONG: Shook the baby to death. He was on crystal meth, baby wouldn't quit crying, and he just yelling at it and shook it up. He's out of prison now. I mean, he got, like, ten years or something like that.
>
> [PROSECUTOR]: So, you got—so, how old was the baby?
>
> MR. LONG: He had a girlfriend. The baby was just—I don't even know if it was about a year old, something like that. I was living out here.

. . . .

> [PROSECUTOR]: Were you familiar with the situation and everything?
>
> MR. LONG: Well—
>
> [PROSECUTOR]: I mean, as far as talking to him when it was happening, him going to court and what happened there?
>
> MR. LONG: I was getting information from my friend that used to be married to this man, and so as far as personally, I have talked to the boy a few times since he's been out, but he doesn't like to—

The prosecutor then broke in and summarized Long's "life experiences" that might impact his ability to serve as a fair and impartial juror in a potentially extended trial:

> [Y]our issue with your work and your paying bills and things[,] . . . what you know about this case, do you feel like that your experiences and knowledge of other situations with the torture, and the sex offense involving your friend, your issues with drugs, and so forth, and your job situation, do you feel like that would be—substantially impair your ability in this particular case, because of the issues that are in this case, to say that you could not be a—fulfill the duties as a juror in this particular case? In other words, be totally fair and impartial in this case?

Long responded that he would "have compassion" for people in "that situation"—apparently referring to those who have substance abuse issues—and noted that "[t]he things that I did not being in my right mind has hurt [sic]." The trial court stepped in shortly thereafter:

> THE COURT: Mr. Long, I've been sitting here and listening to you talk about your life's experiences. And the bottom line of the question is this, considering the issues that may be involved in this case, involving an allegation of murder by torture, a case in which there may be some evidence of child abuse and evidence of drug use, do you believe that your own life's experiences would affect your own ability to be a completely objective and fair and impartial juror to both sides?

> MR. LONG: I believe that I would struggle.
>
> THE COURT: Struggle with being fair?
>
> MR. LONG: Yeah, my—
>
> THE COURT: Struggle with—let me put—do you think you would struggle with being objective and impartial?
>
> MR. LONG: Like I said, I don't know the whole case or anything like that. I know what drugs can do to people, and I just—I've got a soft spot in my heart for people who get addicted.

Long was excused from the courtroom briefly during which time the defense stated it would not consent to Long being excused for cause at that point. Long was returned to the courtroom for further voir dire. During further questioning by the State, Long stated that he had a "soft spot" for people who are using illegal drugs because when a person is on drugs:

> You're not in your right mind. You're really not who you were born to be, and it changes you, and, you know, you're breaking the law by doing it, so everything that goes with it is breaking the law, and unless you've been there, you won't ever understand what it's like to be on the other side.

When the State asked directly whether Long's life experiences would "impair your ability to be objective in this particular case," Long answered, "Yes." Long answered affirmatively three more times to variations of the same inquiry by the State. The State moved to excuse Long for cause but the defense objected again. Long was again asked to step out of the courtroom.

The trial court noted the life experiences of Long and his explicit answer that those would substantially impair his ability to be a juror in a case that involved substance abuse. The State agreed, while defendant contended that Long had only suggested he would be more compassionate to defendants who had experienced substance abuse. Ultimately, after hearing arguments from each side, the trial court announced that

> upon consideration of the totality of Mr. Long's responses to questions asked by the prosecutor and by the [c]ourt, including but not limited to his

> description of his extensive history of substance abuse, his admission of sympathy for persons suffering [from] substance abuse; and representations of [c]ounsel for the State and [d]efendant that there may be evidence of substance abuse by [d]efendant introduced during the trial of this case, especially if this case reaches a sentencing phase; the Court also noting that when describing his history of drug abuse, that this prospective juror became visibly upset and began softly weeping, the [c]ourt does find that this prospective juror's ability to be completely objective, fair, and impartial to both the State, as well as [d]efendant, would be substantially impaired, and accordingly, the State's challenge for cause is sustained.

On appeal, defendant, quoting *Wainwright*, 469 U.S. at 424, contends that the trial court abused its discretion in allowing the State's motion to excuse Long for cause, asserting that "the State did not establish that . . . Long's 'concerns' would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " We cannot agree. While, as defendant notes, the alleged substance use and abuse forecast to be presented in defendant's case was not identical to Long's experiences, Long stated several times that his experiences would impair his ability to be impartial in a case that involved substance abuse. Given that the excusal of cause is left to the trial court's discretion, we must "defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially." *Brogden*, 334 N.C. at 43 (quoting *Davis*, 325 N.C. at 624).

Regarding defendant's argument that the trial court erred in declining to offer defense counsel the opportunity to question Long, "[w]hether to allow defendant[ ] an opportunity to rehabilitate a prospective juror challenged for cause also lies within the trial court's discretion." *Stephens*, 347 N.C. at 366. Here, "the record shows the [State's] challenge is supported by the prospective juror's answers to the prosecutor's and court's questions," and there has been no "showing that further questioning would have elicited different answers" by Long. *See Gibbs*, 335 N.C. at 35. Accordingly, "the [trial] court [did] not err by refusing to permit the defendant to propound questions about the same matter." *Gibbs*, 335 N.C. at 35; *see also Warren*, 347 N.C. at 326 ("A defendant has no absolute right to question or to rehabilitate prospective jurors before or after the trial court excuses such jurors for cause."). This argument is overruled.

J. In camera review of Reyes's mental health records

[11] Defendant next represents that on his motion,[39] the trial court entered an order for disclosure of mental health records of Reyes and a subsequent order explaining the trial court had reviewed records in camera and would order some of Reyes's records disclosed to the defense, while the remainder of the records in question would be placed under seal in the superior court file. In that order, the trial court stated:

> The court has carefully reviewed these records and found that, with the exception of the attached letters, all of them pertain to grief counseling Ms. Reyes received following the death of her minor child. The mental health records of Ms. Reyes contain no information that would tend to exculpate defendant or to mitigate his punishment if he is found guilty of any crime charged. The attached letters, contained in Ms. Reyes'[s] mental health records, appear to be from . . . defendant to Ms. Reyes.

Defendant asks this Court to review the records that were sealed in the superior court file "for any inconsistent statements or other impeachment evidence, and to remand the case for a new trial if it determines that [defendant] was denied access to evidence or information that was material and favorable to his defense," citing "the importance of Taylor's mother to the credibility of the State's case."

Where the trial court conducts an in camera inspection of certain evidence and denies the defendant's request for its production, the evidence should be sealed and "placed in the record for appellate review." *State v. Hardy*, 293 N.C. 105, 128 (1977). Having examined these records to determine whether they contain any evidence that is "both favorable to the accused and material to guilt or punishment," *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987), we agree with the trial court's assessment that Reyes's medical records under seal contain no information—either

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39. At the hearing on defendant's motion for disclosure of Reyes's medical records, which is not included in the record on appeal, the State represented that it was not aware of and did not possess any such evidence. Counsel for Reyes, who had been charged with felony child abuse in connection with Taylor's death, was also present and objected on her behalf. Reyes's counsel contended that the discovery of Reyes's medical records would violate her rights under the Fifth Amendment and her right to privacy and physician/patient privilege, although her counsel acknowledged that the trial court could compel disclosure of this information if it was necessary to a proper administration of justice under N.C.G.S. § 8-53.

exculpatory or impeaching—that is pertinent, much less material, to defendant's guilt or sentence. *See id.* ("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

K. Arbitrary capital sentencing system

[12] Defendant further argues that he received a capital sentence as part of "an arbitrary system that fails to rationally distinguish between the many potentially-capital cases that do not receive the death penalty, and the very few that do." In support of his position, defendant cites numerous murder cases, including those in which "[d]efendants killed young children in appalling circumstances," *see State v. Stacks*, No. COA21-167, 2022 WL 2204788 (N.C. Ct. App. June 21, 2022) (unpublished); *State v. Stepp*, 232 N.C. App. 132 (2014); *State v. Hampton*, No. COA14-394, 2014 WL 7149212 (N.C. Ct. App. Dec. 16, 2014) (unpublished); *State v. Keels*, No. COA11-350, 2011 WL 6046177 (N.C. Ct. App. Dec. 6, 2011) (unpublished); were "engaged in mass killing, or murdered serially," *see State v. Bradley*, No. COA17-1391, 2018 WL 5796233 (N.C. Ct. App. Nov. 6, 2018) (unpublished); *State v. Thomas*, 268 N.C. App. 121 (2019); *State v. Hurd*, 246 N.C. App. 281 (2016); *State v. Stewart*, 231 N.C. App. 134 (2013); *State v. Cooper*, 219 N.C. App. 390 (2012); or "committed planned-out murders for money," *see State v. Dixon*, No. COA15-350, 2016 WL 4608185 (N.C. Ct. App. Sept. 6, 2016) (unpublished); *State v. Chaplin*, No. COA13-393, 2013 WL 5947754 (N.C. Ct. App. Nov. 5, 2013) (unpublished); *State v. Britt*, 217 N.C. App. 309 (2011); where juries nonetheless rejected the opportunity to recommend the imposition of a death sentence following their return of guilty verdicts. Defendant also cites recent murder cases where "prosecutors have chosen to try defendants non-capitally even though they subjected children to horrendous and protracted abuse." *See State v. McCullen*, No. COA19-319, 2020 WL 2126784 (N.C. Ct. App. May 5, 2020) (unpublished); *State v. Lail*, No. COA19-468, 2020 WL 774106 (N.C. Ct. App. Feb. 18, 2020) (unpublished); *State v. Cheeks*, 267 N.C. App. 579 (2019); *State v. Paddock*, 204 N.C. App. 280 (2010). Finally, defendant cites media accounts of "potentially-capital cases involving heinous and shocking facts that nonetheless were not even taken to trial, but were resolved with non-capital plea agreements."

Defendant asserts that these examples demonstrate that "the overwhelming majority of potentially capital cases" are resolved without the imposition of a death sentence, such that those defendants who "receive

the death penalty are not chosen rationally, for reasons unique to those cases[, but r]ather, they are a random and infinitesimal subset of defendants whose cases are not meaningfully distinguishable from the scores of other aggravated murder defendants who receive life sentences or less." Defendant then suggests that this impermissible arbitrariness could be rectified in either of two ways:

> One is to vacate [defendant's] death sentence pursuant to the statutory obligation to ensure proportionality, which provides relief from arbitrarily imposed death sentences. *See* N.C.G.S. § 15A-2000(d)(2) (requiring a death sentence to be overturned "upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor").
>
> The alternative remedy is for the Court to declare the death penalty unconstitutional as applied to [defendant]. The federal and state constitutions prohibit cruel and/or unusual punishments. *See* U.S. Const. amend. VIII (banning "cruel and unusual punishments"); N.C. Const. art. I, § 27 (banning "cruel *or* unusual punishments") (emphasis added).

Engaging in proportionality review as directed by the General Assembly, we have considered whether (1) the record in this case supports the aggravating circumstances found by the jury, (2) defendant's capital sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor," and (3) the death sentence in defendant's case "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2021); *see also State v. McNeill*, 371 N.C. 198, 264 (2018). As the Court observed in *McNeill*, "[t]his Court has held the death penalty to be disproportionate in eight cases." *Id.* at 264–65 (citing *State v. Kemmerlin*, 356 N.C. 446, 487–89 (2002); *Benson*, 323 N.C. at 328–29; *State v. Stokes*, 319 N.C. 1, 19–27 (1987); *State v. Rogers*, 316 N.C. 203, 234–37 (1986); *State v. Young*, 312 N.C. 669, 686–91 (1985); *State v. Hill*, 311 N.C. 465, 475–79 (1984); *State v. Bondurant*, 309 N.C. 674, 692–94 (1983); *State v. Jackson*, 309 N.C. 26, 45–47 (1983)). We conclude that neither the facts of defendant's crimes against Taylor nor defendant's personal circumstances are substantially similar to the crimes or defendants in any of those eight cases. We also note that "this Court 'ha[s] never found a death sentence disproportionate in a case involving a victim of first-degree murder who also was sexually assaulted,' " as was the

case with Taylor here. *Id.* at 265 (alteration in original) (quoting *State v. Kandies*, 342 N.C. 419, 455, *cert. denied*, 519 U.S. 894 (1996)).

We must also reject defendant's suggestion that our state's capital sentencing scheme is cruel and/or unusual in violation of the United States Constitution or North Carolina Constitution. "The rights guaranteed by N.C.G.S. § 15A-2000 are anchored in the eighth amendment prohibition against cruel and unusual punishment in that the statute 'requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' " *State v. Wilson*, 322 N.C. 117, 144 (1988) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). Accordingly, North Carolina's death sentence system has been upheld repeatedly as constitutional. *See, e.g.*, *McNeill*, 371 N.C. at 262.

L. Preservation issues

[13] Defendant raises five additional issues that he concedes have previously been decided by this Court contrary to his position. First, defendant contends that the trial court erred by overruling his objection to the imposition of the death penalty in the absence of a jury finding that defendant had acted with a specific intent to kill Taylor. The jury here found defendant guilty of first-degree murder only on theories of murder by torture and felony murder. Second, defendant argues that the trial court erred in denying his pretrial motion to prevent the State from seeking the death penalty, alleging that the murder indictment against defendant failed to raise any element which elevates the crime of murder from second-degree to first-degree and failed to allege any aggravating circumstances. Third, defendant asserts that the trial court erred in denying his motions objecting to the submission to the jury of the aggravating factors, namely a motion objecting to the submission of the aggravating circumstance found in N.C.G.S. § 15A-2000(e)(5) (capital felony was committed while the defendant was engaged in other specified felonies) on the ground that it subjected him to double jeopardy and multiple punishments and to the submission of the aggravating circumstance found in N.C.G.S. § 15A-2000(e)(9) (capital felony was especially heinous, atrocious, or cruel) on the ground that it is vague and overly broad. Fourth, defendant contends that the trial court erred in overruling his "objection to the death penalty due to the failure, in practice, of existing procedures to meet minimum constitutional requirements." Fifth, defendant argues that the trial court erred when it overruled his objection to the death penalty under international law.

While he acknowledges the existing law is contrary to his position, defendant asks the Court to revisit these issues. *See State v. Leary*, 344 N.C. 109, 119 (1996) (addressing culpability and specific intent to kill in determining whether the defendant was eligible for the death penalty); *State v. Hunt*, 357 N.C. 257, 269 ("Since the genesis of the short-form murder indictment in 1887, its validity has continually been avowed by the General Assembly."), *cert. denied*, 539 U.S. 985 (2003); *State v. Gregory*, 340 N.C. 365, 412 (1995) (holding that the submission of the aggravating circumstance in N.C.G.S. § 15A-2000(e)(5) is proper when a murder occurred during the commission of one of the enumerated felonies but when the defendant was also convicted of first-degree murder on some other basis); *McNeill*, 371 N.C. at 262 (noting that North Carolina's capital sentencing scheme has repeatedly been upheld as constitutional under the United States Constitution and North Carolina Constitution); *State v. Thompson*, 359 N.C. 77, 126 (2004) (holding that North Carolina's death penalty does not violate international law), *cert. denied*, 546 U.S. 830 (2005). Having considered each of defendant's arguments on these points, we conclude that there is no reason to revisit or depart from our precedent, and accordingly, we overrule all of defendant's preservation arguments.

III. Conclusion

For the foregoing reasons, we conclude that defendant received a fair trial and capital sentencing proceeding free of prejudicial error and that the death sentence recommended by the jury and imposed by the trial court is not excessive or disproportionate.

AFFIRMED.

Justice BERGER concurring.

I concur in Justice Morgan's opinion but write separately to address the conclusion that defendant's *Miranda* rights were violated during questioning by law enforcement.

"Both the United States Supreme Court and this Court have held that *Miranda* applies *only* in the situation where a defendant is subject to custodial interrogation." *State v. Barden*, 356 N.C. 316, 337 (2002) (emphasis added). "Custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody . . . .' " *Illinois v. Perkins*, 496 U.S. 292, 296 (1990) (alteration in original) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). "A person is in custody for purposes of *Miranda* when it is apparent from the totality

of the circumstances that there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *State v. Garcia*, 358 N.C. 382, 396 (2004) (cleaned up).

Certainly, if *Miranda* applied to detention by private citizens, the lead opinion is correct in its reasoning. However, I believe centering our attention on the actions of a private citizen muddies the very clear waters of our *Miranda* jurisprudence in two important ways.

First, *Miranda*'s strictures developed so that "the constitutional rights of the individual could be enforced against overzealous *police practices*," *Miranda*, 384 U.S. at 444 (emphasis added), not against other private citizens. This is why "[o]ur appellate court decisions are replete with examples of individuals who, though occupying some official capacity or ostensible position of authority, have been ruled unconnected to law enforcement for *Miranda* purposes." *State v. Etheridge*, 319 N.C. 34, 43 (1987). While the lead opinion correctly notes that these decisions primarily involve statements made to private citizens, the rationale for excluding them from the *Miranda* analysis is equally applicable to detention by private citizens who are unconnected to law enforcement. A private citizen acting on his or her own authority cannot take a person into "custody" for purposes of *Miranda*, and our inquiry here should focus on whether law enforcement took defendant into custody when they arrived at the hospital.

Second, our task is to review whether defendant was subjected to a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Garcia*, 358 N.C. at 396 (cleaned up). The "free to leave" standard is not the appropriate lens through which we view the conduct at issue here. *See State v. Buchanan*, 353 N.C. 332, 339–40 (2001) (The formal arrest inquiry and "free to leave" standard "are not synonymous[,]" and we have disavowed opinions that "stated or implied that the determination of whether a defendant is 'in custody' for *Miranda* purposes is based on a standard other than the 'ultimate inquiry' of whether there is a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' ").

Thus, "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' " *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). Here, although defendant may "not have felt able to leave" prior to the arrival of law enforcement, the pertinent inquiry is whether law enforcement, once present, subjected defendant to a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Garcia*, 358 N.C. at 396 (cleaned up).

The trial court's unchallenged findings of fact demonstrate that when defendant made the challenged statements: (1) defendant was not placed under arrest; (2) the door to the exam room was open for portions of the interaction; (3) both officers had left the exam room for a time upon arrival, leaving defendant alone with the door open; (4) defendant was informed that he was not under arrest; (5) defendant was not accused of anything, promised anything, or threatened; and (6) defendant was not handcuffed "or restrain[ed] in any manner." These factual findings amply support the trial court's conclusion that defendant was not in custody for purposes of *Miranda*.

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

Justice EARLS concurring in part and dissenting in part.

The death penalty is an "unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering." *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring). In this way, a sentence of death "is the ultimate sanction." *Id.* at 286; *see also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice."). And when a crime as heinous as that committed in this case occurs, there is an unsurprising and perhaps human urge to impose upon the perpetrator this most grievous consequence. In these circumstances, a trial court's responsibility to quell this impulse and ensure that justice is delivered dispassionately and evenhandedly is at its highest, meaning that a trial court has a heightened duty to "ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of . . . passion." *Eddings v. Oklahoma*, 455 U.S. 104, 117–18 (1982) (O'Connor, J., concurring).

As the majority recounts, Taylor, the four-year-old victim in this case, died after being subjected to unimaginable and appalling abuse. The State introduced overwhelming evidence at trial tending to prove that Mr. Richardson inflicted her injuries and was solely responsible for her death. Given the severity and brutality of Taylor's injuries and the evidence of the abuse she suffered, it would be easy in this case to excuse any errors committed by the trial court by reasoning that Mr. Richardson's death sentence was inevitable, regardless of the trial court's conduct.

It is this line of reasoning that I believe underlies the majority's decision today, though it does not say so outright. Instead, the majority overlooks blatant errors committed by the trial court by employing shaky legal reasoning to affirm Mr. Richardson's conviction and death sentence. But as Mr. Richardson's appellate counsel eloquently explained during oral argument before this Court, "if the rule of law matters at all, it matters not just in the easy cases and the convenient cases; it matters most in the hard cases." This is, without question, an extraordinarily hard case. But the rule of law does not cease to exist in the face of any crime, no matter how extreme.

In this case, I concur in the majority's decision to affirm Mr. Richardson's conviction. But because I believe that the trial court committed both structural error and allowed the State to present unfairly prejudicial evidence, I would hold that a new sentencing hearing is required so that the punishment Mr. Richardson receives is the product of just process. I only address the issues as they relate to sentencing.

I. Discussion

A. Judge Lock's Failure to Recuse was Prejudicial Error

As the majority explains, when Mr. Richardson was about one year old, his father, Doug Richardson, was shot several times in his home. Mr. Richardson's mother, Sandra Richardson, was charged and tried with conspiracy to murder Mr. Richardson's father. The State alleged that Sandra Richardson hired a hitman to kill Doug Richardson. She was acquitted after her criminal trial, but the judge who presided over child custody proceedings for the custody of Mr. Richardson later found that she bore responsibility for the incident.

Much of Mr. Richardson's defense during both the guilt and sentencing phases of his trial centered on the trauma he experienced being raised by Doug and Sandra Richardson in this dysfunctional atmosphere. This defense strategy required Mr. Richardson's trial counsel to investigate the circumstances of Doug Richardson's shooting to gain insight into the reverberating effects it may have had on Mr. Richardson. As Mr. Richardson explains in his brief to this Court:

> [D]efense counsel interviewed Doug, Sandy, and other Richardson family members about the event. Defense counsel spoke with one of Sandy's codefendants. They interviewed Sandy's defense attorney. They reviewed the superior court file of both the criminal trial and civil custody proceedings. Defense

> counsel also tried to obtain the District Attorney's file, but it had been destroyed. In addition, defense counsel determined that the chief police investigator in Sandy's case was deceased, and because Sandy was acquitted, the transcript from her trial was not available.

There was one other individual with inside information about the incident that the defense was unable to interview: Judge Thomas H. Lock himself.

Judge Lock, who presided over Mr. Richardson's trial, was one of the primary prosecutors who prosecuted the case against Sandra Richardson. Judge Lock's role in prosecuting Sandra Richardson included acting as one of two counsel of record, signing indictments, participating in interviews of witnesses, and delivering the State's closing argument at trial. The record also reflects that at least one of Mr. Richardson's relatives remembered seeing Judge Lock at the subsequent custody hearing after Doug Richardson filed for divorce and sought custody of Mr. Richardson.

Based on Judge Lock's significant role as a prosecutor, the defense sought to meet with him to discuss his knowledge of the case and the Richardson family. Judge Lock addressed the defense's request in open court, explaining that the executive director of the North Carolina Judicial Standards Commission advised him that he need not recuse himself from Mr. Richardson's trial and emphasizing that although he remembered the case against Sandra Richardson, it had occurred twenty years earlier and he did not recall it involving any evidence that would bear on Mr. Richardson's case. Judge Lock declined to answer any questions the defense had about the prosecution.

In response to Judge Lock's refusal to discuss Sandra Richardson's case, the defense moved to disqualify him from presiding over Mr. Richardson's trial and filed a discovery motion seeking the disclosure of any information Judge Lock had about the earlier case. The motion for disqualification explained that "[t]he fact that Defendant's father was shot three times by a[n unknown] person purportedly acting at the bequest [sic] of Defendant's mother [was] . . . likely to be a major focus of Defendant's case should it reach a capital penalty phase," and "[t]he defense [could not] fully investigate or develop a critical and material piece of mitigation as long as Judge Lock [was] presiding over [the] case."

The motion specifically explained that it was important that the defense interview Judge Lock because:

> 1) he potentially has a lot of knowledge about the case against Sandra Richardson and can fill the defense in about details that are not readily understood through the discovery; 2) Judge Lock presumably interacted a fair amount with the victim in that case, Doug Richardson, and therefore can discuss his observations about how the shooting may have effected [sic] Doug Richardson physically, mentally and emotionally; and 3) Judge Lock can describe his observations of Sandra Richardson throughout the trial. Judge Lock's observations about Mr. Richardson are relevant to her stability and character.

In short, the defense hoped to use Judge Lock's knowledge as mitigation evidence regarding the shooting itself and Judge Lock's observations of Mr. Richardson's parents in light of the incident. The motions were considered by Judge James Floyd Ammons Jr., who denied them both.

N.C.G.S. § 15A-1223(e) provides that "[a] judge *must* disqualify himself from presiding over a criminal trial or proceeding if he is a witness for or against one of the parties in the case." N.C.G.S. § 15A-1223(e) (2021) (emphasis added). Our Court has yet to interpret the text of § 15A-1223(e), but the text of the statute is simple: If Judge Lock was a witness for or against Mr. Richardson, disqualification was required. *See* N.C.G.S. § 15A-1223(e).

A witness is "[s]omeone who sees, knows, or vouches for something." *See Witness*, Black's Law Dictionary (11th ed. 2019). The defense had good reason to believe that Judge Lock may have been a witness for Mr. Richardson. In his order on Mr. Richardson's motion to disqualify Judge Lock, Judge Ammons found that "Judge Lock played a major role in the prosecution of Sandra Richardson," including serving as counsel of record and interviewing witnesses. Based on this role, it is entirely plausible that Judge Lock developed his own personal impressions of Mr. Richardson's parents and had the opportunity to gain insight into their relationship and the circumstances surrounding the shooting through his witness interviews and the additional efforts he devoted to developing the case.

There is also the chance that Judge Lock did not develop the kind of impressions that would have been useful or relevant to Mr. Richardson as mitigation evidence. The error that was invited here, however, is that Judge Lock never disclosed *anything* that he knew to the defense or a neutral arbiter like Judge Ammons who could have reviewed the content

of his recollections to determine whether the information constituted relevant mitigating evidence. Instead, Judge Lock simply made that decision for Mr. Richardson, declaring that he "did not recall [Sandra Richardson's] case containing any evidence which would be pertinent to the defendant's capital case." This was not Judge Lock's decision to make unilaterally, especially given his admission that he recalled the prosecution. At minimum, Judge Lock's recollections of the prosecution and any opinions he developed should have been provided to Judge Ammons prior to Judge Ammons' consideration of Mr. Richardson's motion to disqualify Judge Lock and motion seeking discovery. Because no one except for Judge Lock himself knows what information he retained about the trial and the impressions he developed about the members of the Richardson family, it is impossible to determine whether he was a witness for Mr. Richardson under § 15A-1223(e) such that recusal was required.

The majority holds that the information the defense sought to elicit from Judge Lock was "speculative conjecture." And it faults Mr. Richardson for not identifying "any particular knowledge that Judge Lock could have that would be relevant to defendant or to the crimes for which defendant faced trial." This assertion ignores that the defense had no choice *but* to speculate about what information Judge Lock might be able to provide because Judge Lock refused to meet with or answer any of the defense's questions regarding Sandra Richardson's prosecution. The defense could therefore only identify the kind of information that Judge Lock might be able to shed light on, meaning its intention to obtain discovery from Judge Lock was necessarily based on its theory of what he might be able to discuss. The defense cannot now be penalized for Judge Lock's own failure to provide this information or recuse himself as he was required to do by statute.

Though we cannot say with certainty what information Judge Lock would have provided to the defense, it is undisputed that he played a substantial role in Sandra Richardson's prosecution and remembers the case, despite it happening over twenty years earlier. It therefore seems highly likely that Judge Lock developed the kinds of insights that the defense sought to obtain, such as impressions about Doug Richardson's mental state following the shooting, information that Doug Richardson provided about Sandra Richardson's personality, and details about the state of their relationship and ability to care for Mr. Richardson.

To assert that Judge Lock was free of any of this kind of information is to ignore the indispensable role a prosecutor plays in trying a criminal defendant and the extreme attention to detail that the prosecutor is

required to pay to develop his or her case. Any trial lawyer is familiar with the importance of developing a "theory of the case"—an important technique that "distills and organizes all the particular elements of the case, including those for which there may be no strong answer. It is the overall theme advanced by the attorney through different means in every part of his presentation of the case." Kenneth M. Mogill & Lia N. Ernst, *Examination of Witnesses* § 1:3 (2d ed. 2022). To develop this overarching theme in prosecuting Sandra Richardson, Judge Lock almost certainly would have delved into the dynamics of her relationship with Doug Richardson, her personality and stability in general, and Doug Richardson's own behaviors. Thus, despite uncertainty regarding the precise substance of Judge Lock's impressions, it is likely that he gained at least some insight in these areas.

But Judge Lock's unique relationship to the Richardson family is significant not just for purposes of § 15A-1223(e); it also implicates Mr. Richardson's rights under the U.S. Constitution. The U.S. Supreme Court has "firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007); *see also Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (citation omitted)). To wit, "the sentencer may not . . . be precluded from considering 'any relevant mitigating evidence.' " *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (quoting *Eddings*, 455 U.S. at 114). "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation" and can be "particularly relevant." *Eddings*, 455 U.S. at 115.

The defense placed particular emphasis on obtaining such information from Judge Lock because "[t]estimony from a respected superior court judge that he observed, firsthand, serious dysfunction in the Richardson family would have been . . . powerful" mitigating evidence. And, as already discussed, it is not just plausible but likely that through his work on the case and his contact with Doug Richardson, Judge Lock gained an intimate look into Doug and Sandra Richardson's marriage, their points of tension, and the events that led to the alleged shooting. But by refusing to disclose any information regarding his recollections

of prosecuting Mr. Richardson's mother for allegedly conspiring to murder his father, Judge Lock deprived the jury of the opportunity to hear this testimony and Mr. Richardson of the chance to present all of the mitigating evidence that was reasonably available.

The majority downplays this deprivation, opining that any information Judge Lock may have been able to provide would have been immaterial, "speculative conjecture," and not "pertinent to defendant's case." As an initial matter, even if a materiality requirement existed, there would be no way to objectively assess whether Judge Lock was a material witness here because he did not reveal any of the knowledge he retained from prosecuting Sandra Richardson to either the defense or a neutral judge like Judge Ammons. What is more, neither the U.S. Constitution's guarantee that "criminal defendants be afforded a meaningful opportunity to present a complete defense," *California v. Trombetta*, 467 U.S. 479, 485 (1984), nor § 15A-1223(e) contain any form of a materiality requirement as contemplated by the majority.

Start with the Eighth Amendment to the U.S. Constitution. Though mitigation evidence must be relevant, this is a "low threshold" that includes "evidence which tends logically to prove or disprove some fact or circumstance which a factfinder could reasonably deem to have mitigating value." *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (cleaned up). And "[o]nce this low threshold for relevance is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." *Id.* (quoting *Boyde v. California*, 494 U.S. 370, 377–78 (1990)). Thus, in terms of the kind of evidence that Mr. Richardson was constitutionally entitled to introduce, the standard is based purely on relevance—not materiality.

For the reasons already described, though it is not certain, it is likely that Judge Lock could have provided at least some relevant mitigating evidence, meaning that had it been provided by Judge Lock during discovery, Mr. Richardson would have had a constitutional right to introduce it at trial. But again, the problem here is that Judge Lock refused to provide this information in the first place, and Judge Ammons denied Mr. Richardson's discovery motion which would have required Judge Lock to do so. But there is no constitutional basis for imposing a higher burden (i.e., a materiality requirement) on the compelled production of mitigation evidence than that imposed on its introduction to a jury. Under this approach, criminal defendants would be required to prove that potential witness testimony is material before that testimony is even provided. Instituting this onerous burden at the outset would be repugnant to a criminal defendant's "constitutionally protected right . . . to provide

[a] jury with . . . mitigating evidence," *Williams v. Taylor*, 529 U.S. 362, 393 (2000), and impede defense counsel from "fulfill[ing] their obligation to conduct a thorough investigation of [a] defendant's background," *id.* at 396. But in characterizing the evidence that Mr. Richardson's defense sought from Judge Lock as immaterial, this is exactly the kind of burden the majority appears to believe was required here.

Subsection 15A-1223(e) also lacks a materiality requirement. Again, the plain text of the statute states that "[a] judge must disqualify himself from presiding over a criminal trial or proceeding if he is a witness for or against one of the parties in the case." N.C.G.S. § 15A-1223(e). This text does not contain any reference to the position that the judge must be a material witness, and "in effectuating legislative intent, it is [this Court's] duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *Lunsford v. Mills*, 367 N.C. 618, 623 (2014).

The majority accepts the State's argument that the materiality requirement was "invited error" because Mr. Richardson "contended in his written motions and supporting oral arguments that Judge Lock could offer 'material mitigating evidence.' " Even if true, Judge Ammons had a duty to properly apply the law. As already described, § 15A-1223(e) does not contain any materiality requirement. When a trial court judge makes an error of law, it is the duty of an appellate court to correct that misapplication. It does not matter which party advocated for the misapplication because any legal error, regardless of its source, must be corrected. It is therefore Judge Ammons's misapplication of the law by inserting a materiality requirement that resulted in error here. There is no legal basis for binding the party that advocated for that misapplication to an incorrect legal standard.

Based on his unusual relationship with the Richardson family, Judge Lock should have been disqualified from presiding over Mr. Richardson's trial under § 15A-1223(e), and he was required to disclose his knowledge of the prosecution and the Richardson family either to the parties in this case or a neutral arbiter under the Eighth Amendment to the U.S. Constitution. "[E]rror committed at trial which infringes upon [a] defendant's constitutional rights is presumed to be prejudicial and entitles him to a new trial unless the error in question is harmless beyond a reasonable doubt." *State v. Autry*, 321 N.C. 392, 399–400 (1988). Here, however, there is no way to assess whether the error was harmless beyond a reasonable doubt because Judge Lock's knowledge remains undisclosed.

At sentencing, the jury declined to find any of the seven mitigating factors that the defense introduced relating to Sandra Richardson's

prosecution. It is impossible to determine whether the information Judge Lock possessed, if presented as mitigating evidence, would have changed the jury's decision to impose the death penalty in this case. As a result, the State cannot overcome the presumption of prejudice that exists here stemming from Judge Lock's refusal to provide potential mitigating evidence that Mr. Richardson had a constitutional right to introduce as part of his defense.

B. The Trial Court's Evidentiary Errors Unfairly Prejudiced Mr. Richardson for Sentencing Purposes

1. North Carolina's Arbitrary Death Penalty Sentencing Scheme Requires Trial Courts to Exercise the Utmost Care to Avoid Death Sentences Imposed Arbitrarily

In *Furman*, the U.S. Supreme Court "held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980). In other words, capital punishment schemes that provide "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" are unconstitutional. *Furman*, 408 U.S. at 313 (White, J., concurring). In a separate concurrence, Justice Stewart explained that the death sentences at issue were imposed arbitrarily, making them "cruel and unusual in the same way that being struck by lightning is cruel and unusual" in that "of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Id.* at 309–10 (Stewart, J., concurring) (footnote omitted).

"[W]antonly and . . . freakishly imposed," *id.* at 310, death sentences persist in North Carolina's capital sentencing scheme. *See* Matthew Robinson, *The Death Penalty in North Carolina, 2021: A Summary of the Data and Scientific Studies* (2021); *see also* James G. Exum Jr., *Capital Punishment in North Carolina: A Justice's View On Why We Can 'No Longer Tinker With the Machinery of Death'*, 99 N.C. L. Rev. 101 (2020) (cataloguing arbitrariness in North Carolina death sentences).

Because randomly imposed death sentences are pervasive in North Carolina, it is incumbent upon trial court judges who preside over capital trials to exercise the utmost care to avoid erroneous rulings that could unfairly prejudice criminal defendants. Given that this form of punishment is imposed so arbitrarily, a trial court's failure to exercise proper care, for example, by admitting improper evidence, could mean

the difference between life and death for a defendant. With stakes so high and chances of a randomly imposed death sentence so great, trial courts have a duty to make sure that their own mistakes are not the reason an individual is sentenced to death. For the reasons discussed below, I do not believe that the trial court exercised this degree of care in Mr. Richardson's case.

2. The Manner of the State's Display of Photographs was Excessive and Unfairly Prejudicial at Sentencing

At trial, the State fixated on the nature and severity of the victim's injuries. To that end, it deluged the jury with gut-wrenching images of the victim's body and wounds. The defense objected to the introduction of the photographs, urging the trial court to exclude them under Rule 403 of the North Carolina Rules of Evidence. In the defense's view, the tsunami of gruesome images held minimal probative value and a monstrous prejudicial risk.

The trial court disagreed. It permitted the State to introduce the images, reasoning that the interest of convenience outweighed any prejudice. The State jumped on that offer. Of the State's fourteen witnesses, eight relied on those lurid images in their testimony, presenting a total of eighty-eight distinct pictures to the jury.[1] The State took a similar tack during closing arguments. In their final pitch to the jury, prosecutors exhibited a photographic slideshow of the victim's face and wounds. Those images were the last things jurors saw before they deliberated.

In my view, the trial court erred by permitting a trial-by-photograph. The graphic images carried little probative weight, especially because Mr. Richardson did not contest the cause or extent of the victim's injuries. Yet the State belabored the victim's wounds, plying jurors with picture after gruesome picture of the victim's body. The excessive use of the photographs and how the State presented them only ballooned their prejudicial impact. Rule 403 was designed to prevent the very tactics the State engaged in here: Attempting to coax a decision based on emotion, not evidence. The trial court erred by holding otherwise—the majority errs, too, by affirming that ruling.

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1. The State's witnesses offered eighty-eight distinct pictures throughout their testimony. But many witnesses returned to previously admitted images, generating 108 photographic exhibits admitted through testimony. On top of that, prosecutors displayed eight photos already admitted into evidence during closing argument. All told, the State showed an image to the jury 116 times over the course of the trial.

Rule 403 of the North Carolina Rules of Evidence governs the admissibility of photographs. *State v. Mlo*, 335 N.C. 353, 374 (1994). In essence, Rule 403 is an evidentiary gatekeeper: It screens the information that reaches the jury, thereby fostering reasoned, dispassionate deliberation.

To do so, Rule 403 employs a balancing test. It tasks trial judges to exclude evidence if the probative value is "substantially outweighed" by the "danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (2021). That is, if the evidence carries an "undue tendency" to elicit a "decision on an improper basis, . . . [usually] an emotional one." *State v. Mason*, 315 N.C. 724, 731 (1986) (cleaned up).

Photographs carry a unique risk of prejudice. *See State v. Hennis*, 323 N.C. 279, 284 (1988). After all, hearing testimony about something is quite different from seeing it yourself. Recognizing that danger—and its special risk in emotionally charged cases like Mr. Richardson's—this Court has taken special care to screen when and how the State may admit photographs. In analyzing prejudice, our cases focus on three factors: the purpose for which the State admits the pictures, whether their use is "excessive or repetitious," and how the State presents them. *See id.* at 283–86.

First, Rule 403 permits the State to offer photographs—even lurid ones—"so long as they are used for illustrative purposes." *Id.* at 284; *see also State v. Watson*, 310 N.C. 384, 397 (1984) ("Properly authenticated photographs of the body of a homicide victim may be introduced into evidence under instructions limiting their use to the purpose of illustrating the witness' testimony." (quoting *State v. Cutshall*, 278 N.C. 334, 347 (1971))). The State, for instance, may offer pictures to "illustrate testimony as to the cause of death." *Hennis*, 323 N.C. at 284. In the same vein, prosecutors may use photographs to "illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree." *Id.* Or, when it is in dispute,[2] the State may admit pictures demonstrating "the character of the attack made by defendant upon the deceased." *State v. Gardner*, 228 N.C. 567, 573

2. As our cases make clear, the State may not admit photographs to settle a nonexistent dispute. Where the parties do not contest a point, photographs illustrating that point lack probative value—their only conceivable purpose is to elicit prejudice. *See*, *e.g.*, *State v. Mercer*, 275 N.C. 108, 121 (1969) (barring the State from admitting "poignant and inflammatory" pictures of the victim's body when the evidence as to the cause of death was uncontradicted), *overruled on other grounds by State v. Caddell*, 287 N.C. 266 (1975); *see also State v. Johnson*, 298 N.C. 355 (1979) (determining that where there was no evidence that the defendant had mutilated or dismembered the body of the deceased, photographs of the victim's body after its having been ravaged by animals not probative of any material fact at issue).

(1948). In each of those cases, the photographs served a legitimate and limited purpose: Illustrating a witness's testimony to bolster the State's case. For that reason, their probative weight tipped Rule 403's scales.

Second, the "excessive" use of inflammatory photographs triggers Rule 403's bar. *See Hennis*, 323 N.C. at 283. Our cases have used a slew of descriptors— "redundant," "excessive," "repetitious," "unnecessary," "duplicative," "unduly reiterat[ive]." *See id.* at 284–87 (collecting cases). But the core insight is simple: When a "photograph adds nothing to the State's case, then its probative value is nil"—"nothing remains but its tendency to prejudice." *Id.* at 286 (cleaned up); *see also State v. Mercer*, 275 N.C. 108, 120 (1969) ("But where a prejudicial photograph is relevant, competent and therefore admissible, the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors."), *overruled on other grounds by State v. Caddell*, 287 N.C. 266 (1975).

Third, and finally, *how* the State presents photographs matters as much as the pictures themselves. In other words, context matters because it shapes the way jurors perceive, process, and weigh photographic evidence. For that reason, our Rule 403 analysis looks to factors like the "level of detail and scale," whether the pictures are colorized, and "where and how [they are] projected or presented." *See Hennis*, 323 N.C. at 285; *see also Mlo*, 335 N.C. at 374–75 (admonishing courts to consider "the circumstances surrounding the presentation of the photographs" when applying Rule 403). *Hennis* marks our clearest decision on that point. *See Hennis*, 323 N.C. at 285.

In that case—a grisly murder trial much like this one—the State offered thirty-five photographs of the crime scene and the victims' autopsies. *Id.* at 282. Of those photographs, nine depicted the victims' bodies at the scene. *Id.* at 282–83. The remaining twenty-six detailed the victims' injuries. *Id.* at 283. More specifically, the photographs zeroed in on the "head and chest areas of the victims," revealing "in potent detail the severity of their wounds" and the effects of decomposition. *Id.* To display the images, the State erected a screen on the courtroom wall opposite the jury. *Id.* at 282. The screen was large—large enough to "project two images 3 feet 10 inches by 5 feet 6 inches side-by-side." *Id.* On top of that, the State projected the photographs directly above the defendant's head. *Id.*

On review, this Court held that the number of photographs and the manner of their presentation flunked Rule 403's balancing test. *Id.* at

286–87. For one, the pictures were unduly "repetitious." *Id.* at 286. The State presented picture after picture "depicting substantially the same scene." *Id.* at 284–85 (quoting *Mercer*, 275 N.C. at 120). For example, the State offered "several color images of the same victim's neck wound." *Id.* at 286. But because the State presented other "color images of that same wound taken at the crime scene," the extra photographs "added nothing to the [S]tate's case." *Id.* And since the deluge of "grotesque and macabre" pictures lacked marginal probative value, they had "potential only for inflaming the jurors." *Id.*

The State's method of presenting the pictures compounded their prejudicial impact. *Id.* By projecting the lurid photos on an "unusually large screen," the State rendered them larger than life, inescapable even. *Id.* The jury had no choice but to stare at close-ups of the victims' wounds. And because the pictures appeared "directly over [the] defendant's head," the jury "continually [had] him in its vision as it viewed the slides." *Id.* All in all, the Court concluded, the photographs' "redundant content" undercut their probative value. *Id.* at 287. But they carried an extreme risk of prejudice—plying jurors with picture after blown-up picture of the victims' wounds created an "undue tendency" to elicit an improper verdict. *See id.* at 283 (reciting Rule 403's definition of "unfair prejudice"). Because the trial court thus erred by admitting the pictures, the defendant deserved a new trial.

Hennis demands the same result here. In Mr. Richardson's case—just as in *Hennis*—the State flunked each Rule 403's prejudice factors.

Begin with the purpose of the photographs. During Mr. Richardson's trial, the State offered eighty-eight pictures. It repeated many of them. So in total, the State showed jurors an image 116 times over the course of trial. And not just any images—gruesome, zoomed-in shots of the victim's injuries. Of the State's fourteen witnesses, eight used photographs during their testimony. Those witnesses decamped from the witness stand and stood in front of the jury box. They first narrated the victim's injuries—then they described the wounds again, this time with the aid of a picture displayed on a sixty-inch monitor. To underscore their testimony, they zoomed in on the pictures to magnify the wounds.

The State, of course, may offer photographs for a legitimate purpose like illustrating witness testimony. But the pictures shown here stray far beyond Rule 403's guardrails. Witness after witness used the same pictures to discuss the same injuries. In fact, at least four witnesses rehashed points made by others, relying on identical pictures used in prior testimony. Put simply, many of the State's witnesses had little to

illustrate because their testimony traversed well-worn terrain. And for that reason, the State lacked a legitimate purpose in continuing to ply jurors with redundant, inflammatory images. Instead, the State's campaign of photographic warfare sought merely to "arouse the passions of the jury"—the very risk Rule 403 was created to forestall. *See State v. Murphy*, 321 N.C. 738, 741 (1988).

In the same vein, the State's "excessive or repetitious" use of photographs crossed the line from probative to prejudicial. As *Hennis* made clear, when the "use of photographs that have inflammatory potential is excessive or repetitious, the probative value of such evidence is eclipsed by its tendency to prejudice the jury." *Hennis*, 323 N.C. at 284. The pictures here were certainly inflammatory—larger-than-life images of a four-year-old's battered body could not be anything but. Any juror could grasp the horror of her wounds with a handful of photographs presented by a handful of proper witnesses. That is especially so because Mr. Richardson did not dispute the cause of the victim's injuries or their severity. Instead, at both the guilt and sentencing phases of trial, the defense focused on Mr. Richardson's state of mind.

Yet the State belabored the victim's wounds, inaugurating the gruesome details of the crime as the centerpiece of its case. Just look at the numbers: eight witnesses presented 108 pictures to the jury. That is over three times the number in *Hennis*—and in that case, three victims suffered multiple injuries. *See id.* at 281–86. Put another way, the prosecutor in *Hennis* had more ground to cover than the State did here. And still, this Court concluded that the repetitious and redundant use of grotesque photographs tipped Rule 403's scales. *Id.* at 286. If that was true in *Hennis*, it is doubly—no, *triply*—true here.

Another data point: In this case, the testimony of witnesses who relied on photographs spilled into 158 pages of transcripts. By Mr. Richardson's estimate, the State sunk nearly four hours of witness testimony flashing lurid photos to the jury. And as in *Hennis*, many of those images depicted "substantially the same scene." *See Hennis*, 323 N.C. at 284 (quoting *Mercer*, 275 N.C. at 120). In fact, the State displayed five photographs three times, showing jurors again and again (and again) images of the victim's head, torso, back, arms, legs, and genitalia. Even the trial judge chided the State's tactics, warning the prosecutors that he harbored "some of the same concerns" as the defense about "unfair prejudice and needless presentation of cumulative evidence."

All told, the State's use of photographs meets any definition of "excessive." Even more because Mr. Richardson did not contest the

cause or extent of the victim's injuries. By rehashing inflammatory images to prove an undisputed point, the State exceeded the limits set by Rule 403.

If any doubt about prejudice remains, the State's method of presentation extinguishes it. Start with the screen. As in *Hennis*, the State displayed the pictures on an "unusually large screen," here a sixty-inch monitor. *Cf. Hennis*, 323 N.C. at 286. That means that each image was two and one-half feet wide and four and one-half feet tall. To jurors, the pictures may have appeared even larger—prosecutors parked the screen just seven feet in front of the jury box. While testifying, the State's witnesses stood beside the screen, manipulating the photographs to punctuate their descriptions of the victim's injuries. The images were in color. *Cf. id.* at 285 (noting that "whether [a photograph] is color or black and white" bears on its potential for prejudice). And unlike in 1988—when this Court decided *Hennis*—the pictures were high definition. So high definition, in fact, that the State's witnesses could magnify the grittiest of details for the jury. The images were, in a word, inescapable. The jury could not help but see each of the horrific pictures presented over four hours of testimony.

What's more, the State leveraged the most gruesome of the pictures in its closing argument to stoke the jury's anger. In urging jurors to return a guilty verdict, the State showed a photograph of the victim's battered face. Then again. And then again. Sandwiched between that face picture were graphic images of the victim's body, including five close-up shots of her genitalia. At one point, the prosecutor zoomed into a particularly gruesome image, remarking, "Now, that's an interesting bite." The timing, too, compounded the prejudicial impact. By focusing its closing argument on rehashing lurid, agonizing pictures, the State saturated the jury with emotion right before it retired to deliberate. The jurors left the courtroom with those gut-wrenching, ghastly images etched into their memories. How could they not? And for that reason, the State's resort to trial-by-photograph created an "undue tendency to suggest a decision on an improper [emotional] basis." *See Hennis*, 323 N.C. at 283.

All told, the State flounders on each Rule 403 factor. It lacked a legitimate purpose in admitting the photographs, instead relying on their shock value to sway jurors. The use of the pictures was also excessive. By any principled metric, the prejudice engendered by continually plying the jury with lurid images eclipsed any probative value, especially for an undisputed point. How the State presented the images clinches the case. Regardless of the content, a juror could scarce look away from larger-than-life, colorized, high-definition pictures on a monitor mere

feet from her face. But where that screen shows horrific images of a four-year-old's body—images magnified by witnesses and shown again and again—the effect is inescapable. Because the "danger of unfair prejudice" substantially outweighed any probative value, Rule 403—properly interpreted—barred the State from the "excessive or repetitious" use of the pictures. *See Hennis*, 323 N.C. at 284. The trial court clearly erred by holding otherwise.

The trial court's reasoning for allowing the State's preferred display was particularly misguided. Instead of implementing measures to ensure that the State's presentation of evidence did not veer into prejudicial territory given the nature of Taylor's injuries and the court's awareness that jurors would see a significant number of photographs often repeatedly, the trial court acquiesced to the State's preferred means of presenting the photos—on a large screen, just feet from the jury—because doing so was convenient for various reasons. Specifically, the trial court explained that the monitor's location was "plainly visible to all jurors including the alternate jurors at one time without having to relocate it" and without other individuals in the audience being able to see it and that its placement made it "visible to all jurors . . . without having [an] exhibit shown at multiple locations along the jury box as would be required if a smaller monitor was being used or smaller photographs were being used." The court went on to conclude that "in considering the balancing test required by Rule 403, . . . the value of displaying the photographs and exhibits in [the proposed] fashion [was] not substantially outweighed by the danger of unfair prejudice to the defendant."

The trial court's explanation focused exclusively on the reasons why the State's preferred display was the most convenient option. It did not reject other possibilities as logistically impossible, nor did it appear to consider the risks of the State's display in the context of this particular case and the evidence likely to be introduced during the trial. Thus, despite its invocation of Rule 403's balancing test, the record suggests that the trial court did not actually weigh the risk of unfair prejudice to Mr. Richardson against the probative value of presenting the evidence in the manner proposed by the State. Instead, the trial court chose expediency over its duty to prevent unfair prejudice. There is no basis for making this trade-off in the absence of proper balancing under Rule 403, no matter how convenient the State's display may have been. Moreover, the State has no right to present its photographic evidence in the most convenient way that it can conceive of.

All that the trial court was required to do here was implement a different, perhaps moderately less convenient, manner of displaying the

State's photographic evidence. With this in mind, it is hard to imagine that there are any circumstances in which the risk of unfair prejudice to a criminal defendant who is facing death does not substantially outweigh the mere expediency of the State's preferred manner of presenting evidence; a criminal defendant's life must always trump convenience. In employing an illusory balancing test under Rule 403 that failed to consider the gravity of what was at stake in this trial, the trial court's decision to allow the State's preferred photographic display was arbitrary and unsupported by reason, which amounted to an abuse of discretion. *See Hennis*, 323 N.C. at 285 ("Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.").

It is not enough that the trial court erred in permitting the State's introduction of photographic evidence, it must also be shown that this error caused actual prejudice. *Hennis*, 323 N.C. at 287 ("Only upon a showing that the trial court erred and that defendant has been prejudiced thereby will defendant be granted a new trial."). Though I do not believe that the trial court's error prejudiced Mr. Richardson at the guilt phase of trial, I would hold that it caused prejudice at the sentencing phase. As Mr. Richardson's brief to this Court points out, "[T]he jury's sound rejection of 43/46 mitigating factors (of which 32 were uncontroverted) is strong evidence of [its] lack of impartiality" because "[i]t is one thing to conclude that mitigating factors are outweighed by aggravating factors; it is another to deny they have any mitigating value at all." For example, "[n]ot one juror found that Mr. Richardson taking [Taylor] to the hospital was mitigating," and "[n]ot one juror found Mr. Richardson was under the influence of a mental or emotional disturbance, nor that his age of 21 was mitigating." This suggests that the jury was bent on sentencing Mr. Richardson with the harshest penalty possible, regardless of what the mitigating evidence showed. But, as discussed, a jury's anger is not a proper basis for sentencing a criminal defendant to death. *See Hennis*, 323 N.C. at 283.

3. Dr. Barbaro's Testimony was Unreliable, Needlessly Cumulative, and Unfairly Prejudicial

Appellate review of expert testimony in Mr. Richardson's case is based on an earlier version of North Carolina Rule of Evidence 702(a) that has since been amended. *See* N.C.G.S. § 8C-1, Rule 702(a) (2003). The previous version of the rule stated that when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may

testify thereto in the form of an opinion." *Id.* In *Howerton v. Arai Helmet, Ltd.*, this Court explained that the rule required a "three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" 358 N.C. 440, 458 (2004) (citations omitted), *superseded on other grounds by statute as stated in SciGrip, Inc. v. Osae*, 373 N.C. 409 (2020). Dr. Barbaro's testimony failed the first requirement.

When assessing reliability under the former version of Rule 702(a), it is true that this Court has instructed that trial courts "should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *Howerton*, 358 N.C. at 459. At the time of Mr. Richardson's trial, this Court had approved the use of bite mark testimony in two cases. First, in *State v. Temple*, which was decided in 1981, this Court held that expert witnesses who provided bite mark testimony "applied scientifically established techniques of dentistry and photography to the solution of a particular novel problem," leading it to conclude that the testimony "was based upon established scientific methods[ ] and is admissible as an instrumentality which aids justice in the ascertainment of the truth." 302 N.C. 1, 12–13 (1981). A year later, this Court approved *Temple* in *State v. Green*, 305 N.C. 463 (1982). There, the Court declined to reverse *Temple*'s acceptance of bite mark testimony as a form of reliable evidence seemingly because the methodology "ha[d] been approved in other jurisdictions." *Id.* at 471.

Since *Temple* and *Green* were decided, however, there has been increasing skepticism as to the reliability of bite mark testimony. *See, e.g.*, David L. Faigman et al., *The Judicial Response to Expert Testimony on Bitemark Identification—Cases after Daubert*, 4 Mod. Sci. Evidence § 35:6 (2022) ("[B]etween the mid[-]1970s and today, a paucity of research [regarding bite mark evidence] has been replaced by a more substantial, though still limited body of research and earlier assumptions of accuracy have been replaced by data suggesting that moderate to high error rates are typical."). In light of this evolving understanding of bite mark evidence, there is no reason that "non-novelty, by itself, [should] shelter from reexamination erroneous scientific claims that have lost the support of the field or fields from whence they came." *Id.* Such reexamination is necessary here.

In 2009, the first independent report examining the reliability of bite mark evidence was published by a committee of neutral scientists.

See Comm. on Identifying the Needs of the Forensic Scis. Cmty., Nat'l Rsch. Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (NAS Report). "In [the NAS Report], The National Academy of Sciences' Committee on Identifying the Needs of the Forensic Science Community fulfill[ed] the congressional charge of providing recommendations on policy initiatives that must be adopted in any plan to improve the forensic science disciplines." *Strengthening Forensic Science in the United States: A Path Forward*, U.S. Dep't of Just., Off. of Just. Programs, https://www.ojp.gov/ncjrs/virtual-library/abstracts/strengthening-forensic-science-united-states-path-forward (last visited Aug. 2, 2023). The NAS Report outlined some of the "problems inherent in bite mark analysis and interpretation," including that "[t]he uniqueness of the human dentition has not been scientifically established" and that "[t]he ability of the dentition, if unique, to transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness has not been scientifically established." NAS Report, at 175. The NAS Report therefore explained that "no scientific studies support" the position that "bite marks can demonstrate sufficient detail for positive identification." *Id.* at 176. The NAS Report found that bite mark evidence is unreliable in other ways as well. For example, it "suffers from the potential for large bias among bite mark experts in evaluating a specific bite mark." *Id.* at 174.

Since the NAS Report was published, several other expert commissions have reached similar, and even more forceful, conclusions regarding the unreliability of bite mark evidence. For example, the Texas Forensic Science Commission, a body statutorily-created by the Texas legislature,[3] issued a report concluding that courts should not admit bite mark evidence in criminal cases and explaining that "1) there is no scientific basis for stating that a particular patterned injury can be associated to an individual's dentition; and 2) there is no scientific basis for assigning probability or statistical weight to an association, regardless of whether such probability is expressed numerically." Tex. Forensic Sci. Comm'n, *Forensic Bitemark Comparison Complaint Filed by National Innocence Project on Behalf of Steven Mark-Chaney—Final Report* (2016) (TFSC Report). The report further stated that "[t]hough these claims were once thought to be acceptable and have been admitted into evidence in criminal cases" around the country, "it is now clear

3. Among other things, the commission is charged with investigating the misuse of forensic evidence. *See About Us*, Tex. Forensic Sci. Comm'n, Tex. Jud. Branch, https://www.txcourts.gov/fsc/about-us/ (last visited Aug. 2, 2023).

they lack any credible supporting data." *Id.* at 15; *see also* President's Council of Advisors on Sci. & Tech., *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* 9 (2016) (PCAST Report) (explaining that the "available scientific evidence strongly suggests that examiners . . . cannot even consistently agree on whether an injury *is* a human bite mark" and that "the prospects of developing bitemark analysis into a scientifically valid method [are] low").[4]

Though courts have historically been willing to admit bite mark evidence, in response to this growing body of research refuting the reliability of bite marks as a valid or reliable form of forensic evidence, in recent years many courts have questioned whether its admission is appropriate. *See*, *e.g.*, *Ege v. Yukins*, 485 F.3d 364, 376 (6th Cir. 2007) (opining that "[b]ite mark evidence may by its very nature be overly prejudicial and unreliable"); *Starks v. City of Waukegan*, 123 F. Supp. 3d 1036, 1052 (N.D. Ill. 2015) (explaining that "[i]t is . . . doubtful that 'expert' bite mark analysis would pass muster under Federal Rule of Evidence 702 in a case tried in federal court"); *State v. Lopez-Martinez*, No. 100,643, 2010 WL 2545626, at *4 (Kan. Ct. App. June 11, 2010) (Leben, J., concurring) (agreeing with the majority that "this case d[id] not present [the court] with an opportunity to consider whether [the Kansas Supreme Court's] holding that bite-mark testimony is admissible remains good law" but opining that, based on modern scientific developments, "[r]econsideration of the admissibility of bite-mark testimony seems appropriate").

Rather than engaging with the modern scientific developments that have led to a growing consensus that bite mark testimony is unreliable, the majority relies on this Court's holdings from over forty years ago that condoned the admission of such testimony. But as scientific understandings of various forms of forensic evidence evolve, courts have an obligation to respond to those advancements accordingly. By failing to re-examine the admissibility of a certain form of evidence in light of new science and relying solely on historical acceptance to justify its continued use, this Court allows junk science to serve an improper role in the criminal justice system. Because the emerging scientific consensus suggests that bite mark testimony is inherently unreliable, I dissent from the majority's view that it is admissible evidence and would

4. "The President's Council of Advisors on Science and Technology (PCAST) is an advisory group of the Nation's leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from inside the White House and from cabinet departments and other Federal agencies." PCAST Report.

take this opportunity to revisit this Court's previous decisions that conclude otherwise.

Aside from failing to pass muster under the former version of Rule 702(a), the probative value of Dr. Barbaro's testimony was substantially outweighed by the risk that his testimony would unfairly prejudice Mr. Richardson, and it was needlessly cumulative. *See* N.C.G.S. § 8C-1, Rule 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."). The probative value of Dr. Barbaro's testimony in this case was minimal. First, Dr. Barbaro's testimony was not necessary for the State to show that Taylor sustained a significant number of bites. The State had at least three witnesses who treated or inspected Taylor, identified several of the wounds on her body as bite marks, and estimated the age of those wounds. The State's own description of the bite marks demonstrates that there was no need for a forensic odontologist to identify the wounds as bite marks on top of the testimony from the other medical professionals in this case. For example, the State points out that there were a considerable number of bite marks on her body, and the marks were so detailed that "some of the[m] . . . included impressions from eight upper and lower teeth." Further, the defense did not dispute the testimony of the three other medical professionals that the marks were indeed bite marks.

Aside from establishing that the wounds were bite marks through the testimony of several other medical professionals, the State also introduced overwhelming evidence that Mr. Richardson was the only person who had access to Taylor and could have caused her injuries, meaning that Dr. Barbaro's testimony was not necessary for identification purposes. For example, a police officer who interviewed Mr. Richardson after he brought Taylor to the hospital testified for the State that Mr. Richardson admitted both "[t]hat he had been watching [Taylor] for the past two weeks while her mother . . . was in military training" and that "he was the only person that had been watching her." Mr. Richardson did not contest the veracity of this admission. In sum, Dr. Barbaro's testimony did not serve any independent purpose, and in light of all other evidence introduced in this case, was needlessly cumulative.

While Dr. Barbaro's testimony was not particularly helpful in proving any element of the State's case either at the guilt phase or the sentencing phase, it was massively inflammatory. For example, when asked to describe his reaction when he saw Taylor and her injuries, Dr. Barbaro

testified that he "immediately said a prayer that she would die." He testified over the defense's objection about Mr. Richardson's intent in biting Taylor by discussing the purpose of animal bites, opining that "[b]ears and dogs are trying, for the most part, to kill their victim. So, they're tearing and using their teeth as their tool or weapon to tear or maim their victim" and that "bite mark evidence in adolescents and above . . . is used strictly for punishment."[5] All the while, Dr. Barbaro relied on photographs to illustrate his testimony, utilizing the prejudicial monitor display previously discussed. Dr. Barbaro zoomed in on photographs of Taylor's wounds, hyper-magnifying their appearance to the jury.

The trial court sustained the defense's objections to these inflammatory statements, as well as many others, and instructed the jury to disregard them. "It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information." *Bruton v. United States*, 391 U.S. 123, 135 (1968). But "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* Dr. Barbaro's emotionally charged and highly prejudicial statements present one such context.

Despite the trial court's instructions that the jury ignore certain improper testimony, the content of Dr. Barbaro's statements was such that it would be unrealistic to believe that, when it came time for sentencing, the jurors could simply forget what they had heard. Though jurors may frequently be able to follow instructions to disregard evidence, jurors are human, and whether subconsciously or not, there are bound to be times when they are unable to do so. Where, as here, the testimony to be disregarded is both inappropriate expert testimony and intensely graphic and chilling, it is to be expected that those statements will reverberate in the minds of the jurors, infecting their capacity to render a dispassionate sentence. The exceedingly human tendency of failing to disregard this type of evidence has consequences, and in capital cases, those consequences are particularly extreme. Because the nature of Dr. Barbaro's testimony was such that a jury was likely incapable of properly disregarding it, his statements played into the difference between life and death for Mr. Richardson. In this way, the trial court's instructions were insufficient to cure the highly prejudicial effect of his testimony.

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5. These are a few of the many instances in which Dr. Barbaro's testimony crossed the line, serving no other purpose but to inflame the passions of the jury.

Because the State already presented substantial evidence of Mr. Richardson's guilt and his methods of abusing Taylor, it appears that the State introduced Dr. Barbaro's testimony merely to inflame the passions of the jurors such that any punishment imposed would not be based on a neutral, dispassionate application of the law but on the jury's own anger. In short, Dr. Barbaro's testimony served no other purpose than to enrage the jury. In this respect, his testimony was unnecessarily cumulative of testimony provided by other witnesses, and its content created a substantial risk of unfair prejudice to Mr. Richardson. Because it lacked probative value, it was error to admit it under Rule 403.

Taken together, the trial court's errors prejudiced Mr. Richardson at sentencing. Even if individual missteps may not establish prejudice "when considered in isolation," the "cumulative effect of the errors" may undermine a proceeding's reliability and fairness. *See State v. Canady*, 355 N.C. 242, 246 (2002) (aggregating trial court's multiple errors and concluding that cumulative effect of errors prejudiced defendant); *see also State v. Allen*, 378 N.C. 286, 304 (2021) (holding that courts must "consider the cumulative effect of alleged errors by counsel" in analyzing whether a defendant alleging ineffective assistance of counsel has shown prejudice).

In capital cases, there is a heightened risk of cumulative error during sentencing—the phase when jurors decide whether to impose the death penalty. *See*, *e.g.*, *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999) (holding that cumulative errors prejudiced defendant at sentencing phase of capital trial, but not during guilt phase).[6] That is because the choice to exact "our state's most extreme punishment," *State v. Robinson*, 375 N.C. 173, 175 (2020), is morally infused and deeply personal. *See Woodson*, 428 U.S. at 303–04. For that reason, emotional appeals carry unique sway in capital cases, as they color jurors' moral calculus and their assessment of a defendant's culpability. And for the same reason, courts shoulder a special duty to ensure that a jury's decision to impose a death sentence

6. Courts have recognized that the question of prejudice may apply differently at the guilt and sentencing phases of a capital trial. In other words, even if a legal error would not change a jury's finding of guilt, it could alter the sentence it would impose. *See*, *e.g.*, *Smith v. Wainwright*, 741 F.2d 1248, 1255 (11th Cir. 1984) (ordering hearing on trial counsel ineffectiveness claim in capital case because counsel's failure to impeach witness during guilt phase "may not only have affected the outcome of the guilt/innocence phase, it may have changed the outcome of the penalty trial"); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003) (recognizing in capital case that prejudice analysis varies depending on whether legal errors occurred during the guilt or sentencing phases of trial, and analyzing defendant's claims accordingly).

flows from reason, not rage. *See Eddings*, 455 U.S. at 117–18; *California v. Ramos*, 463 U.S. 992, 998–99 (1983).

In my view, the fairness and reliability of Mr. Richardson's sentencing was undercut by the cumulative error of Judge Lock's failure to recuse, thereby depriving Mr. Richardson of potentially mitigating evidence; the relentless deluge of multiple gruesome photographs the State repeatedly presented to the jury; and Dr. Barbaro's inflammatory testimony comparing Mr. Richardson to an animal. Without those errors and their aggregated effect, there is a "reasonable probability that at least one juror would have struck a different balance" in deciding whether to sentence Mr. Richardson to death. *Wiggins v. Smith*, 539 U.S. 510, 535 (2003); *Porter v. McCollum*, 558 U.S. 30, 40–42 (2009) (per curiam). And because the death penalty requires jurors' unanimous agreement, N.C.G.S. § 15A-2000(b)(3), there is an unacceptable risk that Mr. Richardson's sentence was the fruit of flawed legal process. To ensure that the "most serious and irrevocable of our state's criminal punishments" is imposed through fair and just proceedings, *see State v. Ramseur*, 374 N.C. 658, 686 (2020), I would remand for a new sentencing hearing.

II. Conclusion

I concur with the results of the majority affirming the jury's verdict that Mr. Richardson was guilty of the first-degree murder of Taylor, as well as guilty of first-degree kidnapping, sexual offense with a child, and felony child abuse inflicting serious injury. However, I believe that the errors identified above require a new sentencing hearing.

VALUE HEALTH SOLUTIONS, INC. AND NAGARAJAN NEIL PARTHASARATHY
v.
PHARMACEUTICAL RESEARCH ASSOCIATES, INC. AND
PRA HEALTH SCIENCES, INC.

No. 100A22

Filed 1 September 2023

1. Fraud—dismissal—fraud by omission and promissory fraud—failure to state a claim—failure to meet particularity requirement

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by dismissing plaintiffs' claims of fraud by omission and promissory fraud pursuant to Civil Procedure Rules 12(b)(6) and 9(b). In the first place, plaintiffs did not raise those claims in their amended complaint; furthermore, plaintiffs failed to satisfy the particularity requirement of Rule 9(b).

2. Fraud—dismissal—fraud and fraudulent inducement—failure to meet particularity requirement—broad allegations

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

3. Fraud—dismissal—negligent misrepresentation—failure to meet particularity requirement

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by dismissing plaintiffs' negligent misrepresentation claim for failure to satisfy the heightened pleading standard of Civil Procedure Rule 9(b) where the complaint did not allege the time, place, speaker, or specific contents of the alleged misrepresentation.

4. Contracts—breach of contract—implied covenant of good faith and fair dealing—contractual gap

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

5. Contracts—breach of contract—express terms—summary judgment

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

6. Contracts—breach of contract—third-party sales—summary judgment—remand

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

a license to plaintiffs' software. In addition, the covenant of good faith and fair dealing was inapplicable to this issue.

7. Fraud—intentional misrepresentation and fraudulent inducement—letter of intent—non-binding

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

8. Fraud—intentional misrepresentation and fraudulent inducement—attempt to amend purchase agreement—amendments not made

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

9. Unfair Trade Practices—breach of contract and fraud claims—termination of employment—substantial evidence

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claims under the Unfair and Deceptive Trade Practices Act (UDTPA). First, plaintiffs' UDTPA claims (aside from the claim regarding plaintiff founder's termination) were simply a repackaging of their breach of contract and fraud claims—essentially alleging that defendants had failed to perform under the terms of the contract, which did not support a

finding of the required "substantial aggravating circumstances." In addition, when viewed in the light most favorable to plaintiffs, the record did not contain evidence creating a genuine issue of material fact. As for plaintiffs' other UDTPA claim—that co-founder plaintiff's termination was unfair—plaintiffs failed to overcome the high threshold to surpass the at-will employment presumption.

10. Pleadings—amendments—undue delay and material prejudice—previous extensive revisions, discovery closed, full briefing on motion to dismiss

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not abuse its discretion in denying, based on undue delay and material prejudice to defendants, plaintiffs' motion for leave to file a Second Amended Complaint. Plaintiffs had previously amended their complaint with extensive revisions; discovery had closed, with thousands of documents exchanged; and the parties had fully briefed the motion to dismiss plaintiffs' Amended Complaint.

11. Discovery—complex business case—third discovery request—unduly burdensome—remand

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

Justice EARLS concurring in part and dissenting in part.

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

Appeal pursuant to N.C.G.S. § 7A-27(a) from an order entered on 13 December 2019, an order and opinion entered on 4 February 2020, an order and opinion entered on 22 May 2020, and an order and opinion entered on 6 April 2021, by Judge Gregory P. McGuire, Special Superior

Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 15 March 2023.

Guidry Law Firm PLLC, by David G. Guidry, for plaintiff-appellants.

Barnes and Thornburg LLP, by John M. Moye, Allen R. Baum, and Mitchell Osterday, for defendant-appellees.

BARRINGER, Justice.

I. Factual Background

Pharmaceutical Research Associates, Inc. and PRA Health Sciences, Inc. (collectively defendants, will be referred to as PRA in the singular), together form a large contract research organization, providing clinical trial services to pharmaceutical and biotechnology companies around the world. Value Health Solutions, Inc. (VHS) is a software company, founded by plaintiff Neil Parthasarathy. VHS developed three software applications for use in the clinical trial process: ClinTrial Max (CTMax), Cloud Max, and Info Max (collectively, the Solutions). The Solutions were compatible with a platform called Salesforce, which is widely used by organizations involved in clinical trials. The Solutions caught the interest of PRA.

A. PRA's Evaluation of VHS's Software Capabilities

PRA approached Parthasarathy in early 2014, expressing interest in acquiring the Solutions. A year-long negotiation process and due diligence period ensued, during which PRA had full access to the Solutions. PRA tested the Solutions to determine what enhancements would be necessary if PRA were to acquire it. PRA identified several functional deficiencies in the software and prepared a list of enhancements PRA would require to "close the gap" between the Solutions and the software PRA was using at that time. PRA advised Parthasarathy of these functional deficiencies.

B. PRA's Letter of Intent

PRA's Executive Vice President and Chief Financial Officer, Linda Baddour, sent Parthasarathy a "Non-Binding Letter of Intent" (LOI) on 15 October 2014. The LOI outlined PRA's proposal to acquire VHS. The

LOI included, among other things, that PRA would make the following payments: (1) a one time, up-front payment to VHS and Parthasarathy of between one and three million dollars; (2) incentive payments of $333,000.00, with each conditioned upon the completion of one of three "Integration Milestones" within eighteen months of PRA acquiring VHS; and (3) future incentive payments to VHS and Parthasarathy, conditioned upon the completion of certain "Performance Milestones" as related to external sales of licenses of VHS's software.

As summarized by the trial court, the LOI proposed the following structure for the Performance Milestones:

> i. a payment of $2.5 million for reaching $25 million in annual sales within two years of closing;
>
> ii. a payment of $5 million for reaching $50 million in annual sales within three years of closing;
>
> iii. a payment of $7.5 million for reaching $75 million in annual sales within four years of the closing; and
>
> iv. payment of a one percent (1%) annual royalty on sales for an additional four years after the $75 million sales amount is reached.

The LOI also stated that it

> constitutes a statement of the intentions of the parties with respect to a potential Transaction, and does not contain all matters upon which agreement must be reached in order for a definitive agreement to be finalized or for the transaction to be consummated. Except for sections 3 through 8 of [the] LOI, which shall be legally binding in accordance with their respective terms, neither this LOI nor the acceptance thereof is intended to, nor shall it, create a binding legal obligation, or any obligation by any of the parties hereto to enter into any transaction, negotiate or take any other action in contemplation thereof, or [execute] any definitive agreements. The parties further acknowledge and agree that, except as otherwise provided in the immediately preceding sentence, none of this LOI, any proposal made . . . , nor the current on-going discussions between the parties are intended to (and shall not) create a legally

> binding obligation or commitment on the part of any party with respect to the negotiation or completion of the Transaction.

C. The Asset Purchase Agreement

On 21 May 2015, plaintiffs and defendants entered into an Asset Purchase Agreement (APA), governed by Delaware law. Under the terms of the APA, the Solutions would be sold to PRA, by plaintiffs, in exchanged for PRA stock and $2.5 million. The APA further provided for "contingent payments" if certain milestones were achieved.

The first group of contingent payments was outlined in Article 2.6(a)(i), (ii), and (iii) of the APA. The first group of contingent payments pertained to the following: integration of the VHS software into PRA's clinical trial system; completion of product enhancements coinciding with functional deficiencies identified during PRA's due diligence efforts; and completion of the migration of PRA clinical trial studies into VHS software (collectively, the Development Milestones).

The second group of contingent payments was outlined in the APA in sections 2.6(a)(iv), (v), (vi), and (vii). The second group of contingent payments pertained to the external sales of licenses to the Solutions within four years of the APA closing (the Sales Milestones).

Article 2.6 of the APA provides:

> Milestones. As additional consideration for the transactions contemplated hereby, and subject to the terms of this Section 2.6, Purchaser shall make (or [PRA] shall make on Purchaser's behalf) the following payments (each, a "Contingent Payment"):
>
> i. upon completion of the integration of the parties' Salesforce™ environments set forth on Schedule 2.6(a)(i), [PRA] shall issue to Seller (or as otherwise directed by Seller's Representative), within thirty (30) days after such completion, that number of shares of PRA Common Stock equal in value to Three Hundred Thirty-Three Thousand U.S. Dollars ($333,000.00), based on the Fair Market Value as of the date of issuance of such shares; provided, however, that completion occurs within the first consecutive eighteen (18) months from the Effective Time (the "Integration Period");

ii. upon completion of the key product enhancements set forth on Schedule 2.6(a)(ii), [PRA] shall issue to Seller (or as otherwise directed by Seller's Representative), within thirty (30) days after such completion, that number of shares of PRA Common Stock equal in value to Three Hundred Thirty-Three Thousand U.S. Dollars ($333,000.00), based on the Fair Market Value as of the date of issuance of such shares; provided, however, that completion occurs within the Integration Period;

iii. upon completion of the migration of the clinical trial management systems studies of Purchaser and its Affiliates into [CTMax] as set forth on Schedule 2.6(a)(iii), [PRA] shall issue to Seller (or as otherwise directed by Seller's Representative), within thirty (30) days after such completion, that number of shares of PRA Common Stock equal in value to Three Hundred Thirty-Three Thousand U.S. Dollars ($333,000.00), based on the Fair Market Value as of the date of issuance of such shares; provided, however, that completion occurs within the Integration Period;

iv. upon the achievement of aggregate External Sales equal to Twenty[-]Five Million U.S. Dollars ($25,000,000), Purchaser shall make, within thirty (30) days following the date on which [PRA] files its next quarterly report with the United States Securities and Exchange Commission (the "SEC") after such achievement, a cash payment of Two Million Five Hundred Thousand U.S. Dollars ($2,500,000.00) to Seller (or as otherwise directed by Seller's Representative) (the "First Milestone Payment"); provided, however, that such achievement occurs prior to the second (2nd) anniversary of the Closing Date (the "First Milestone period");

v. upon the achievement of aggregate External Sales equal to Fifty Million U.S. Dollars ($50,000,000.00), Purchaser shall make, within thirty (30) days following the date on which

[PRA] files its next quarterly report with the SEC after achievement, a cash payment of Five Million U.S. Dollars ($5,000,000.00) to Seller (or as otherwise directed by Seller's Representative) (the "Second Milestone Payment"); provided, however, that such achievement occurs prior to the third (3rd) anniversary of the Closing Date (the "Second Milestone Period");

vi. upon the achievement of aggregate External Sales equal to Seventy[-]Five Million U.S. Dollars ($75,000,000.00), Purchaser shall make, within thirty (30) days following the date on which [PRA] files its next quarterly report with the SEC after achievement, a cash payment of Seven Million Five Hundred Thousand U.S. Dollars ($7,500,000.00) to Seller (or as otherwise directed by Seller's Representative) (the "Third Milestone Payment"); provided, however, that such achievement occurs prior to the fourth (4th) anniversary of the Closing Date (the "Third Milestone Period"); and

vii. for four (4) consecutive calendar years following the achievement of aggregate External Sales equal to Seventy-Five Million U.S. Dollars ($75,000,000.00) (the "Major Milestone", and the date on which the Major Milestone is achieved, the "Major Milestone Date"), Purchaser shall make, within thirty (30) days following the date on which [PRA] files its next quarterly report with the SEC after each of the four (4) anniversaries of the Major Milestone Date, a per annum royalty payment to Seller (or as otherwise directed by Seller's Representative) equal to one percent (1%) of the aggregate amount of External Sales made during the applicable calendar year (such payments, the "Royalty Payments"). For the avoidance of doubt, any such Royalty Payments shall be made regardless of whether the First Milestone Payment, the Second Milestone Payment and/or the Third Milestone Payment have previously been made.

The APA defines "External Sale" as "the sale of one or more licenses to the Solutions by [PRA] or one of its Affiliates to a third party which is not (i) an Affiliate of [PRA] or (ii) using such license(s) in connection with providing services to [PRA] and/or any of its Affiliates."

The APA further provides for the independence of the contingent payments in Section 2.6(b), titled "Independence of Contingent Payments":

> [PRA]'s obligation to pay the Contingent Payments to [VHS] (or as otherwise directed by [VHS's] Representative) in accordance with Section 2.6(a) is an independent obligation of [PRA] and is not otherwise conditioned or contingent upon the satisfaction of any conditions precedent to any preceding or subsequent Contingent Payment and the obligation to pay a Contingent Payment to [VHS] shall not obligate [PRA] to pay any preceding or subsequent Contingent Payment. For the avoidance of doubt and by way of example, if the conditions precedent to the payment of the First Milestone Payment for the First Milestone Period are not satisfied, but the conditions precedent to the payment of the Second Milestone Payment for the Second Milestone Period are satisfied, then [PRA] would be obligated to pay such Second Milestone Payment for the Second Milestone Period for which the corresponding conditions precedent have been satisfied, and not the First Milestone Payment for the First Milestone Period.

D. The Takeda Master Services Agreement

On 31 August 2016, PRA entered into a Master Services Agreement (MSA) with Takeda Pharmaceuticals (Takeda). Under the MSA, PRA was to provide services to Takeda through use of PRA's "Owned Technology." Section 7.02(b) of the MSA is entitled "License to [PRA] Owned Technology During the Term." This section of the MSA reads as follows:

> Section 7.02(b) License to [PRA] Owned Technology During the Term. As of the Commencement Date and for the remainder of the Term, [PRA] hereby grants Takeda, Takeda Affiliates and their respective Personnel and third party service providers the right to access and use [PRA] Owned Technology used in supporting or providing the Services for purposes of receipt and use of the Services in the conduct of

> Takeda's and Takeda's Affiliates' business. For the avoidance of doubt, the foregoing right is granted under all [PRA] Owned IP and includes the right to use all configuration capabilities offered by the [PRA] Owned Technology.

The MSA defines PRA Owned Technology as follows:

> "[PRA] Owned Technology" means (i) all confidential or proprietary processes, procedures, methodologies, standard operating procedures, software, templates, programs[,] and other protectable materials that are used generally by [PRA] in [PRA]'s business[;] . . . (ii) derivative works [of item (i)] . . . ; and (iii) any form of delivery for (i) and (ii) received as part of the services, such as via Cloud Computing.

The MSA includes "software as a service" within cloud computing. PRA's Rule 30(b)(6) witness regarding the MSA, Brian Haas, testified that "software as a service means that the client does not have to own the technology . . . [to] utilize [it]," but instead, "through licensing," the client can be "provided with access to that output or that use of the software."

The Solutions is among the software PRA agreed to utilize in order to provide services to Takeda. PRA currently uses updated versions of VHS's software to manage "approximately three to four" projects for Takeda under the MSA. PRA has earned approximately $491 million under the MSA.

E. Discussions of Amending the APA Milestones

In December 2016, Parthasarathy and Colin Shannon, Chief Executive Officer of PRA, met to discuss amending the APA to provide new deadlines by which to achieve the milestones. Shannon requested that Deborah Jones-Hertzog, PRA's Senior Vice President of IT, work with Chuck Munn, PRA's in-house counsel, to develop a new framework for the milestone deadlines. A draft was proposed and circulated amongst Jones-Hartzog, Munn, and Mike Irene, PRA's Executive Director of IT. The draft was never presented to Parthasarathy.

Plaintiffs alleged before the trial court that PRA "falsely promis[ed] to amend the APA and extend the milestone deadlines" and "made representations to . . . Parthasarathy that induced him to believe that PRA intended to amend the payment milestone timelines." Specifically, those representations include an email from Shannon to Parthasarathy stating that PRA was "obviously trying to get [VHS and/or Parthasarathy] a

contract" regarding the milestones. The representations also include a communication from Jones-Hertzog to Parthasarathy stating that she had an updated milestone timeline for which she was awaiting approval.

In July 2017, Parthasarathy submitted his own proposed amendments to the Development Milestones and proposed resolutions of the Sales Milestones. In his proposal, Parthasarathy asserted the following: that milestone (i) had been completed and should be paid "as soon as possible"; and that milestones (ii) and (iii) "need[ed] to be rewritten" or, alternatively, PRA needed to identify what additional work was needed from Parthasarathy so that those milestones could be completed and paid no later than January 2018. Parthasarathy's proposal also acknowledged that milestone (iv), the first Sales Milestone, had not been achieved. No agreement was reached regarding amending the milestones.

F. Parthasarathy's Employment Agreement with PRA

As part of the acquisition plan regarding the Solutions, PRA hired Parthasarathy as the Vice President of Technology. His employment agreement stated that Parthasarathy would have the "status and responsibilities as determined from time to time" by PRA's "CEO or the CEO's designee." The employment agreement also required Parthasarathy to dedicate his full-time attention, skills, and energy to his role with PRA. PRA contends that, in 2017, Parthasarathy "checked out" of his role with PRA, started a business with his own employees, would attend meetings but make no contribution, and stopped replying to emails.

II. Procedural History

Plaintiffs filed the Complaint in this matter on 5 October 2018. On 26 March 2019, defendants filed the Amended Answer, Affirmative Defenses, and Counterclaims. On 4 September 2019, plaintiffs moved to amend the Complaint.

On 5 September 2019, Plaintiffs submitted Plaintiffs' Rule 10.9 Summary of Discovery Dispute (the Third Discovery Dispute) by email. The trial court determined that the Third Discovery Dispute was not sufficiently ripe. The discovery dispute sought determination as to whether documents requested were necessary to determine whether defendants had violated the External Sales provisions of the APA.

On 1 November 2019, the trial court granted leave for plaintiffs to file an Amended Complaint. The Amended Complaint asserted claims for breach of contract, intentional misrepresentation, negligent misrepresentation, fraudulent inducement, violation of North Carolina's Unfair and Deceptive Trade Practices Act (UDTPA), promissory estoppel, and

unjust enrichment. Plaintiffs renewed their Rule 10.9 discovery dispute on 25 November 2019, via email, to the court. A discovery teleconference was held on 9 December 2019. On 2 December 2019, defendants filed an answer to plaintiffs' amended complaint, and a motion to dismiss all of plaintiffs' claims except for the breach of contract claim. On 13 December 2019 the trial court entered its order denying plaintiffs' Rule 10.9 discovery request without prejudice to the trial court issuing a later order following disposition of summary judgment motions. On 17 December 2019, defendants voluntarily dismissed one of two remaining counterclaims, to which plaintiffs filed a reply on 30 December 2019.

Plaintiffs filed a Motion for Leave to File Second Amended Complaint on 23 January 2020. On 4 February 2020, the trial court denied plaintiffs' motion to amend the Complaint for a second time. On 22 May 2020, the trial court entered its Order and Opinion on Defendants' Motion to Dismiss Amended Complaint. The trial court dismissed plaintiffs' claims for negligent misrepresentation and fraudulent inducement "to the extent" the claims were based on pre-APA misrepresentations. Claims based on misrepresentations and statements made in the pre-APA LOI, and post-APA were not dismissed. The trial court granted defendants' motions to dismiss as related to the negligent misrepresentation, promissory estoppel, and unjust enrichment claims.[1] The trial court denied the motion to dismiss as related to the UDTPA claim.

Plaintiffs and defendants filed cross motions for summary judgment, filing briefs in support on 11 August 2020 and 12 June 2020, respectively. Plaintiffs sought summary judgment on the final remaining counterclaim. Additionally, as directed by the trial court in the Rule 10.9 discovery dispute conference and order, Plaintiff moved for summary judgment as to whether the Takeda MSA qualified as an "External Sale" under the APA. Defendants' motion sought summary judgment on plaintiffs' four remaining claims—breach of contract, intentional misrepresentation, fraudulent inducement, and violation of the UDTPA.

On 6 April 2021, the trial court entered its Order and Opinion granting summary judgment for defendants on all of plaintiffs' remaining claims. The order denied summary judgment to plaintiffs on defendants' final counterclaim for breach of contract against Parthasarathy and on the issue of whether the Takeda MSA constituted an "External Sale."

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1. Plaintiffs have not appealed the trial court's order granting defendants' Motion to Dismiss the claims of promissory estoppel and unjust enrichment. Accordingly, those issues are not before us and will not be discussed further in this opinion.

Defendants stipulated to the dismissal of the final counterclaim on 8 October 2021. Plaintiffs filed notice of appeal on 22 October 2021.

III. Motion to Dismiss

A. Standard of Review

Dismissal of a claim under Rule 12(b)(6) is subject to de novo review. *Bridges v. Parrish*, 366 N.C. 539, 541 (2013). A dismissal is warranted "when: '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Krawiec v. Manly*, 370 N.C. 602, 606 (2018) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002)). In evaluating a party's complaint, this Court will "take the allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor." *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 106–07 (2022).

B. Fraud by Omission and Promissory Fraud

[1] The trial court correctly dismissed plaintiffs' purported claims of fraud by omission and promissory fraud pursuant to North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted for failing to satisfy the requirements found in Rule 9(b). Plaintiffs did not plead fraud by omission or promissory fraud in their Amended Complaint. Instead, the Amended Complaint raised claims of intentional misrepresentation, negligent misrepresentation, and fraudulent inducement. A complaint that fails to allege a legal theory that is later briefed does not meet Rule (9)(b)'s pleading requirement. *See Terry v. Terry*, 302 N.C. 77, 85 (1981).

Moreover, plaintiffs did not satisfy the particularity requirement of Rule 9(b) as interpreted by this Court. N.C.G.S. § 1A-1, Rule 9(b) (2021). "[I]n pleading actual fraud[,] the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations. *Terry*, 302 N.C. at 85; N.C.G.S. § 1A-1, Rule 9(b) ("In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.") An alleged misrepresentation must be "definite and specific." *Ragsdale v. Kennedy*, 286 N.C. 130, 139 (1974).

C. Fraud and Fraudulent Inducement

[2] We agree with the trial court and affirm the order dismissing the claims of fraud and fraudulent inducement based on pre-APA

representations not involving the LOI. A successful fraud claim requires a plaintiff prove: "(1) representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Id.* at 138. The elements for showing fraudulent inducement are identical. *Ward v. Fogel*, 237 N.C. App. 570, 581 (2014), *disc. rev. denied*, 368 N.C. 249 (2015) (mem.).

The trial court divided plaintiffs' fraud-related claims into two categories: claims based on alleged misrepresentations occurring prior to execution of the APA; and claims based on alleged misrepresentations that occurred after execution of the APA. The trial court granted defendants' 12(b)(6) Motion to Dismiss plaintiffs' claims for intentional misrepresentation and fraudulent inducement for pre-APA representations claims not involving the LOI on the grounds that the claims were not pled with sufficient particularity to satisfy Rule 9(b) requirements.[2] Claims related to post-APA representations and those related to the LOI remained.

Here, the Amended Complaint is devoid of any facts that identify who specifically made statements to plaintiff Parthasarathy. Nor does the Amended Complaint specify exactly when the statements were made, or where. The Amended Complaint only made broad allegations stating that PRA knowingly made false representations. The closest allegation to providing particularity states that "[d]uring a yearlong due diligence period and negotiations, PRA represented to [plaintiff Parthasarathy] that in addition to using [the Solutions] to provide services to PRA's customers, PRA also would sell or license [the Solutions] to other PRA customers, and, with few exceptions to any customers VHS had developed relationships with prior to the acquisition." This allegation falls short of the particularity requirement of Rule 9(b).

The Amended Complaint is absent of facts sufficient to meet the heightened standard specifying the time, place, and content of the misrepresentation, nor does it identify who made the misrepresentation. *Terry*, 302 N.C. at 85. Accordingly, the trial court was correct in dismissing the claims for fraud and fraudulent inducement based on PRA's alleged pre-APA representations.

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2. Section IV. C. of this opinion affirms the trial court's summary judgment order dismissing plaintiffs' claims of intentional misrepresentation and fraudulent inducement in the LOI.

D. Negligent Misrepresentation

[3] The trial court granted defendants' 12(b)(6) Motion to Dismiss plaintiffs' claim for negligent misrepresentation based on insufficient pleading. We agree with the trial court and affirm the trial court's order dismissing plaintiffs' negligent misrepresentation claim.

The North Carolina Business Court and North Carolina's federal district courts have consistently held that complaints alleging negligent misrepresentation must plead such claims with particularity. *See*, *e.g.*, *Aldridge v. Metro Life Ins. Co.*, No. 18-CVS-1050, 2019 NCBC LEXIS 116, at *113 (N.C. Super. Ct. Union Cnty. (Bus. Ct.) Dec. 31, 2019); *Beam v. Sunset Fin. Servs.*, No. 18-CVS-2925, 2019 NCBC LEXIS 56, at **18 (N.C. Super. Ct. Iredell Cnty. (Bus. Ct.) Sept. 3, 2019); *Rabinowitz v. Suvillaga*, No. 17-CVS-244, 2019 NCBC LEXIS 8, at *33 (N.C. Super. Ct. New Hanover Cnty. (Bus. Ct.) Jan. 28, 2019); *Provectus Biopharmaceuticals, Inc. v. RSM US LLP*, No. 17-CVS-10396, 2018 NCBC LEXIS 101, at *57 (N.C. Super. Ct. Mecklenburg Cnty. (Bus. Ct.) Sept. 28, 2018); *Herrera v. Charlotte Sch. of Law, LLC*, No. 17-CVS-1965, 2018 NCBC LEXIS 35, at *36 (N.C. Super. Ct. Mecklenburg Cnty. (Bus. Ct.) Apr. 20, 2018); *Bucci v. Burns*, No. 16-CVS-15478, 2017 NCBC LEXIS 83, at *7–8 (N.C. Super. Ct. Wake Cnty. (Bus. Ct.) Sept. 14, 2017); *Deluca v. River Bluff Holdings II, LLC*, No. 13-CVS-783, 2015 NCBC LEXIS 12, at *20 (N.C. Super. Ct. Brunswick Cnty. (Bus. Ct.) Jan. 28, 2015); *Al-Jamal v. Michael Baker Corp.*, No. 5:12-CV-746-F, 2013 U.S. Dist. LEXIS 93676, at *18 (E.D.N.C. July 3, 2013) ("Plaintiff is cautioned that any fraud or negligent misrepresentation claims must comply with [Federal] Rule 9(b)'s pleading requirements."); *Rohlik v. I-Flow Corp.*, No. 7:10-CV-173-FL, 2011 U.S. Dist. LEXIS 73454, at *6 (E.D.N.C. July 7, 2011) ("[C]laims of negligent misrepresentation [also] fall within the purview of Rule 9(b)." (alterations in original)); *Suntrust Mortg., Inc. v. Busby*, 651 F. Supp. 2d 472, 484–85 (W.D.N.C. 2009) (applying Rule 9(b) to negligent misrepresentation fraud claims); *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 351 F. Supp. 2d 436, 447 (M.D.N.C. 2005) (applying Rule 9(b) to negligent misrepresentation fraud claims); *Angell v. Kelly*, 336 F. Supp. 2d 540, 549 (M.D.N.C. 2004) (applying Rule 9(b) to negligent misrepresentation fraud claims); *Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 199 (M.D.N.C. 1997) (After noting a split among federal courts as to whether Rule 9(b) applies to claims for negligent misrepresentation, adopting the "approach that negligent misrepresentation . . . claims come within Rule 9(b).").

We hold that, in North Carolina, claims for negligent misrepresentation must satisfy the heightened pleading standard of North Carolina

Rules of Civil Procedure Rule 9(b). A claim of negligent misrepresentation is "closely akin to fraud, differing primarily in the requisite state of mind of the purported actor." *Dealers Supply Co., Inc. v. Cheil Indus., Inc.*, 348 F. Supp. 2d 579, 590 (2004) (citing *Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 202 n.14 (M.D.N.C. 1997)). Similar to a claim for fraud or mistake, "negligent misrepresentation is based upon some 'confusion or delusion of a party such as by some misrepresentation.' " *Id.* at 590 (quoting *Breeden*, 171 F.R.D. at 203). The similarity of the claims supports the extension of Rule 9(b) to "all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud." *Id.* (quoting *Toner v. Allstate Ins. Co.*, 821 F. Supp. 276, 283 (D. Del. 1993)).

The key distinction between negligent misrepresentation claims and ordinary negligence claims is that the former requires proof not merely of a breach of duty, but also the additional requirement that the claimant *justifiably relied* to his detriment on the information communicated without reasonable care. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206 (1988). As in a fraud case, we require the plaintiff to identify this alleged negligent misrepresentation with particularity so that the defendant can understand the time, place, and content of the representation, the identity of the person making the representation, and how the plaintiff justifiably relied on that information. *Cf. Terry*, 302 N.C. at 85. As a federal court succinctly explained when applying Rule 9(b) to negligent misrepresentation claims, "[u]nless defendant and others share plaintiff's view of the situation, they will find it difficult to grasp plaintiff's claim." *Breeden*, 171 F.R.D. at 202.

Here, plaintiffs have not alleged the time, place, speaker, or the specific contents of the alleged misrepresentation purported in the claim. Aside from the pleaded facts related to the letter of intent, the Amended Complaint contained only one reference to any misrepresentation: "[d]uring a yearlong due diligence period and negotiations, PRA represented to [plaintiff Parthasarathy] that in addition to using [the Solutions] to provide services to PRA's customers, PRA also would sell or license [the Solutions] to other PRA customers, and, with few exceptions, to any customers VHS had developed relationships with prior to the acquisition." This lone statement does not identify who, specifically, made the misrepresentation, when it was made, where it was made, or the specific nature of the misrepresentation. Therefore, the 9(b) heightened standard of pleading with particularity has not been met. Accordingly, the trial court was correct to dismiss plaintiffs' claim of negligent misrepresentation.

IV. Defendants' Motions for Summary Judgment

A. Standard of Review

"The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524 (2007). Summary judgment is appropriate when no genuine issue of material fact exists, and a party is entitled to judgment as a matter of law. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523 (2012) (citing N.C.G.S. § 1A-1, Rule 56(c)). Rule 56(c) of the North Carolina Rules of Civil Procedure states that summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2021). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83 (2000). In review of the motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. *Id.*

Contract interpretation is a question of law. *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354 (1970). When interpreting a contract, the Court should presume that the words of the agreement were deliberately selected and be given their plain meaning. *Briggs v. American & Efird Mills, Inc.*, 251 N.C. 642, 644 (1960).

B. Breach of the APA

Under Delaware law, courts "interpret contracts as a whole," "will give each provision and term effect, so as not to render any part of the contract mere surplusage," and "will not read a contract to render a provision or term meaningless or illusory." *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 56 (Del. 2019) (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). "When the contract is clear and unambiguous, we will give effect to the plain-meaning of the contract's terms and provisions." *Id.* at 56–57 (quoting *Osborn*, 991 A.2d at 1159–60). It is true that under Delaware law the implied covenant of good faith and fair dealing "inheres in every contract," *Chamison v. HealthTrust*, 735 A.2d 912, 920 (Del. Ch. 1999), and may be used to imply terms for "developments that could not be anticipated." *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010). However, the covenant of good faith and fair dealing "is not an equitable remedy for rebalancing economic interests after events that could have been anticipated." *Id.* at 1128. Indeed, the covenant of good faith and fair dealing should not be applied "to give the plaintiffs contractual protections that 'they failed to secure for themselves at the bargaining table.' "

Winshall v. Viacom Int'l, Inc., 76 A.3d 808, 816 (Del. 2013) (quoting *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1260 (Del. 2004).

1. Sections 2.6(a)(i) and (ii) of the APA

[4] The trial court granted defendants' motion for summary judgment for plaintiffs' breach of contract claims as related to Sections 2.6(a)(i) and (ii) of the APA. We affirm the trial court's order granting summary judgment.

Schedules 2.6(a)(i) and (ii) permit PRA to "reasonably determine" completion of the first and second software development earnout milestones. Plaintiffs assert that defendants breached the terms of the APA by failing to reasonably exercise their contractually afforded discretion to determine the completion of Integration Milestones (i) and (ii). "When a contract confers discretion on one party, the implied covenant requires that the discretion be used reasonably and in good faith." *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146–47 (2009). Essentially, plaintiffs claim that PRA violated the implied covenant of good faith and fair dealing.

A plaintiff may rely on the implied covenant when there is a gap in the contract and a defendant behaves in an unexpected manner, "thereby frustrating the fruits of the bargain that the asserting party reasonably expected." *Nemec*, 991 A.2d at 1126. Stated another way, breach of the implied covenant is a claim available to a plaintiff who could not have contracted around a defendant's allegedly arbitrary or unreasonable behavior. *Id.* That is not the circumstance here.

The record presents evidence that during negotiations, PRA devised a list of functional deficiencies that were later incorporated into the APA as milestones. The record also presents evidence that the first milestone "was so loosely worded it can be argued either way" and that partial achievement of milestone two was "grey." Further, Parthasarathy acknowledged, in 2016 November via email, that milestones (i) and (ii) were partially done.

Following execution of the APA, it quickly became apparent that completing the milestones would be very difficult if not impossible. However, plaintiff Parthasarathy has "a right to enter into good and bad contracts, the law enforces both." *Nemec*, 991 A.2d at 1126. This Court will not utilize the nebulous covenant of good faith and fair dealing to "rewrite a contract" that a plaintiff "now believes to have been a bad deal." *Id.*

Parthasarathy, a sophisticated party and highly experienced software developer, could have anticipated the potential difficulties of these milestones. Parthasarathy could have declined to agree that the determination of milestone completion rested on the discretion of PRA. Defendants could have negotiated for these milestones to be performed on a sliding scale, or negotiated for the milestones to be revaluated at a certain point in time with a buyout/buyback if deemed unattainable. Plaintiffs could have declined to agree to incorporate into the APA the functional gaps[3] discussed during negotiations. Plaintiff Parthasarathy complains that defendants allocated inadequate resources towards completion of the milestones—Parthasarathy could have and should have anticipated the need for adequate resources and contracted for such allocations.

Plaintiffs have not presented evidence of a disputed issue of fact that PRA did not act reasonably and in good faith in determining that plaintiffs failed to meet milestones (i) and (ii). Simply put, the milestones required certain tasks to be completed. Because those tasks were not completed, defendants determined the milestones had not been met. The "implied [covenant of]good faith cannot be used to circumvent the parties' bargain." *MHS Capital LLC v. Goggin*, 2018 Del. Ch. LEXIS 151 at *30–31 (quoting *Dunlop v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005). Thus, plaintiffs have presented no evidence on which to base the existence of a triable issue of material fact sufficient to survive defendants' Motion for Summary Judgment.

Establishing the existence of a contractual gap is essential because the "implied covenant applies only if the contract is silent as to the subject at issue." *Id.* The "implied covenant of good faith and fair dealing involves inferring contractual terms to handle developments or contractual gaps that neither party anticipated." *Nationwide Emerging Managers, LLC v. NorthPointe Holdings, LLC*, 112 A.3d 878, 896 (Del. 2015) (cleaned up) quoting *Nemec*, 991 A.2d at 1125. "It does not apply when the contract addresses the conduct at issue." *Id.*

This contract is not silent on these contested actions. The APA expressly states that milestone (i) is triggered "upon completion of the integration of the parties' Salesforce environments set forth on Schedule 2.6(a)(i)." Schedule 2.6(a)(i) provides that integration "shall be deemed

3. The functional gaps discussed by the parties during negotiations are not to be confused with a contractual gap in the context of contractual construction, and as discussed in this opinion. In this opinion, for the sake of clarity, the functional gaps will be referred to as the functional deficiencies.

completed when, as reasonably determined by Purchaser, [CTMax] (A) sufficiently shares all core data with the PRA Salesforce Modules and (B) does not conflict with the functionality of the PRA Salesforce Modules." The APA then provides a non-exclusive list of what is included in the "PRA Salesforce Modules." Schedule 2.6(a)(ii) required that a list of specific "key product enhancements" be completed on a "substantially error-free basis, as reasonably determined by" PRA. The contract also states that milestone (ii) is triggered "upon completion of key product enhancements set forth in Schedule 2.6(a)(ii)." Schedule 2.6(a)(ii) provides the completion of key product enhancements "shall be deemed to have occurred when all of the following functions are available and operating on a substantially error-free basis, as reasonably determined by Purchaser, as part of [CTMax]." The APA is not silent on this issue; thus, there is no contractual gap to be filled by the implied covenant, making application of the implied covenant unnecessary and inappropriate here.

2. Breach of APA Section 2.6(b)

[5] The trial court granted defendants' Motion for Summary Judgment for plaintiffs' claim that defendants breached section 2.6(b) of the APA. We disagree with the trial court's decision and find that plaintiffs have met the threshold of presenting evidence to show a genuine issue of material fact does exist. *See Lowe v. Bradford*, 305 N.C. 366, 370 (1982).

Plaintiffs contend that defendants breached section 2.6(b) of the APA in two ways: (1) by conditioning all work on the third software Development Milestone on the completion of the first and second Development Milestones; and (2) by conditioning all External Sales on the completion of the three software Development Milestones.

Section 2.6(b) is titled "Independence of Contingent Payments," (the Independent Milestone Provision or IMP). The trial court and all parties agree that the IMP provides that PRA cannot make payment for achievement of any milestone conditioned on having completed a prior milestone. The trial court determined that the IMP *only* prohibits conditional payments. However, this interpretation ignores the independent nature of the IMP. Contrary to what the trial court held, the IMP also unambiguously provides that satisfaction of the criteria of one milestone is not contingent on satisfaction or completion of the criteria of any other milestone.

Defendants argue that the IMP's use of the word "payments" limits application of the IMP to only defendants' obligation of payments and does not address the manner in which PRA may condition all External

Sales on the completion of the three software Development Milestones. This argument is not persuasive.

Under Delaware law, "contracts are to be interpreted 'as a whole,' " and this Court should "give each provision and term effect, so as not to render any part of the contract mere surplusage," and "not read a contract to render a provision or term meaningless or illusory." *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d at 56–57 (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)).

Following defendants' logic, 2.6(b) "independence" is limited to only how and when payments are to be made—that defendants are not bound to pay for milestone (i) simply because milestone (ii) is completed. Conversely, defendants are bound to pay for milestone (ii) upon completion even if milestone (i) is not complete. But this reading would render the IMP in 2.6(b) duplicative of 2.6(a), rendering it meaningless, contrary to principles of contract construction. *See id.* at 56–57.

Put another way, defendants' interpretation is that 2.6(a) does not state how a milestone payment is earned, because it leaves room for prerequisites not contemplated by 2.6(a). Defendants would have it that, but for 2.6(b), plaintiffs could complete milestone (ii) and still not be owed payment if they have not completed milestone (i). While Defendants argue that 2.6(b) means PRA cannot withhold *payment* for completion of a milestone based on incompletion of another, PRA may still *condition*—in an undefined and unspecified manner—pursuit of a milestone until completion of another. This unreasonable interpretation is such "that no reasonable person would have accepted when entering the contract," thus producing an absurd result. *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1208 (2021) (quoting *Osborn*, 991 A.2d at 1160).

Additionally, the IMP even goes so far as to give an example of how the IMP should apply, "[f]or the avoidance of any doubt:"

> [I]f the conditions precedent to the payment of the First Milestone Payment for the First Milestone Period are not satisfied, but the conditions precedent to the payment of the Second Milestone Payment for the Second Milestone Period are satisfied, then Purchaser would be obligated to pay such Second Milestone Payment for the Second Milestone Period for which the corresponding conditions precedent have been satisfied, and not the First Milestone Payment for the First Milestone Period.

The negotiating parties knew how to illustrate their intentions. Thus, if they intended that completion of certain milestones be required before others could be pursued, the parties could have also illustrated that "for the avoidance of any doubt." The example provided in the APA evidences that the parties contemplated and intended that a subsequently listed milestone is contingent only on its respective requirements and the milestones have concurrently running deadlines for completion.

Plaintiffs have presented evidence tending to support their assertion that defendants did condition certain milestones on the completion of others, in breach of the express terms of the contract. When viewing these facts in a light most favorable to plaintiffs, and thus presenting a triable issue of material fact, summary judgment was not appropriate here. *See Lowe*, 305 N.C. at 370.

Specifically, Irene testified that completion of the first two milestones was made a dependency to the third milestone. Additionally, Irene testified that PRA's "primary purpose [in acquiring the software] was to use the system for PRA and then, also to commercialize it *in that order*." (Emphasis added.) When viewed in the light most favorable to plaintiffs, this is evidence of PRA acting in violation of the express terms of the contract and summary judgment is not appropriate.

Defendants argue further that this claim is barred by the three-year statute of limitations. N.C.G.S. § 1-52(1); 10 Del. C. 8106. To preserve an issue for appeal, N.C. R. App. P. 10(a)(1) requires a party to have "presented to the trial court a timely request, objection, or motion . . . and to obtain a ruling upon the party's request, objection, or motion." While defendants did plead that some or all of plaintiffs' claims are time barred, this argument was not presented to the trial court and no ruling was obtained. Therefore, we decline to reach the issue of whether any claim is time barred by the statute of limitations, because this issue is not before this Court.

3. Breach of Contract Associated with the External Sales Provisions

[6] The trial court granted defendants' Motion for Summary Judgment as related to plaintiffs' claim that defendants breached the express and implied terms of the APA External Sales provisions. We disagree with the trial court's grant of summary judgment for defendants on this claim and remand the issue for further proceedings.

The trial court misconstrued the definition of the unambiguous contract term "External Sale." The APA defines "External Sale" as "the sale of

one or more licenses . . . to a third party which is not (i) an Affiliate of Purchaser or (ii) using such license(s) in connection with providing services to Purchaser and/or any of its Affiliates." The trial court correctly hones in on the key language of the APA: "the sale of one or more licenses to the Solutions by [PRA] . . . to a third party." However, the trial court ultimately makes a misstep in the analysis by giving credence to defendants' argument that there has been no "External Sale" without a specific fee or payment attributable solely or separately to the license.

The plain meaning of "sale" is: "the transfer of property . . . for a price." *Sale*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007). In the context of the Takeda Master Services Agreement (MSA), Section 7.02(b) of the MSA refers to the transfer as "License to [PRA] Owned Technology." As the trial court found, " 'License' is a familiar term when used in connection with software, typically meaning a limited right to access and use a software product owned by another entity."

The Takeda MSA closely mirrors the APA definition of "External Sale." As part of a bundle including the use of the software and providing services to Takeda, and in exchange for a price of approximately $491 million over a term of years, PRA transferred a license to Takeda; Takeda is neither an affiliate of PRA nor providing a service to PRA.

Defendants appear to be arguing that they have excluded the transaction with Takeda from the APA definition of "External Sale" by simply bundling the transfer of the license as part of a service package and by not including an invoice line item of the license. This interpretation is unreasonable and produces an absurd result. *Manti Holdings, LLC*, 261 A.3d at 1208.

Moreover, defendants could have contracted around the issue of a line-item requirement if such a carve out was truly an intended part of the bargain. In the APA, defendants excluded from the realm of "External Sale" "(i) an Affiliate of Purchaser or (ii) using such licenses in connection with providing services *to Purchaser* and/or any of its Affiliates." (Emphasis added.) The parties could have included a third carve out: "(iii) license bundled within a software as a service agreement in connection with PRA providing services *to a third-party*." *See Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 816 (Del. 2013) (quoting *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1260 (Del. 2004). Defendants did not do so. Furthermore, defendants' own expert witness, Bryan Haas, testified that "software as a service is not always a license. Sometimes it's just that you have access to use [it]." It seems that a license did not necessarily have to be issued to provide this

service to Takeda. Nevertheless, PRA issued a license to Takeda and called it a license in the MSA.

To be sure, this Court is not suggesting that if PRA were to simply refuse to use the term "license" for a transfer of software that it would be excluded from the definition of "External Sale." Instead, what this Court is saying is that, here, in this circumstance, the Takeda MSA specifically included, for a price, the transfer of a license to use the "PRA[ ] Owned Technology." What is unknown is whether the Takeda MSA was drafted such that Takeda was required to pay consideration to acquire and use a license of the Solutions. Therefore, defendants' failure to pay for the transfer of the license to Takeda under the MSA, as required by the APA, may be a breach of contract.

We hold that the Takeda contract could be an "External Sale." This Court remands this issue to the trial court to determine whether the Takeda MSA was drafted such that Takeda was required to pay consideration to acquire and use a license of the Solutions. Because we hold that "External Sale" is an unambiguous contract term and that defendants could have contracted around the issue of a line item requirement, if such was truly intended in the bargain, we further hold that the application of the covenant of good faith and fair dealing does not apply to this case. *Id.* On remand the trial court may find there is a need for additional discovery to determine if there are other external contracts that include transfer of licenses to the Solutions, either in effect, or that were specifically termed as such and which required consideration in exchange for the Solutions.

When viewed in the light most favorable to plaintiffs, the Takeda MSA could meet the definition of an "External Sale." This possibility constitutes more than substantial evidence that PRA breached the APA by engaging in external sales, thereby creating a genuine issue of material fact. Thus, this Court overturns the trial court's decision to grant summary judgment on defendants' breach of contract term as related to the External Sales provisions.

C. Alleged Misrepresentations PRA Made in the Letter of Intent

[7] The trial court granted summary judgment in favor of defendants on plaintiffs' claims of intentional misrepresentation and fraudulent inducement based on representations contained in the LOI. We agree with the trial court's order and affirm summary judgment.

There must be evidence of a misrepresentation of existing "or ascertainable facts, as distinguished from a matter of opinion or representation

relating to future prospects." *Ragsdale v. Kennedy*, 286 N.C. 130, 139 (1974) (citing *Berwer v. Union Cent. Life Ins. Co.*, 214 N.C. 554 (1938)). "[U]nfulfilled promises cannot be made the basis for an action of fraud." *Williams v. Williams*, 220 N.C. 806, 810 (1942).

In support of their argument that misrepresentations were made in the LOI, plaintiffs point to evidence occurring *after* the LOI was signed. For example, plaintiffs raise PRA's internal discussions at a board meeting during which plaintiffs claim that PRA disclosed its alleged plan not to sell the Solutions and its intent to block competitors from acquiring the Solutions. This meeting occurred in December 2014. Yet, the LOI was executed on 15 October 2014. Plaintiffs also point to the "ability to earn" language contained in the LOI, upon which plaintiffs claim to have relied. The trial court, quoting *Ragsdale*, found that this language "is, by its very nature, a statement of future intent or a 'representation relating to future prospects.' " 286 N.C. at 139. Notably, the "ability to earn" language is not present in the APA.

The LOI expressly provided that it was a nonbinding document and contemplated a more complete future agreement. *See Ragsdale*, 286 N.C. at 139 (an action for fraud cannot be predicated on future conduct); *see also Triad Packaging, Inc. v. SupplyOne, Inc.*, 597 F. App'x 734, 739–40 (4th Cir. 2015) (applying North Carolina law to find that a party's statements regarding the sale price and closing date in a nonbinding letter of intent were "classic projections, exemplified by the letter's nonbinding nature . . . [and] cannot, therefore, form the basis of a fraud claim"). Further, an intentional misrepresentation must be "definite and specific." *Ragsdale*, 286 N.C. at 139. On this basis, the trial court determined that "[t]he LOI contains fulsome disclaimers making it clear that its contents should not be relied upon by any party to the transaction, and that any reliance on its terms are solely at the relying party's risk." We agree.

As aptly noted by the trial court, plaintiffs have cited no authority from North Carolina or other jurisdictions in which a court has recognized a claim arising out of representations contained in a letter of intent. This is not the case in which this Court should recognize such a claim.

We hold that this LOI cannot form the basis of a fraud claim. Accordingly, we hold that the trial court was correct in granting summary judgment in favor of defendants for plaintiffs' claims of intentional misrepresentation and fraudulent inducement based on representations contained in the LOI.

D. Alleged Misrepresentations PRA Made about Amending the APA

[8] The trial court granted summary judgment in favor of defendants on plaintiffs' claims of intentional misrepresentation and fraudulent inducement based on statements made by Shannon and Jones-Hertzog regarding possible amendments to the APA. We affirm the trial court's order on this issue.

Plaintiffs claim that PRA's alleged post-APA representations stating that it would amend the APA milestones were fraudulent and that PRA never intended to amend the APA milestones. However, the trial court found that evidence in the record supports the notion that PRA was attempting to amend and engaged in negotiations with plaintiff Parthasarathy regarding a potential amendment of the APA milestones.

Specifically, in December 2016, Shannon asked Jones-Hertzog to work with Munn on amending the milestones. Additionally, Jones-Hertzog reached out to Irene for input on an amendment. Irene also met in person with plaintiff Parthasarathy and discussed amendment. On 15 December 2016, potential amendments were shared internally at PRA. Evidence in the record establishes that in January 2017 an amendment framework was again shared internally at PRA. The record reveals that in May 2017, Jones-Hertzog told plaintiff Parthasarathy that she was awaiting approval of a proposed amendment.

Failure to reach an agreement on the amendment of the milestones does not support a finding that PRA knew it was false at the time it represented that PRA would work towards an amendment. *See Williams*, 220 N.C. at 810 ("It is generally held . . . that mere unfulfilled promises cannot be made the basis for an action of fraud.").

Plaintiffs have not presented evidence of a genuine issue of material fact as to whether defendants' statements regarding amendment were false at the time the statements were made. Thus, the trial court was correct in granting summary judgment in favor of defendants on this issue.

E. Unfair and Deceptive Trade Practice Act

[9] This Court affirms the trial court's order grant of summary judgment in favor of the defendants regarding plaintiffs' claim under the Unfair and Deceptive Trade Practice Act (UDTPA). "Whether an act found to have occurred is an unfair or deceptive practice which violates N.C.G.S. § 75-1.1 is a question of law for the court." *Nobel v. Foxmoor Grp., LLC*, 380 N.C. 116, 119 (2022).

Establishing a prima facie claim for unfair and deceptive trade practices requires a plaintiff to show: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *SciGrip, Inc. v. Osae*, 373 N.C. 409, 426 (2020) (quoting *Dalton v. Camp*, 353 N.C. 647, 656 (2001)). "[U]nfairness or 'deception either in the formation of [a] contract or in the circumstances of its breach' may establish the existence of substantial aggravating circumstances sufficient to support an unfair and deceptive trade practices claim." *Id.* (quoting *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989)). Notably, most employer-employee disputes fall outside the purview of the UDTPA. *Dalton*, 353 N.C. at 657.

Plaintiffs allege that defendants violated the UDTPA by negotiating the PRA under false pretenses, interfering with the APA milestones, and terminating plaintiff Parthasarathy's employment. Plaintiffs' UDTPA claim is an attempted second bite at the apple and, as the trial court stated, is a repackaging of the breach of contract and fraud claims. Setting aside the termination of Parthasarathy, this claim amounts to an allegation that PRA did not perform under the terms of the contract. This allegation does not support a finding of the required "substantial aggravating circumstances" attending the breach. *See SciGrip, Inc.*, 373 N.C. at 427 ("[A]n intentional breach of contract, standing alone, simply does not suffice to support the assertion of an unfair and deceptive trade practices claim.").

Moreover, plaintiffs have not presented any evidence that identifies a genuine issue of material fact to survive summary judgment on their UDTPA claim. Specifically, plaintiffs argue that an internal presentation to PRA's board shows that PRA did not intend to sell the software externally. However, the record reveals that at the internal presentation defendants considered VHS's software as "[r]evenue generating technology," and mirrored the milestone framework of the APA.

Plaintiffs allege that PRA acted fraudulently during negotiations by feigning interest in selling the software only to decline to pursue those sales until after the software was fully enhanced. However, aside from plaintiff Parthasarathy's own words, there is nothing in the record to support this assertion. Rather, the record contradicts this assertion. Specifically, the testimony of Chuck Piccirillo, PRA's Senior Vice President of IT, recounts internal discussions within PRA about "getting into software selling." Piccirillo also recounts a conversation between PRA staff and plaintiff Parthasarathy during which it was explained that functional deficiencies in the software would need to be addressed

prior to selling. The record also contained Shannon's deposition testimony that the negotiations made clear that the software could not be sold until modifications were made. Plaintiff Parthasarathy's testimony standing alone is not substantial evidence of a material fact to survive summary judgment. *See Lowe*, 305 N.C. at 369 ("An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense.").

The record does not support plaintiffs' assertion that PRA's promises to amend the APA were false, see sections I. E. and IV. D, *supra*. Thus, even after reviewing these claims in the light most favorable to the plaintiffs, we find no genuine issue of material fact exists for plaintiffs' allegations that PRA never intended to sell the software.

Lastly, plaintiffs assert that Parthasarathy's termination was unfair—specifically that PRA terminated Parthasarathy in an inequitable assertion of power. However, unless PRA's conduct is "egregious enough" to "overcome the longstanding presumption against unfair and deceptive practices claims as between employers and employees," plaintiff will not prevail. *Dalton*, 353 N.C. at 658.

What the record shows is that the employment agreement at issue states that Parthasarathy will have the "status and responsibilities as determined from time to time" by PRA's "CEO or the CEO's designee." In North Carolina, an at-will employment State, "in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." *Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 331 (1997). Subject to a few limited exceptions not relevant here, an at-will employee may be terminated "for no reason, or for an arbitrary or irrational reason." *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175 (1989) (quoting *Sides v. Duke Univ.*, 74 N.C. App. 331, 342 (1985)). Thus, a high threshold must be overcome to surpass the at-will employment presumption. *See Kurtzman*, 347 N.C. at 331. Here, that threshold has not been surpassed. Accordingly, the trial court was correct in granting summary judgment in favor of defendants for plaintiffs' UDTPA claim.

V. Second Motion to Amend the Complaint

A. Standard of Review

"A motion to amend is addressed to the [sound] discretion of the trial court. Its decision will not be disturbed on appeal absent a showing

of abuse of discretion." *Isenhour v. Universal Underwriters Ins. Co.*, 345 N.C. 151, 154 (1996) (alteration in original) (quoting *Henry v. Deen*, 310 N.C. 75, 82 (1984)). An abuse of discretion occurs when the trial court's decision is "manifestly unsupported by reason" or is "so arbitrary that it could not have been the result of a reasoned decision." *Piazza v. Kirkbride*, 372 N.C. 137, 144 (2019) (quoting *White v. White*, 312 N.C. 770, 777 (1985)).

B. Motion for Leave to File an Amended Complaint

[10] The trial court denied plaintiffs' motion for leave to file a Second Amended Complaint on the basis of undue delay and material prejudice to the defendants. We hold that the trial court did not abuse its discretion and affirm the trial court's order denying plaintiffs' motion for leave to amend.

Once an answer has been served, a plaintiff may only amend their pleading by leave of court or written consent of the adverse party. N.C.G.S. § 1A-1, Rule 15(a) (2021). Leave to amend lies within the trial court's discretion, though should be freely given "when justice so requires." *Id.* "Among proper reasons for denying a motion to amend are undue delay . . . and unfair prejudice to the nonmoving party." *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 603 (2018).

Plaintiffs argue that the trial court's denial was not based in law, thus, an abuse of discretion. Plaintiffs further contend that the trial court's ruling is contrary to the notion that "leave [to amend] shall be freely given when justice so requires." N.C.G.S. § 1A-1, Rule 15(a). This argument is not persuasive. Review of the trial court's order demonstrates plentiful justification for denying plaintiffs' motion to amend. Specifically, the trial court noted that plaintiffs had previously amended their complaint and that the amendment contained extensive revisions. The trial court further noted that discovery had closed, with thousands of documents having been exchanged. The parties had fully briefed the motion to dismiss plaintiffs' Amended Complaint. The trial court then concluded that leave to amend would cause material prejudice to defendants and undue delay. Considering the reasoning provided by the trial court, we hold that the trial court did not abuse its discretion in denying plaintiffs' motion for leave to file a Second Amended Complaint.

VI. Discovery Motion Under Business Court Rule 10.9

A. Standard of Review

A trial court's discovery ruling is subject to an abuse of discretion standard and "will be overturned 'only upon a showing that its ruling

was manifestly unsupported by reason and could not have been the result of a reasoned decision.' " *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 241 (2017) (quoting *In re Foreclosure of Lucks*, 369 N.C. 222, 228 (2016)).

B. Business Court Rule 10.9

[11] We hold that the trial court's denial of plaintiffs' discovery request was not an abuse of discretion. Accordingly, we affirm the trial court's denial of plaintiffs' Third Discovery Request.

Business Court Rule 10.9 "applies to motions under Rules 26 through 37 and Rule 45 of the Rules of Civil Procedure." BCR 10.9(a). The trial court acted within the scope of Rule 10.9 in denying plaintiffs' request. Rule 26 states: "[t]he frequency or extent of use of discovery methods . . . *shall be limited by the court if it determines that:*

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) *the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice . . . .*

N.C.G.S. § 1A-1, Rule 26(b)(1a) (2021) (emphasis added).

Rule 26 requires the need for information by one party be balanced against the "likelihood of an undue burden imposed upon the other." *Willis v. Duke Power Co.*, 291 N.C. 19, 34 (1976). Additionally, North Carolina trial courts are vested with broad authority to manage cases in their dockets, including discovery issues. *See, e.g.*, *Beard v. N.C. State Bar*, 320 N.C. 126, 129 (1987) (explaining that trial courts retain inherent authority "to do all things that are reasonably necessary for the proper administration of justice"). Rule 26 grants the trial court, even acting on its own initiative, broad discretion to limit the frequency and extent of discovery. N.C.G.S. § 1A-1, Rule 26(b)(1a).

On 25 November 2019, plaintiffs renewed their previously submitted Rule 10.9 request (the Third Discovery Request), to which defendants objected as irrelevant, unduly burdensome, and time consuming.

Specifically, defendants argued that such an order would require defendants to review hundreds of customer agreements and alert customers before producing the contents of any agreements. Defendants also expressed concern that the customers whose contracts may be within the scope of production could, before release, object to disclosure of their contract information. Additionally, defendants contended that plaintiffs' discovery request would include "*all* financial information for *every* PRA customer agreement which includes as part of its terms a general license to access PRA's technology."

In response, plaintiffs argued that the previously produced contract with Takeda constitutes an "External Sale" under the APA. As such, plaintiffs needed to determine what similar contracts existed and which similar contracts would result in "additional External Sales underlying damages." To that end, plaintiffs requested production of all documents showing "sales, revenue, and profit[s]" arising from any of the contracts and agreements it sought. Plaintiffs also sought production of "all contracts or agreements of any kind" between PRA and its customers in which PRA has granted the customer "a license in, access to, or use of in any manner whatsoever, [of] any version of [the Solutions], whether express or implied, direct or indirect, alone, or in combination with any other software, products, or services," or in which PRA has agreed to provide products or services to its customers "using any version of [the Solutions] . . . whether express or implied, direct or indirect, alone, or in combination with any other software, products, or services."

As a pre-filing requirement to a discovery motion, Rule 10.9 mandates that the parties "engage in a thorough, good-faith attempt to resolve or narrow the dispute. If the dispute remains unresolved, then the party seeking relief must e-mail a summary of the dispute" to the trial court. BCR 10.9(b)(1). As required by Rule 10.9(b)(1) and Rule 10.9(b)(2), on 5 September 2019, plaintiffs emailed Plaintiffs' Rule 10.9 Summary of Discovery Dispute, along with Certificate of Compliance with BCR Rule 7.8. On 24 September 2019, the trial court advised the parties, by email, that "the dispute underlying the 10.9 [request was] not sufficiently ripe for the [c]ourt to provide reasonable guidance." Plaintiffs later advised the trial court by email, on 25 November 2019, that "the parties have conferred a few additional times but continue to be at an impasse on the same set of issues and could use the [c]ourt's guidance to help resolve them."

Pursuant to Rule 10.9, the trial court "schedule[d] a telephone conference with counsel to discuss the dispute." BCR 10.9(b)(3). The telephone conference was held on 9 December 2019. Rule 10.9 provides that the court may "order the parties to file a motion and brief regarding the

dispute . . . or issue an order that decides the issues raised or that provides the parties with further instructions." *Id.* Consistent with the Rule, "the [c]ourt . . . decide[d] the parties' dispute during the conference" by denying the Third Discovery Request. *Id.*

Plaintiffs now argue that the trial court abused its discretion by converting an informal and required email request into a motion to compel. Specifically, plaintiffs argue that the trial court converted the 25 November 2019 email into a motion to compel. We do not agree. Nothing in the record indicates that the trial court made such a conversion. Rather, in the Background Section of the Order, the trial court stated, "During the conference, the Court advised counsel that due to the late stage of discovery in this case and its concern that requiring PRA to produce the requested documents would be unduly burdensome and could unnecessarily cause a lengthy delay in resolving this case, the Court was *inclined to deny a motion to compel* PRA to respond to the Third Request." (Emphasis added.)

The Order in no way characterized the plaintiffs' email as a motion to compel. Instead, after "propos[ing] that the parties move for summary judgment on the issue of whether . . . the Takeda Agreement constituted an External Sale under the APA," the trial court indicated that it would compel production if the plaintiff prevailed on that issue. At best, this language contemplates a potential future motion to compel that may be filed. Moreover, the trial court denied the Rule 10.9 request "*without prejudice* to the [c]ourt issuing a later order, following disposition of summary judgment motions, compelling PRA to produce the documents and information sought in the Third Request." (Emphasis added.) In supporting its denial, the trial court reasoned that the request was unduly burdensome at this late stage of discovery and would unnecessarily cause delay in resolving this case, without first determining the issue regarding External Sales under the APA.

We hold that the trial court complied with both Business Court Rule 10.9 and Rule 26 of the Rules of Civil Procedure and that the denial of the Rule 10.9 discovery request was not an abuse of discretion. However, given this Court's holding that the Takeda contract does constitute an "External Sale" under the APA, what further discovery that may be appropriate, if any, is an open question for the trial court to address upon remand.

VII. Conclusion

We affirm in part and reverse in part the trial court's order in this case. We affirm the trial court's order for all issues except for the order granting defendants' motion for summary judgment on the issues of

breach of the APA section 2.6(b) and the External Sales provisions. Further, we hold that the trial court did not abuse its discretion by denying plaintiffs' discovery motion under Rule 10.9. Given that this Court hereby overturns the trial court's order for summary judgment on the breach of the APA regarding the External Sales provisions, determining that the Takeda MSA may be an "External Sale," the issue of further discovery should be reconsidered by the trial court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Justice EARLS concurring in part and dissenting in part.

While I agree with the majority on many of the issues presented in this case, I disagree on three issues. First, I concur with the majority holding that plaintiffs' complaint is insufficient to plead the claim of negligent misrepresentation under the North Carolina Rules of Civil Procedure. However, I disagree that Rule 9(b) is the proper standard for this inquiry. *See* N.C.G.S. § 1A-1, Rule 9(b) (2021). Instead, in my view the clear language of the rules means that negligent misrepresentation claims are only subject to the pleading standard of Rule 8. *See* N.C.G.S. § 1A-1, Rule 8 (2021). Second, regarding the defendants' Motion for Summary Judgment as it relates to the plaintiffs' breach of contract claim under sections 2.6(a)(i) and (ii) of the Asset Purchase Agreement (APA), I would hold that under Delaware law the implied covenant of good faith and fair dealing applies to this case and thus summary judgment for defendants on this claim is not warranted.

Third, I would hold that under Delaware law the implied covenant of good faith and fair dealing applies to Pharmaceutical Research Associates, Inc.'s (PRA) post-closing conduct and that summary judgment for defendants is not appropriate as to whether PRA breached the implied terms of the APA's External Sales provision, as a reasonable jury could find that: (1) PRA sequenced the milestones such that work could not begin on the second and third milestones until work on the first milestone was completed; (2) PRA sequenced the External Sales Milestone by not allowing work to begin on External Sales until after work on the first three Development Milestones was completed; (3) when PRA unmanaged the software package it diverted resources away from the APA milestones and eliminated the possibility of licensing the software on the AppExchange[1] and thwarted Parthasarathy's efforts to meet the

1. Salesforce's AppExchange is the online platform where VHS had planned to license or sell its software to customers.

External Sales provision; and (4) PRA's interference with the Vertex deal was intentional.

I. Motion to Dismiss

On review, the dismissal of a claim under Rule 12(b)(6) is subject to de novo review. *Bridges v. Parrish*, 366 N.C. 539, 541 (2013). A dismissal is warranted when "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Krawiec v. Manly*, 370 N.C. 602, 606 (2018) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002)). In evaluating the party's complaint, this Court must "take the allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor." *See New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 106–07 (2022).

A. Negligent Misrepresentation

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206 (1988). "[T]o establish justifiable reliance a plaintiff must sufficiently allege that he made a reasonable inquiry into the misrepresentation and allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 454 (2015) (cleaned up).

While the trial court applied the heightened Rule 9(b) pleading standard, negligent misrepresentation is properly pled under Rule 8's notice pleading standard. *See* N.C.G.S. § 1A-1, Rule 8; *see also Raritan River Steel Co.*, 322 N.C. at 207–08. Under Rule 8, a complaint must contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C.G.S. § 1A-1, Rule 8(a). The majority asserts that a claim for negligent misrepresentation is similar to a claim for fraud and accordingly, the two require the same pleading standard under North Carolina Rule of Civil Procedure 9(b). However, Rule 9(b) does not apply to negligent misrepresentation, and the language of the rule specifically states that "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." N.C.G.S. § 1A-1, 9(b). Thus, while Rule 9(b) clearly

applies to a claim of fraud, it does not apply to claims for negligent misrepresentation. *Id.*

Value Health Solutions, Inc. (VHS) and Neil Parthasarathy (together "VHS") assert that the amended complaint adequately pleads a claim for negligent misrepresentation. VHS argues that the gap analysis PRA conducted of the software allowed it to learn about the software's capabilities as well as identify any functions or features PRA may have wanted to develop further after acquiring it. According to VHS, the results of this analysis became the basis for the Letter of Intent (LOI) and APA. VHS alleges that despite PRA knowing the software would need to be developed further, this information was not shared with VHS. Thus, VHS alleges that PRA "failed to exercise care and competence in obtaining and communicating . . . to Mr. Parthasarathy and VHS regarding the timeline and development [of PRA's internal software platform] and the impact it would have on PRA's business and the timely completion of the milestones." VHS also contends that the information PRA did provide was "false or inaccurate" because "PRA knew or should have known that" its internal software development plans "would interfere and prevent the completion of the software and sales milestones." VHS notes that in the end, the technical requirements contained in each milestone "were a moving target" with many of them being "waived and abandoned" or "not required" in favor of other requirements. According to VHS, had it known that PRA would alter the milestones and condition them on one another it would have never entered into the APA with PRA. Lastly, VHS argues that its reliance on PRA was justified because PRA had " 'full' and 'unfettered' access to VHS's software, overall control of the due diligence process, and [the] opportunity to conduct any testing or analysis it desired."

While many of these allegations might support VHS's breach of contract claims, they do not allege that PRA made misstatements or misrepresentations about the technical requirements needed to integrate the software into PRA's internal platform. Moreover, the test for determining whether reliance was justifiable is whether the plaintiff "sufficiently allege[d] that he made a reasonable inquiry into the misrepresentation and allege[d] that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Arnesen*, 368 N.C. at 454 (cleaned up). VHS does not argue that it made a reasonable inquiry into PRA's alleged misstatements, nor does it argue that it was denied the opportunity to investigate or that even if it had investigated, it could not have learned the true facts. *See id.*

Furthermore, to make a claim for negligent misrepresentation a party must allege that a duty of care existed. *Raritan River Steel Co.*, 322 N.C. at 206. VHS cannot meet this standard because the alleged negligent misrepresentation occurred as the result of an arm's-length transaction. An "[a]rm's-length transaction[ ] encompass[es] dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship." *Head v. Gould Killian CPA Grp., P.A.*, 371 N.C. 2, 9 (2018) (cleaned up). In contrast, a fiduciary relationship is "characterized by 'a heightened level of trust and the duty of the fiduciary to act in the best interests of the other party.' " *Id.* at 10 (quoting *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014)). Because the transaction between VHS and PRA was an arm's-length transaction and not one where a fiduciary relationship existed, VHS cannot show, and has not alleged, that PRA violated a duty necessary to plead negligent misrepresentation. VHS has not made a sufficient claim for negligent misrepresentation under North Carolina Rule of Civil Procedure 8, and the trial court was correct to dismiss this claim.

Accordingly, I concur with the majority in the result on this issue, namely that the plaintiffs' complaint was insufficient to plead negligent misrepresentation. However, I would hold that negligent misrepresentation is properly pled under North Carolina Rule of Civil Procedure 8 and not Rule 9(b).

II. Summary Judgment Claims Related to Triable Issues of Material Fact

A. Standard of Review

"This Court reviews decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review." *Cummings v. Carroll*, 379 N.C. 347, 358 (2021). To evaluate "the appropriateness of a trial court's decision to grant or deny a summary judgment motion in a particular case, 'we view the pleadings and all other evidence in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor.' " *Id.* (quoting *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182 (2011)).

"The purpose of [summary judgment] is to eliminate formal trials where only questions of law are involved." *Lowe v. Bradford*, 305 N.C. 366, 369 (1982) (citing *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523 (1971)). The summary judgment procedure, "allows the trial court to pierce the pleadings to determine whether any genuine factual controversy exists." *Id.* (cleaned up). Accordingly, Rule 56(c) of the North

Carolina Rules of Civil Procedure states that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Id.* (quoting N.C.G.S. § 1A-1, Rule 56(c)). "An issue is genuine if it can be proven by substantial evidence and a fact is material if it would constitute or irrevocably establish any material element of a claim or a defense." *Id.* (cleaned up).

To prevail on summary judgment, the moving party must meet "the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Id.* (first citing *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467 (1979); then citing *Zimmerman v. Hogg & Allen*, 286 N.C. 24 (1974)). "If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." *Id.* (citing *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200 (1980)). Importantly, "[t]he opposing party need not convince the court that he would prevail on a triable issue of material fact but only that the issue exists." *Id.* at 370. Issues that are "legitimately called into question" must be preserved for resolution by a jury, and "it is not the function of this Court, or the trial court . . . , to weigh conflicting evidence of record." *Howerton*, 358 N.C. at 471.

B. Breach of the APA

Under Delaware law, courts interpret contracts as a whole, "will give each provision and term effect, so as not to render any part of the contract mere surplusage," and will not "read a contract to render a provision or term meaningless or illusory." *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 56 (Del. 2019) (cleaned up). "[The] central aim . . . of contract law is to protect and fulfill the reasonable expectations of the parties in forming a contract." Mohsen Manesh, *Express Contract Terms and the Implied Contractual Covenant of Delaware Law*, 38 Del. J. Corp. L. 1, 7 (2013). While "parties [typically] articulate their intent in the express terms of an agreement," courts recognize that "[n]o matter how skilled, sophisticated, or resourceful[ ] [the] parties [are, they] will be unable to anticipate and address every possible situation that may develop after the contract is formed." *Id.* Accordingly, "[m]odern contract law . . . recognize[s] an implied covenant to the effect that each party to a contract will act with good faith towards the other with respect to the subject matter of the contract." *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986).

This covenant is breached when it is "clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter." *Id.*

At the same time, the covenant of good faith and fair dealing "is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, . . . later adversely affected one party to a contract. Rather the covenant is a limited and extraordinary legal remedy." *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010). The covenant should not be applied "to give plaintiffs contractual protections that they failed to secure for themselves at the bargaining table." *Winshall v. Viacom Int'l, Inc.*, 55 A.3d 629, 636–37 (Del. Ch. 2011) (cleaned up). Accordingly, a court should not use the implied covenant to "rewrite a contract" that a party "now believes to have been a bad deal." *Nemec*, 991 A.2d at 1126. Delaware courts have cautioned that the implied covenant is applied "rarely, and only in narrow circumstances." *NAMA Holdings, LLC v. Related WMC LLC*, No. 7934-VCL, 2014 WL 6436647, at *17 (Del. Ch. Nov. 17, 2014) (unpublished) (quoting *Allied Cap. Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1032 (Del. Ch. 2006)).

The implied covenant of good faith and fair dealing "inheres in every contract," *Chamison v. HealthTrust, Inc.-Hosp. Co.*, 735 A.2d 912, 920 (Del. Ch. 1999), and is "best understood as a way of implying terms in the agreement, whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions[,]" *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (cleaned up). Moreover, if the terms of the contract provide a party with discretion in determining whether a condition is met, the implied covenant requires that the party use good faith in making that determination. *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1055 (Del. Ch. 1984), *aff'd*, 575 A.2d 1131 (Del. 1990). The term "good faith" "exclude[s] a wide range of heterogenous forms of bad faith" and stated most simply, requires "a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Dunlap*, 878 A.2d at 441–42 (cleaned up). Indeed, "[a] party may breach the implied covenant of good faith and fair dealing without violating an express term of the contract." *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1016 (Del. Ch. 2004) (citing *Chamison*, 735 A.2d at 920).

1. Breach of APA sections 2.6(a)(i) and (ii)

In this case, sections 2.6(a)(i) and (ii) of the APA required PRA to "reasonably determine" completion of the first and second software development earnout milestones. The use of the phrase "reasonably determine" grants PRA discretion, and this discretion must be exercised in good faith. *See Gilbert*, 490 A.2d at 1055. However, VHS contends that instead of exercising this discretion in good faith, PRA's determination regarding completion of the first and second development milestones was "unreasonable, arbitrary, and made in bad faith." Accordingly, VHS asserts that there is substantial evidence in the record showing that PRA violated the implied covenant of good faith and fair dealing.

More specifically, VHS argues that the APA development milestones "were in a constant state of flux." Indeed, VHS claims that the required functional updates were a moving target and that PRA never reasonably evaluated completion of those milestones. The evidence VHS presented shows that during the negotiation period, Mike Irene (PRA's Executive Director of IT) compiled a list of "functional gaps" to assess whether VHS's software was worth pursuing. This assessment was incorporated into the APA as milestones that needed to be met to trigger additional payments from PRA to VHS. However, in the case of the first milestone, which was the integration of Salesforce modules, PRA made changes to the agreed upon list of required modules. Specifically, PRA determined that some of the modules included in the APA no longer "made sense" and decided not to integrate them. After making this determination, PRA not only removed those modules from the list but also mandated the integration of additional modules which were not included in the APA.

In regard to the second milestone, which was the completion of key product enhancements, PRA determined that certain functional requirements "did not make the cut" or "were no[ ] [longer] required." Furthermore, the evidence presented supports that other functional requirements under the second milestone were changed based on incorrect information that PRA had about its existing Siebel System.

Determining whether PRA breached sections 2.6(a)(i) and (ii) of the APA requires this Court to look beyond whether the first and second milestones were completed. Instead, this Court must determine which party is responsible for these milestones not being met. Under the APA, PRA had an express and implied obligation to make a reasonable determination about the completion of the first two software development milestones and to exercise this discretion in good faith. However, changing the requirements necessary to meet the first two milestones

does not meet the definition of what it means to "reasonably determine" in good faith. Instead, it shows changes that were not originally agreed on by both parties in the APA. Based on the evidence presented above and viewed in the light most favorable to VHS, *see Cummings*, 379 N.C. at 358, summary judgment is not appropriate. Moreover, it is not this Court's role to weigh the evidence, *Howerton*, 358 N.C. at 471, and VHS is not required to "convince [this Court] that [it] would prevail on an issue of material fact[,]" but instead all that is required is for VHS to show that an issue of material fact exists, *Lowe*, 305 N.C. at 370. VHS has met this threshold. Accordingly, I would hold that the covenant of good faith and fair dealing applies to this case, and the trial court erred in granting defendants' Motion for Summary Judgment.

2. Breach of Contract Associated with the External Sales Provision

I agree with the majority that the trial court erred in granting summary judgment in favor of the defendants as it relates to plaintiffs' claim that PRA breached the External Sales provision of the APA. But in addition to concluding that a jury could find that the Takeda Deal constituted an External Sale, I would also hold that a jury could find PRA violated the implied covenant of good faith and fair dealing in its post-closing conduct as it pertains to the External Sales provision.

VHS contends that PRA violated the implied covenant of good faith and fair dealing associated with the APA's External Sales provisions, sections 2.6(a)(iv) through (vii) of the APA. The External Sales provision is a milestone that requires PRA to make earnout payments "upon the achievement of aggregate External Sales." Under Delaware law, courts first consider the express earnout covenants or clauses which may impact the buyer's post-closing obligations or efforts regarding earnout payments. *See Chamison*, 735 A.2d at 920. In the absence of such provisions, the implied covenant of good faith and fair dealing will be used to "protect the spirit of an agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain." *Id.*

Because the purpose of applying the covenant of good faith and fair dealing is to "protect the parties' reasonable expectations" under the contract, *Dunlap*, 878 A.2d at 447 (cleaned up), the parties cannot act "arbitrarily or unreasonably thereby frustrating the fruits of the bargain that the asserting party reasonably expected" at the time the contract was executed, *Nemec*, 991 A.2d at 1126. Furthermore, the implied covenant of good faith and fair dealing "requires the finder of fact to

extrapolate the spirit of the agreement from its express terms and based on that spirit, determine the terms the parties would have bargained for to govern the dispute had they foreseen the circumstances under which their dispute arose." *O'Tool v. Genmar Holdings, Inc.*, 387 F.3d 1188, 1195 (10th Cir. 2004) (cleaned up) (applying Delaware law).

In the case at bar, the APA does not include any post-closing covenants or express provisions that reserve or limit PRA's post-closing obligations under the implied covenant of good faith and fair dealing. However, in the court below, PRA argued that the implied covenant of good faith and fair dealing could not be applied to give VHS contractual protections that "they failed to secure for themselves at the bargaining table[,]" quoting *Winshall v. Viacom International, Inc.*, 76 A.3d 808, 816 (Del. 2013) (citation omitted). To support its contention, PRA cited *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 147 (Del. Ch. 2009), and argued that here, as in that case, VHS "could have insisted on specific contractual commitments from PRA" such as the level of resources PRA needed to devote to developing CTMax or a "guarantee that Parthasarathy would have 'full authority' over the [software] development, or a plan for making external sales."

Agreeing with PRA, the trial court cited *Airborne Health*, 984 A.2d at 147, and found in PRA's favor. However, the Business Court's reliance on *Airborne Health* was misguided because that case involved express post-closing obligations. There, the seller had bargained for an express "contractual downside protection" that required the buyer to return assets to the seller if the buyer failed to spend certain threshold amounts to market the seller's products. *Id.* Taking this together with a general efforts clause that did not obligate the seller to spend any certain amount of money, the Delaware Court of Chancery concluded that the implied covenant of good faith and fair dealing did not apply. *Id.* Essentially, because the parties had bargained for post-closing obligations and included express terms to that effect in their contract, there were no gaps for the implied covenant of good faith and fair dealing to fill. *See id.*

No such provision exists in the APA in this case, accordingly the implied covenant of good faith and fair dealing is appropriate to fill in this gap. While it is true that the implied covenant should not be applied to create obligations for PRA that do not exist in the APA, *see Winshall*, 76 A.3d at 816, this does not detract from PRA's obligation to carry out the terms of the contract in good faith and ensure that the parties' reasonable expectations are honored, *see Dunlap*, 878 A.2d at 447. VHS argues there are three questions of fact for the jury: (1) the meaning of

the term "External Sales"; (2) PRA's post-closing obligations under the implied covenant of good faith and fair dealing; and (3) whether PRA used oppressive or underhanded tactics to thwart VHS's reasonable expectations under the APA.

On VHS's first point, the text of the APA is unambiguous. The APA defines an "External Sale" as "the sale of one or more licenses to the Solutions . . . to a third party which is not (i) an Affiliate of Purchaser or (ii) using such license(s) in connection with providing services to Purchaser and/or any of its Affiliates." Merriam-Webster's dictionary defines the term "sale" as "the act of selling," which refers to "the transfer of ownership of and title to property from one person to another for a price." *Sale*, Merriam-Webster.com Dictionary, Merriam-Webster https://www.merriam-webster.com/dictionary/sale (last visited May 30, 2023). While the trial court determined that the term "External Sale" is limited to a standalone sale of the license, this interpretation is inconsistent with the APA's text. By using the term "sale," the APA intended to keep the meaning of "External Sale" broad. If PRA is transferring title by allowing a third party to use the software, that transaction would qualify as an External Sale. This means that by the APA's terms, an External Sale could also include "software as a service" or the right to use VHS's software in conjunction with receiving clinical trial services from PRA. Accordingly, if PRA failed to credit a "software as a service" transaction as an External Sale, then this would be an express breach of the APA.

Second, VHS asserts that a jury must determine whether PRA's post-closing conduct breached the implied covenant of good faith and fair dealing. VHS asserts that four of PRA's actions constituted a breach of this covenant: (1) PRA's sequencing of the milestones, which according to VHS were supposed to be concurrently running; (2) PRA's decision to unmanage the package, which eliminated Salesforce licensing; (3) PRA's diversion of resources away from the APA milestones; and (4) PRA's rejection of specific External Sales opportunities.

The evidence VHS presented shows that as soon as Parthasarathy began working for PRA, he started working on both sets of earnout milestones by circulating plans to complete the milestones and requesting the necessary resources. Parthasarathy took these actions "because in [his] mind[the] clock [was] ticking" on all the milestones and addressing both milestone groups simultaneously was the best strategy to ensure the milestones were completed. However, Colin Shannon (PRA's Chief Executive Officer) expressed to Parthasarathy that the immediate focus would be on the internal software development rather than External

Sales, and only once the internal software development was completed would External Sales become a priority.

Accordingly, Parthasarathy began working on the internal software Development Milestones listed in the APA. However, PRA did not adhere to the milestone requirements listed in the APA. In fact, Chuck Piccirillo (PRA's Senior Vice President of IT) testified that he did not remember reviewing the APA after it was signed, and the transaction had closed. Moreover, at one point the person who had authored the requirements for these milestones, Irene, was no longer involved in this work, and while that person assumed Piccirillo was tracking the requirements for the Development Milestones, it is unclear if this was occurring.

There is also evidence that no development plan was instituted and there were no resource approvals for completion of the milestones for nearly eighteen months after the APA was signed. Namely, Irene testified that although he had "influence on the execution of the [software] plan and the timeline for it[,]" he was not involved in that work until almost eighteen months later. Indeed, Irene explained that eventually the work he did "right[ed] the ship" and was "part of the solution." Moreover, the requirements associated with PRA's internal software development were in flux. For example, regarding the first Development Milestone, the integration of Salesforce modules, PRA determined that some of the required modules no longer "made sense" to integrate. After making this determination, PRA removed those modules from the list and mandated the integration of a different and expanded list of Salesforce modules which were not included in the APA.

Similarly, there is evidence that for the second Development Milestone, key product enhancements, PRA determined that certain functional requirements "did not make the cut" or "were no[ ] [longer] required." In addition, other functional requirements under the second milestone were changed due to incorrect information PRA had about its existing Siebel System. There is also evidence that while PRA knew it would have to "develop [certain functional requirements] from scratch[,]" it never assigned the resources to realize this project.

Additionally, VHS provided evidence showing that VHS's software was originally a "managed package," which means that the application satisfied Salesforce's requirements for licensing through AppExchange. In October 2016, PRA decided to "unmanage the package" of VHS's software in order to customize the software "to [PRA's] own needs." The process to unmanage the code was lengthy and took approximately one to two months of work. Furthermore, by unmanaging the package, PRA

eliminated the possibility of licensing the software on AppExchange and with it any standalone External Sales.

Moreover, there is evidence that in March 2017, a customer named Vertex approached PRA seeking a licensable "managed package" version of the software. Because PRA had unmanaged the package, it could not offer Vertex what it sought. While Vertex ultimately used another software vendor, PRA still gained Vertex as a customer for providing clinical trial management services. There is also evidence that although Parthasarathy was initially involved in discussions regarding Vertex, he was removed from the email chain because Deborah Jones-Hertzog (PRA's Senior Vice President of IT) "did[n't] want [Parthasarathy] to read" the email she was sending. This email included Jones-Hertzog stating that if they sold the software "it would be the 1st time . . . [Parthasarathy's] product" would be sold and that accordingly, Parthasarathy would be entitled to receive royalties under the APA. Indeed, Jones-Hertzog explained in her email that she and Shannon were discussing "different models" under which Parthasarathy could sell the software that "need[ed] to [be] factor[ed] . . . into the conversation."

There is also evidence that in August 2016, PRA finalized its Master Services Agreement (MSA) with Takeda. Under the MSA, PRA agreed to provide clinical trial management services to Takeda using VHS's software. In doing so, PRA licensed its "owned technology," also known as VHS's software, to Takeda to support PRA's providing Takeda with clinical trial management services. During the time PRA provided Takeda with services, PRA earned nearly half a billion dollars in revenue from Takeda. At the same time, PRA has not credited the Takeda transaction toward the External Sales Milestones.

Third, VHS asserts that a jury must decide whether PRA's post-closing conduct thwarted VHS's reasonable expectations to realize the External Sales Milestones in violation of the implied covenant of good faith and fair dealing. As outlined above, the evidence presented by VHS provides support for VHS's version of events. Under the relevant case-law, the implied covenant of good faith and fair dealing must be used to fill in the gap in the APA and determine whether PRA acted arbitrarily or unreasonably thereby frustrating the parties' reasonable expectations at the time the APA was signed. *Nemec*, 991 A.2d 1120.

If a jury believes the evidence presented by VHS, it could find that PRA sequenced the milestones and did not allow work on the second and third milestones to begin until work on the first milestone was completed. A jury could also find the same is true for the External

Sales Milestone and that PRA did not allow work on External Sales to begin until after work on the first three Development Milestones was completed. Next, a reasonable jury could find that by unmanaging the package, PRA diverted resources away from the APA milestones and eliminated the opportunity of licensing the software on AppExchange, thereby thwarting Parthasarathy's efforts to meet the External Sales provision. Indeed, the emails sent by Jones-Hertzog could also lead a jury to believe that PRA's interference in the Vertex deal was intentional. Lastly, under the terms of the APA, a jury could also find that the Takeda Deal meets the definition of an External Sale and that PRA's failure to credit it as such is an express breach of the APA.

Thus, taking the evidence presented in the light most favorable to VHS and drawing all reasonable inferences in VHS's favor, *see Cummings*, 379 N.C. at 358, I would hold that summary judgment is not appropriate, and that the case should be remanded to the trial court so that a jury can decide whether PRA breached the External Sales provision of the APA, and whether PRA violated the implied covenant of good faith and fair dealing through its post-closing conduct.

III. Conclusion

In sum, I depart from the majority opinion on three issues. First, whether Rule 8 or Rule 9(b) of the North Carolina Rules of Civil Procedure applies to pleading a claim for negligent misrepresentation. Second, whether under Delaware law the implied covenant of good faith and fair dealing applies to plaintiffs' breach of contract claims under sections 2.6(a)(i) and (ii) of the APA. Third, whether the implied covenant of good faith and fair dealing applies to PRA's post-closing conduct. Therefore, on those issues I would hold that (1) negligent misrepresentation is properly pled under Rule 8; (2) the implied covenant of good faith and fair dealing applies to VHS's breach of contract claims under sections 2.6(a)(i) and (ii) of the APA and accordingly summary judgment is not appropriate; and (3) the implied covenant of good faith and fair dealing applies to PRA's post-closing conduct and thus summary judgment is not warranted.

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

BATSON v. COASTAL RES. COMM'N

[385 N.C. 296 (2023)]

HOLLIS L. BATSON AND CAROL D. BATSON; LAWRENCE F. BALDWIN AND ELIZABETH C. BALDWIN; BALDWIN-BATSON OWNERS' ASSOCIATION, INC.

v.

COASTAL RESOURCES COMMISSION AND NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

From N.C. Court of Appeals
21-110

From Carteret
19CVS797 19CVS798 19CVS799

No. 94A22

ORDER

Petitioner's motion to reschedule oral argument is allowed for the sole purpose of removing this case from the oral argument calendar currently set for Wednesday, 13 September 2023 and re-calendaring it for Wednesday, 20 September 2023.

By order of the Court in Conference, this the 21st day of June 2023.

Dietz, J., recused.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of June 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

BREWER v. RENT-A-CTR.

[385 N.C. 297 (2023)]

ROBERT BREWER, EMPLOYEE v. RENT-A-CENTER, EMPLOYER, TRAVELERS INSURANCE CO. (SEDGWICK CLAIMS SERVICES, THIRD-PARTY ADMINISTRATOR), CARRIER	From N.C. Court of Appeals 22-296 From N.C. Industrial Commission W94420

No. 139P23

ORDER

This matter is before the Court on plaintiff's motion for reconsideration of an order of this Court allowing defendants' motion for temporary stay on 8 June 2023. It appears to the Court that plaintiff argues that the temporary stay would allow a discontinuation by defendant of weekly disability payments not addressed in the briefs before the Court of Appeals and thus not affected by the opinion of the Court of Appeals. Because N.C. R. App. P. 16 and 28 set out the scope of review on appeal, unless and until there is a subsequent filing by defendants with a different disposition by this Court, the provisions of the Industrial Commission's Opinion and Award regarding the aforementioned monthly disability payments are unaffected by the temporary stay, and plaintiff's motion to reconsider is denied.

By order of the Court in Conference, this the 19th day of June 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of June 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

JAMES HWANG, MD

v.

BRUCE CAIRNS, THE UNIVERSITY OF NORTH CAROLINA, THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, AND UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM

From N.C. Court of Appeals
22-31

From Durham
18CVS2942

No. 58P23

ORDER

On the plaintiff's petition for discretionary review filed 21 February 2023, the Court hereby allows the petition as to Dr. Hwang's first proposed issue: Did the Court of Appeals err in affirming the order granting Defendant Cairns's Motion for Summary Judgment? This issue is only allowed as to plaintiff's slander *per se* and tortious interference of contract claims against defendant Cairns.

On defendants' conditional petition for discretionary review filed 6 March 2023, the Court hereby allows defendants' petition as to the sole issue presented: Did the trial court err in denying defendants' initial motions to dismiss plaintiff's amended complaint under Civil Rules 12(b)(1), 12(b)(2) and 12(b)(6). This issue is only allowed as to defendant Cairns's immunity defenses as they apply to Dr. Hwang's claims for slander *per se* and tortious interference with contract.

By order of the Court in Conference, this the 30th day of August 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of August 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. TIRADO

[385 N.C. 299 (2023)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 20-213
v.	
FRANCISCO EDGAR TIRADO	From Cumberland 98CRS34831

No. 267P21

ORDER

The State's motion to dismiss defendant's notice of appeal based upon a constitutional question is allowed. Defendant's motion to amend his petition for discretionary review is allowed, and the petition for discretionary review is denied as to the first proposed issue and allowed as to the second proposed issue. The parties are directed to address in their briefing the issue of whether defendant's resentencing complied with the Court's decision in *State v. Kelliher*, 381 N.C. 558 (2022).

By order of the Court in Conference, this the 30th day of August 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of September 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

WESLEY WALKER

v.

WAKE COUNTY SHERIFF'S DEPARTMENT; GERALD M. BAKER, IN HIS OFFICIAL CAPACITY AS WAKE COUNTY SHERIFF; ERIC CURRY (INDIVIDUALLY); WESTERN SURETY COMPANY; WTVD, INC.; WTVD TELEVISION, LLC; SHANE DEITERT

From N.C. Court of Appeals
21-661

From Wake
20CVS9039

No. 279PA22

ORDER

Plaintiff's consent motion to dismiss appeal is allowed. The decision of the Court of Appeals is vacated. *See State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 289, 221 S.E.2d 322, 324–25 (1976) (vacating a decision of the Court of Appeals because the case became moot while on appeal) ("When a case becomes moot while on appeal, the usual disposition is simply to dismiss the appeal. This procedure, however, leaves the decision of the Court of Appeals undisturbed as a precedent when, but for intervening mootness, it might not have remained so. While we express no opinion as to its correctness, the better practice in this circumstance is to vacate the decision of the Court of Appeals." (internal citation omitted)); *see also N.C. Bowling Proprietors Ass'n, Inc. v. Cooper*, 375 N.C. 374, 374, 847 S.E.2d 745, 746 (2020) (dismissing appeal as moot and vacating order of lower court).

By order of the Court in Conference, this the 30th day of August 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of August 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice DIETZ concurring.

Once again, this Court enters a routine order that draws an exaggerated, hyperbolic dissent from one of my colleagues. *See post* (Earls, J., dissenting). And, as is the case with so many of my colleague's dissents, one could be forgiven for thinking that doom is upon us.

My colleague accuses the majority of seeking "power" over reason, of engaging in a "radically destabilizing shift," of attempting to "brazenly warp the law," and on and on. Like so many of my colleague's dissents, this one has portions that read more like pulp fiction than a legal opinion.

Lawyers and judges are trained to push past empty rhetoric and weigh the strength of an argument on its merits. It is worth doing so here because reasonable jurists can disagree about how best to resolve this case. But that hardly means—as my dissenting colleague suggests—that "the integrity of our justice system" is now in question.

As an initial matter, our actions today are consistent with precedent. This Court has expressly held that when an appeal becomes moot while at this Court, we retain the power to vacate the lower court decision when we dismiss the appeal. *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 290 (1976).

The concern this Court identified almost 50 years ago in *Southern Bell* is the same one at issue here. As the Court explained, "When a case becomes moot while on appeal, the usual disposition is simply to dismiss the appeal. This procedure, however, leaves the decision of the Court of Appeals undisturbed as a precedent when, but for intervening mootness, it might not have remained so." *Id.* (citation omitted). Thus, in *Southern Bell*, this Court chose to vacate the Court of Appeals decision so that it was not binding on the lower courts: "While we express no opinion as to its correctness, the better practice in this circumstance is to vacate the decision of the Court of Appeals." *Id.*

Our precedent also is far from unique. Federal appellate courts routinely vacate lower court orders when the parties reach a joint settlement or otherwise moot an appeal. As the U.S. Court of Appeals for the Federal Circuit once explained, "vacatur of the judgment at trial is appropriate when settlement moots the action on appeal." *U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728, 731 (Fed. Cir. 1992).

Finally, the Court's order in this case serves our state's jurisprudence. We allowed discretionary review here because the appeal raises questions significant to our jurisprudence and to the public interest. *See*

N.C.G.S. § 7A-31 (2021). In particular, as the parties' briefing acknowledged, the Court of Appeals opinion may have unintentionally changed the law and put our state at odds with our sister states and with widely accepted doctrine found in the Restatement of Torts.

We are quite familiar with the issues presented. We spent months reviewing the parties' submissions before deciding to take up the case, and then we spent months more reviewing the parties' merits briefing ahead of the scheduled oral argument in just over two months. Most importantly—and contrary to the dissent's assertions—we have deliberated "as a body" on the merits of this case, on the consequences of the legal issues presented, and on how best to resolve this appeal. As is often the case, my dissenting colleague did not agree with the outcome of the Court's deliberations and therefore discredits them. But that does not mean they never occurred.

Moreover, given the importance of the legal issues presented, vacating the lower court decision is certainly preferable to the alternative—which is to keep the case because of its importance to our state's law and to force the parties to continue litigating it. *See*, *e.g.*, *N.C. State Bar v. Randolph*, 325 N.C. 699, 701 (1989). This, too, is far from unprecedented. As recently as last year, this Court *denied* a request to voluntarily dismiss an appeal—thus forcing parties to continue litigating a case unwillingly—because of the importance of the issues involved. *See Harper v. Hall*, 383 N.C. 89, 114 (2022), *opinion withdrawn and superseded on other grounds on reh'g*, 384 N.C. 292 (2023).

Rather than force the parties here to endure further, costly litigation, we chose—after much debate—to vacate the lower court opinion, as we did in *Southern Bell*. This permits the Court of Appeals to refine its holding in future cases and perhaps avoid the issues that led us to review this case in the first place. One can reasonably disagree with our approach, but to claim that our decision comes "at the cost of the integrity of our justice system and our citizens' faith in it" is a bit unhinged.

The dissent also argues that vacating the Court of Appeals decision is "contrary to law." This is so, the dissent reasons, because the Rules of Appellate Procedure state that a published Court of Appeals opinion "remains binding precedent unless reversed by this Court."

But that language has never meant that a strict "reversal" following oral argument is the only means of overturning lower court precedent. This Court routinely disavows or vacates Court of Appeals precedent without the need for oral argument and without a formal ruling "reversing" it. Doing so is part of our constitutional role in supervising the

decisions of the lower courts. *See*, *e.g.*, *State v. Ledbetter*, 372 N.C. 692 (2019) (denying petition for discretionary review but holding that the Court "disavows the language in the last paragraph of the Court of Appeals's decision"); *State v. Ore*, 383 N.C. 676 (2022) (summarily vacating Court of Appeals decision based solely on petition for discretionary review and response).

In sum, there is nothing earth-shattering about the Court's straightforward order in this case. As I said, reasonable jurists can disagree about how to resolve this case. I think it is fair, if one ends up on the losing end of that disagreement, to write separately and present an opposing legal view in a dissent. Two of my colleagues have done that in thoughtful dissents. *See post* (Morgan, J., dissenting and Berger, J., dissenting). But that is not what my other dissenting colleague has done. I write separately to emphasize that the reasonable differences of opinion that are present in this case do not warrant my dissenting colleague's angry rhetoric; the needless, toxic disparagement; and the worn-out insistence that every routine disagreement at this Court portends the end of the public's faith in our justice system.

Justice EARLS concurring in part and dissenting in part.

Today, this Court—without legal authority and without the benefit of argument, deliberation, or an opinion—reaches out and changes the law. Whatever the merits of the Court of Appeals decision in this case, it is improper for this Court to act to modify or vacate the Court of Appeals decision in these circumstances. To do so flouts basic principles of the judicial process, and it signals to North Carolinians that "[p]ower, not reason, is the new currency of this Court's decisionmaking." *See Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting). I agree that the appeal should be dismissed but dissent from the portion of the Order directing that the previously published opinion of the Court of Appeals "stands without precedential value."

Legislatures do have the general power to change the law on their own initiative. Courts, however, play a more limited role. Or at least they used to. For nearly 150 years, this Court has adhered to a key constraint on our authority: The doctrine of mootness. *See State ex rel. Martin v. Sloan*, 69 N.C. 128, 128 (1873) (holding when "neither party has any interest in the case except as to costs[,]" this Court is "not in the habit of deciding the case"); *State v. Richmond & Danville R.R. Co.*, 74 N.C. 287, 289 (1876) (holding the same). Put simply, we decline to "hear an appeal

when the subject matter of the litigation has been settled between the parties or has ceased to exist." *Cochran v. Rowe*, 225 N.C. 645, 646 (1945).

Mootness serves twin aims. For one, it allows us to properly do our job. By only hearing live controversies, we "ensur[e] concrete adverseness that sharpens the presentation of issues." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 595 (2021) (cleaned up). Put another way, parties with a stake in the controversy have a stronger incentive to fully and effectively argue their case. And so this Court, by extension, has a firmer and more informed basis to make a decision.

The mootness doctrine also underpins deeper questions about this Court's constitutional authority. As we recognized almost a century ago, "[i]t is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, . . . to answer moot questions." *Poore v. Poore*, 201 N.C. 791, 792 (1931). In other words, we lack the constitutional power to engage in "mere academic inquiry." *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 204 (1942). It is "not [our] province"—and it "ought not . . . be [our] desire"—to "decide questions or causes unnecessarily." *Hasty v. Funderburk*, 89 N.C. 93, 94 (1883). In light of that limit on our authority, we have described mootness as a "fundamental principle," *Tryon*, 222 N.C. at 204, "a form of judicial restraint," *In re Peoples*, 296 N.C. 109, 147 (1978), and a "prudential limitation on judicial power," *Comm. to Elect Dan Forest*, 376 N.C. at 572. It ensures that this Court stays in its constitutionally prescribed lane. It keeps us off the toes of other branches, thus "respect[ing] the separation of powers by narrowing the circumstances" when we may second-guess their actions. *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 206–07 (2023). And most importantly, it ensures that we act only as the people have empowered us to.[1]

That doctrinal background underscores why the majority's action is such a "fundamental and radically destabilizing shift" in judicial

1. To be sure, there are exceptions to the mootness doctrine, *see*, *e.g.*, *Chavez v. McFadden*, 374 N.C. 458, 467–68 (2020) (noting that a court may still consider a moot case if the legal issue is "capable of repetition, yet evading review," meaning that "the underlying conduct upon which the relevant claim rests is necessarily of such limited duration that the relevant claim cannot be fully litigated prior to its cessation and the same complaining party is likely to be subject to the same allegedly unlawful action in the future"), but there is no contention that any of those exceptions apply in this case.

power. *See Mole' v. City of Durham*, 384 N.C. 78, 92 (2023) (Earls, J., dissenting). When we agreed to hear this case, the parties were locked in a legal disagreement—one they asked this Court to resolve. But since then, they have "reached a full settlement of the dispute between them." Because "a controversy no longer exists between [the parties]," as they themselves concede, they ask us to dismiss their appeal. After all, there is nothing left for this Court to do because there is no longer a legal dispute for us to resolve. That should be the end of it. And indeed, for well over a century, when confronted with a moot case like this one, this Court has simply dismissed it.[2]

The majority cites *State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 289 (1976), referring to language in that opinion providing that "the better practice in this circumstance is to vacate the decision of the Court of Appeals." (citing Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772 (1955)). The 1955 note which provides the legal authority for the proposition being advanced is significantly more nuanced than the "better practice" language might

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2. Our precedents are bursting with cases where we have dismissed an appeal when the case becomes moot without reaching out to change the law. *See*, *e.g.*, *Hasty v. Funderburk*, 89 N.C. 93, 94 (1883) ("This court has repeatedly held, that when it appears that the matter in litigation in the action before it has been settled by the parties, or is disposed of in some other way, and it has thus become unnecessary to decide the questions presented by the appeal, it will not proceed to consider and decide them, but will dismiss the appeal."); *Kidd v. Morrison*, 62 N.C. (Phil. Eq.) 31 (1866) (dismissing dispute over slave because emancipation mooted the question); *State v. Richmond & Danville R.R. Co.*, 74 N.C. 287 (1876); *State v. Atl. & N.C. R.R. Co.*, 77 N.C. 299 (1877); *Cochran v. Rowe*, 225 N.C. 645 (1945) (dismissing appeal as moot when parties resolved dispute over property possession); *Simmons v. Simmons*, 223 N.C. 841, 843 (1944) (dismissing appeal as moot because the defendant discharged the ruling against him by "pa[ying] all amounts in arrears"); *In re Estate of Thomas*, 243 N.C. 783 (1956) (dismissing case as moot when defendants paid and plaintiffs accepted judgment); *Stanley v. Dep't of Conservation and Dev.*, 284 N.C. 15, 29 (1973) ("Whenever it appears that no genuine controversy between the parties exists, the Court will dismiss the action *ex mero motu*."); *In re Peoples*, 296 N.C. 109, 147–48 (1978); *Pearson v. Martin*, 319 N.C. 449, 451 (1987) ("Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." (quoting *In re Peoples*, 296 N.C. at 147)); *State ex rel. Rhodes v. Gaskill*, 325 N.C. 424, 425 (1989) (dismissing appeal as moot because, through the entry of a consent judgment, "the State and defendant have agreed upon and settled all matters in controversy between them as regards this proceeding"); *In re A.K.*, 360 N.C. 449, 452 (2006) ("The principal function of the judicial branch of government is to resolve cases or controversies between adverse parties. *See generally* U.S. Const. art. III, § 2; N.C. Const. art. I, § 18 *and* art. IV. When a legal controversy between opposing parties ceases to exist, the case is generally rendered moot and is no longer justiciable.").

suggest.[3] Most importantly, the "circumstance" addressed in that decision involved an intervening, unilateral act by one party, namely that a new Utilities Commission issued a new Order, thereby mooting the controversy before us and sparking a separate wave of litigation over the new Commission Order. *See Utilities Comm'n*, 289 N.C. at 288. Rather than a settlement by the parties, the original Order being appealed was no longer in effect. *Id.* That is very different from the posture of this case, where the parties agree that dismissal is appropriate because they have settled the controversy between them.

The second case cited in the majority's Order is even less applicable here. In *N.C. Bowling Proprietors Ass'n, Inc. v. Cooper*, 375 N.C. 374 (2020), this Court vacated a preliminary injunction that was no longer in effect because the underlying Executive Order had expired. *See id.*, ("Since the challenged restriction in Executive Order 141 is no longer in effect against plaintiff, we dismiss this appeal as moot, vacate the 7 July 2020 preliminary injunction order, and remand to Superior Court, Wake County."). Vacating a preliminary injunction which, by nature is designed to temporarily preserve the status quo while the case proceeds, is quite different from vacating a substantive decision on the merits by the Court of Appeals after that court had full briefing, heard argument, and conducted its deliberations to reach a decision on the merits.

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3. The author of the note cited by the majority was discussing *United States v. Munsingwear*, 340 U.S. 36 (1950), long before that decision was limited by the U.S. Supreme Court's clarification in *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994) that "[w]here mootness is the result of settlement rather than happenstance, however, the losing party forfeits the equitable remedy of vacatur." *Id.*, 513 U.S. at 25. Moreover, the article concludes by making the same argument that I am making here:

> For a court to make an exception to so fundamental a jurisdictional rule as the one precluding the decision of moot cases, certain safeguards should be erected to prevent the dangers against which the rule was designed to guard. Even though sound precedent may arise from a court's decision in a moot case involving questions of great public importance, it should always be borne in mind that legislative or executive action can also accomplish this purpose in many instances, and that it is to keep clear the lines of demarcation between the branches of government that the various restrictions on the judicial power were developed and should be maintained. When such a moot case is decided the courts should take every precaution to insure that adverse and complete argument, or its equivalent, is presented.

Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, *supra* at 796.

Thus, referencing inapposite authority from inapplicable cases, the majority today departs from our "well-established and time-honored practices." *See Mole'*, 384 N.C. at 90 (Morgan, J., dissenting). Despite the absence of a legal dispute and despite the request of the parties to simply dismiss the appeal, the Court reaches out to do something that neither party has requested and, indeed, that the North Carolina Rules of Appellate Procedure do not currently contemplate, namely, that it will effectively "unpublish" the previously published Court of Appeals opinion in this matter by declaring it has no precedential value. For all intents and purposes, the Court effectively vacates the decision below. For future litigants, the Court of Appeals' ruling holds no precedential water. And by effectively vacating the opinion, the majority sends an unmistakable message that it disagrees on the merits. For trial courts and future appellate panels, the Court mysteriously sends the message that the Court of Appeals is wrong without explaining how or why.

To take this step here is not just unwise, it is contrary to law. Under our Rules of Appellate Procedure, a published Court of Appeals opinion—like the one in this case—remains a binding precedent unless reversed by this Court. *In re Civil Penalty*, 324 N.C. 373, 384 (1989); *see also* N.C. R. App. P. 30(e)(1), (4) (the Court of Appeals panel hearing the case decides if its opinion has value as precedent, but counsel and pro se parties may move for publication of an unpublished opinion). Deeper still, to do so blows past fundamental principles of judicial restraint. As this Court has long recognized, when a case is extinguished, so too is our power to act. *See In re A.K.*, 360 N.C. 449, 452 (2006) ("The principal function of the judicial branch of government is to resolve cases or controversies between adverse parties. When a legal controversy between opposing parties ceases to exist, the case is generally rendered moot and is no longer justiciable." (cleaned up)); *see also Tryon*, 222 N.C. at 204; *Poore*, 201 N.C. at 792. No matter how much we dislike a result, we cannot conjure up jurisdiction by judicial fiat. By ignoring that principle—one "recognized in virtually every American jurisdiction," *Pearson v. Martin*, 319 N.C. 449, 451 (1987) (quoting *In re Peoples*, 296 N.C. at 147)—the effect is to write a blank check to retool the law.

The action the Court takes today is not inconsequential, particularly in light of what it telegraphs about our judicial system. The case was calendared for oral argument at our November 2023 session. We have not heard oral arguments. We have not deliberated as a body on the legal issues. And we have not written or exchanged opinions on whether the Court of Appeals was correct. In short, this case has not yet entered the crucible of our deliberative process.

Without any pretense of meaningful adjudication—without any semblance of "careful consideration and input from stakeholders," *Mole'*, 384 N.C. at 98 (Earls, J., dissenting)—this Court changes the law.

The upshot of that decision is clear. By its action in this case, the Court seems to be sending the message that ordinary doctrines of mootness are no longer operative. Moreover, the parties' oral arguments do not matter—we have not heard them. Our deliberations do not matter—we have not engaged in them. And our opinions do not matter—we have not written or exchanged any. All that matters is to achieve a particular result, namely, to make sure that no future litigants are bound by the legal rules articulated by the Court of Appeals in its opinion in this case. But that is not how our judicial system is supposed to work.[4]

The people of this state deserve more than "hasty and unexamined" jolts to the law. *See id.* at 92 (Earls, J., dissenting). And properly helmed, our judiciary curbs the arbitrary exercise of power by promoting consistency and certainty. *Id.* at 101. By continuing a trek down a different path, the action taken with this Order disserves those values, injecting yet more confusion, arbitrariness, and partisanship into North Carolina's legal system. This radical approach allows the Court to brazenly warp the law to its policy preferences unconstrained by the need to have a live controversy to decide through careful deliberation; this is at the cost of the integrity of our justice system and our citizens' faith in it.

I concur that the appeal should be dismissed and dissent from the remainder of the Court's Order.

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

Justice MORGAN dissenting.

I respectfully dissent from this Court's determination that, upon its allowance of the parties' Consent Motion to Dismiss, the opinion issued

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4. In fact, some federal courts have found constitutional defects in the very existence of unpublished opinions. *See Anastasoff v. United States*, 223 F.3d 898, 901 (8th Cir.) (holding that rule declaring that unpublished opinions have no precedential effect is unconstitutional under Article III), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000); *see also United States v. Goldman*, 228 F.3d 942 (8th Cir. 2000); *In re Ark. Rules of Civ. Proc.*, 2007 Ark. LEXIS 332 (2007) (concluding that as a constitutional matter, published and unpublished opinions alike should be precedential).

by the Court of Appeals will be unilaterally stripped by this Court of any precedential authority. Historically, in the event that the jurisdiction of the Supreme Court of North Carolina is invoked for the purpose of reviewing a decision from a lower forum and the state's highest court does not render a decision which alters the outcome of the lower forum in any way, the decision from the lower forum fully stands as our judicial system's determination of the matter. In applying this institutionalized principle to the present action, since this Court's jurisdiction was invoked for the purpose of reviewing the Court of Appeals decision at issue here and this Court ultimately did not render a decision which altered the case's outcome which emanated from the lower appellate court, then the entrenched standard which would be routinely implemented by this Court is the recognition of the Court of Appeals opinion as the final and citable result of the legal action. However, a majority of this Court once again chooses to pursue a newfound practice to confound the orderly methodology of this Court and our judicial system. This unfortunate overreach by a majority of this Court to deprive the Court of Appeals opinion of its appropriate precedential value is a bewildering indication of the extent to which this Court now goes in order to upend its institutionalized practices to achieve its desired ends.

For these reasons, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

Justice BERGER dissenting.

To the extent the order entered by the Court today suggests that settlement of a case reflexively renders matters of law or legal inference moot, I respectfully dissent.

Given the current procedural posture of this case, our rules require that the parties must obtain leave of the Court before dismissal will be allowed. N.C. R. App. P. 37(2). One rationale supporting this rule is the recognition that significant jurisprudential issues must be resolved.[1] "While the federal constitution limits the federal 'Judicial Power' to certain 'Cases' and 'Controversies.' U.S. Const. Art. III, § 2, our Constitution,

1. *See Harper v. Hall*, 383 N.C. 89 (2022), 113-14, *reh'g granted*, 384 N.C. 1 (2023), *and opinion withdrawn and superseded on other ground on reh'g*, 384 N.C. 292 (2023) (a party seeking "to dismiss their own appeal in order to avoid a ruling by this Court" was denied because "th[e] issue is of great significance to the jurisprudence of our state and is squarely and properly before this Court.").

in contrast, has no such case or controversy limitation to the 'judicial power.' " *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 591.

While we will not hear cases "merely to determine abstract propositions of law," *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 399 (1996) (citations omitted), settlement on appeal does not necessarily render a case moot. *See also In re Peoples*, 296 N.C. 109, 147 (1978) (while the "usual response should be to dismiss the action" once it becomes moot, this Court also conceded that "the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint."). Thus, settlement alone does not deprive this Court of jurisdiction where there remains an unresolved matter of law. *See* N.C. Const. art. IV, § 12 ("The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference."); and N.C.G.S. § 7A-26 (the Supreme Court has "jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice and of administrative agencies, upon matters of law or legal inference[.]").

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

1 SEPTEMBER 2023

3P23	State v. Joseph Edwards Teague, III	1. Def's Motion for Temporary Stay (COA21-10) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/04/2023** Dissolved 2. Denied 3. Denied
12P23	State v. Titus Nafis Lee	Def's PDR Under N.C.G.S. § 7A-31 (COA21-665)	Denied **Dietz, J., recused**
13PA22	Wing v. Goldman Sachs Trust Company, et al.	1. Parties' Joint Motion to Dismiss Appeal 2. Parties' Joint Motion to Vacate the Trial Court's 23 October 2020 Order and the Court of Appeals' 7 December 2021 Opinion	1. Allowed 2. Allowed
15P23	State v. Charles Dunn	Def's PDR Under N.C.G.S. § 7A-31 (COA22-34)	Denied
22P23	State v. Brandon L. Griffin	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA22-502) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as moot **Dietz, J., recused**
28P18-2	State v. Eugene Matthews	Def's Pro Se Motion for Writ of Errors	Dismissed **Berger, J., recused**
31P23	Aleah High v. Wake Chapel Church, Inc. and Bishop John Jasper Wilkins, II	1. Def's (Bishop John Jasper Wilkins, II) PDR Under N.C.G.S. § 7A-31 (COA22-358) 2. Def's (Wake Chapel Church, Inc.) PDR Under N.C.G.S. § 7A-31 3. Plt's Conditional PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied 3. Dismissed as moot 4. Dismissed as moot **Dietz, J., recused**

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

1 SEPTEMBER 2023

33P23	Veronica Jane Dillree, by and through her General Guardian, Emily Tobias v. Harry Dillree and his Attorney-In-Fact, Lisa Wilcox	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-423)	Denied
34P23	North Carolina, ex rel. Expert Discovery, LLC v. AT&T Corp., et al.	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA21-671) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
35PA21-2	In the Matter of A.J.L.H., C.A.L.W., M.J.L.H.	1. Petitioner and Guardian ad Litem's Motion for Temporary Stay (COA20-267-2) 2. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad Litem's PDR Under N.C.G.S. § 7A-31 4. Petitioner and Guardian ad Litem's Motion to Amend PDR and Writ of Supersedeas 5. Petitioner and Guardian ad Litem's Motion to Dissolve Temporary Stay as to C.A.L.W. and A.J.L.H.	1. Allowed **08/23/2023** 2. Allowed as amended 3. Allowed as amended 4. Allowed 5. Allowed
37P23	Martin E. Rock v. City of Durham	1. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-235) 2. Petitioner's Pro Se PDR Under N.C.G.S. § 7A-31 3. Petitioner's Pro Se Motion for Leave to Amend Notice of Appeal and PDR	1. Dismissed *ex mero motu* 2. Denied 3. Allowed
39A22	State v. Robin Applewhite	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed **Dietz, J., recused**

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

1 SEPTEMBER 2023

44A23	State v. Joey Lamont Wilkins	1. Def's Notice of Appeal Based Upon a Dissent (COA22-339) 2. Def's PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied **Dietz, J., recused**
53P23	Cox v. Sadovnikov	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **02/06/2023** Dissolved 2. Denied **Dietz, J., recused**
56P12-3	State v. Kareem Abdullah Kirk	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-531)	Denied
58P23	Hwang v. Cairns, et al.	1. Plt's Motion for Extension of Time to File PDR (COA22-31) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied **02/20/2023** 2. Special Order 3. Special Order
60P22	State v. Daniel Isiah Crew, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA20-721)	Denied **Dietz, J., recused**
64P23	State v. James Derek Gary	Def's PDR Under N.C.G.S. § 7A-31 (COA22-232)	Denied
65P22-4	State v. Donovan M. Williams	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP22-243)	Denied
66P23	Ed L. Harris v. North Carolina Department of Adult Correction	1. Plt's Pro Se Motion to Accept Evidence for Claim 2. Plt's Pro Se Motion for Monetary Relief (TA-29518) 3. Plt's Pro Se Motion for Monetary Relief (TA-29476) 4. Plt's Pro Se Motion for Monetary Relief (TA-29398) 5. Plt's Pro Se Motion for Monetary Relief (TA-29518) 6. Plt's Pro Se Motion for Order to Show Cause for Preliminary Injunction and Temporary Restraining	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed

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

1 SEPTEMBER 2023

70P23	Wall Recycling, LLC v. Wake County and TT&E Iron & Metal, Inc.	Def's (Wake County) PDR Under N.C.G.S. § 7A-31 (COA22-181)	Denied **Dietz, J., recused**
71P23	State v. Gary D. Gochie	Def's Pro Se Motion for Notice of Appeal (COAP22-453)	Dismissed
78P23	In the Matter of M.W. and M.W.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA22-21)	Denied
84P23	Kathy Allen, Caveator v. Arthur Allen, Steve R. Allen, and Anthony A. Klish, Propounders	1. Caveator's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-276) 2. Caveator's Pro Se PDR Under N.C.G.S. § 7A-31 3. Caveator's Pro Se Motion for Extension of Time to File Brief 4. Caveator's Pro Se Motion to Supplement the Record 5. Caveator's Pro Se Motion for Extension of Time to File Brief 6. Caveator's Pro Se Motion for Immediate Arbitration 7. Caveator's Pro Se Motion for Entry of Default	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed as moot 6. Dismissed 7. Dismissed
86P23	Doug Turpin and Nicole Turpin v. Charlotte Latin Schools, Inc., et al.	Plts' PDR Prior to Determination by the COA (COA23-252)	Denied
89P23-2	Jeanice Barcelo v. Roy T. Wijewickrama, Chief District Court Judge, Ashley Hornsby Welch, DA, Jason Arnold, Esq., Chief Asst. DA, Joseph Scoggins, Esq., Asst. DA	Petitioner's Pro Se Motion for Due Process and Definitive Statement Regarding Dismissal of Previous Petition	Dismissed
90P23	Randell L. Robinson v. Donna Gentry	Plt's Pro Se Motion for Notice of Appeal	Dismissed

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

1 SEPTEMBER 2023

92P23	State v. Deon Patrick Bobbitt	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Pro Se Motion to Amend and Certify for Discretionary Review	1. Dismissed *ex mero motu* 2. Denied 3. Denied
94A22	Batson, et al. v. Coastal Resources Commission, et al.	Petitioners' Motion to Reschedule Oral Argument	Special Order **06/21/2023** **Dietz, J., recused**
95P23	State v. Joshua Edward Brinklow	1. Def's Pro Se Motion for Appeal 2. Def's Pro Se Motion for Appropriate Relief	1. Dismissed 2. Dismissed
98P23	State v. Tiffany Adonnis Campbell	1. Def's Motion for Temporary Stay (COA22-634) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion that the Court Take Notice of Recently Decided Case in Assessing PDR	1. Allowed **04/11/2023** Dissolved 2. Denied 3. Denied 4. Allowed
100P23	State v. Adron Morris, Jr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-3) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
101P23	State v. James Thomas Christian, III	Def's PDR Under N.C.G.S. § 7A-31 (COA22-299)	Denied
107P23	State v. Alvin Nathanael Smith	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-307) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
109P17-8	In re Olander R. Bynum	Petitioner's Pro Se Petition for Writ of Mandamus	Dismissed
110P23	Oakridge 58 Investors v. Durhill LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-772)	Denied

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112P23	State v. Tyanna Shardae Morrison	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-644) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
115P23	State v. Antonio Purcell	Def's PDR Under N.C.G.S. § 7A-31 (COA22-600)	Denied
118A23	The Estate of Desmond Japrael Stephens, Larry F. Stephens, Administrator v. ADP TotalSource DE IV, Inc., Micron Precision, LLC d/b/a King Machine of North Carolina, and Kory J. Kachur	1. Defs' Notice of Appeal Based Upon a Dissent (COA22-372) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Withdraw Appeal	1. Withdrawn **07/17/2023** 2. Withdrawn **07/17/2023** 3. Allowed **07/17/2023**
120P23	State v. Richard Franklin Collins	Def's PDR Under N.C.G.S. § 7A-31 (COA22-488)	Denied
122P23	Melba Smith v. Troy Greenwald and Troy Greenwald Enterprises, LLC, d/b/a Beltone of the Triangle	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-860)	Denied
123P23-2	State v. Tevin Q. Williams	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
128P23	In the Matter of L.M. & L.E.	1. Respondent-Mother's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-608) 2. Respondent-Mother's Pro Se Notice of Appeal Based Upon a Constitutional Question 3. Respondent-Mother's Pro Se PDR Under N.C.G.S. § 7A-31 4. Respondent-Mother's Pro Se Notice of Appeal Based Upon a Dissent 5. Respondent-Mother's Pro Se Notice of Appeal Based Upon a Constitutional Question 6. Respondent-Mother's Pro Se PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed *ex mero motu* 3. Denied 4. Dismissed *ex mero motu* 5. Dismissed *ex mero motu* 6. Denied

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129P23	State v. William Dewayne Simmons	Def's PDR Under N.C.G.S. § 7A-31 (COA22-642)	Denied
131P16-28	State v. Somchai Noonsab	1. Def's Pro Se Motion to Suppress State's Evidence 2. Def's Pro Se Motion to Suppress State's Evidence	1. Dismissed 2. Dismissed
132P22	County of Mecklenburg, A Body Politic and Corporate v. Helen Barbara Ryan, Unknown Spouse of Helen Barbara Ryan, and City of Charlotte, Lienholder	Plt's Petition for Writ of Certiorari to Review Decision of the COA (COA21-205)	Denied **Dietz, J., recused**
133P23	State v. Landon Lee Meadows	1. Def's Pro Se Motion for PDR (COAP23-17) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
137P07-3	State v. Sherman Wall	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **08/07/2023**
138A23	State v. Joshua David Reber	1. State's Motion for Temporary Stay (COA22-130) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **06/02/2023** 2. Allowed **06/23/2023** 3. ---
139P23	Robert Brewer, Employee v. Rent-A-Center, Employer, Travelers Insurance Co. (Sedgwick Claims Services, Third-Party Administrator), Carrier	1. Defs' Motion for Temporary Stay (COA22-296) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Plt's Motion for Reconsideration of Temporary Stay 5. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **06/08/2023** 2. 3. 4. Special Order **06/19/2023** 5.
141P23	State v. Christine Maria Chisholm	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-659)	Denied

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142A23	In the Matter of K.C.	1. Petitioner's Motion for Temporary Stay (COA22-396) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's Notice of Appeal Based Upon a Dissent 4. Petitioner's PDR as to Additional Issues	1. Dismissed as moot **06/08/2023** 2. Allowed **06/08/2023** 3. --- 4. Allowed
143P23	State v. Robert Lee Lamb, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA22-477)	Denied
144P23	Justin Marlow, as Administrator of the Estate of Michelle Marlow (Deceased) v. TCS Designs, Inc., Jobie G. Redmond, Jeff McKinney, and Eric Parker	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA22-862) 2. North Carolina Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief 3. North Carolina Association of Defense Attorneys' Motion for Extension of Time to File Amicus Brief	1. Denied 2. Dismissed as moot 3. Dismissed as moot
147P23	State v. Joshua McRavion	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-631)	Dismissed
148P23	State v. Terrance Brown	Def's PDR Under N.C.G.S. § 7A-31 (COA22-850)	Denied
149P23	State v. Cameron Clifton Smith	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Motion for Suppressed Evidence	1. Dismissed 2. Dismissed
151P23	Marlon Hubbard, Requester, v. Joanna Monell, No Issue Against	Petitioner's Petition for Writ of Certiorari to Review Order of District Court, Mecklenburg County	Denied
153A23	Carl E. Merrell, et al. v. James M. Smith, et al.	Plts' Motion to Consolidate Cases for Appeal	Allowed **06/22/2023**
155P23	Debra Cullen v. Logan Developers, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA22-223)	Allowed

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161P23	Kathy R. Allen v. Arthur L. Allen, Anthony A. Klish, State Employees' Credit Union, Wake County Superior Court Guardian Ad Litem	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-601) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. Plt's Pro Se Motion for Extension of Time to File Brief 5. Plt's Pro Se Motion for Immediate Arbitration 6. Plt's Pro Se Motion for Entry of Default 7. Plt's Pro Se Motion for Extension of Time to File Brief	1. --- 2. Denied 3. Allowed 4. Dismissed as moot 5. Dismissed 6. Dismissed 7. Dismissed as moot
162P23	State v. Orientia James White	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-369)	Denied
164P23	State v. Kurt Anthony Storm	1. State's Motion for Temporary Stay (COA22-685) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/26/2023** 2. 3.
165P16-3	State v. Simaron Demetrius Hill	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **06/16/2023**
165P16-4	State v. Simaron Demetrius Hill	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **06/23/2023**
165P23	In re Drew Hartley v. State of North Carolina, et al., Sheriff of Onslow County	Petitioner's Pro Se Motion for PDR	Denied **06/28/2023**
166P23	Colell Steele v. North Carolina Department of Public Safety	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-77) 2. Plt's Pro Se Motion for Briefing and Argument 3. Plt's Pro Se Motion for Oral Argument in Person 4. Plt's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Dismissed as moot 3. Dismissed as moot 4. Denied
168P23	In the Matter of C.N., C.N., and C.N.	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **07/03/2023**

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169P23	State v. Christopher L. Minor	Def's Pro Se Motion to Dismiss	Dismissed
170P23	State v. Arsenio Dwayne Curtis	Def's PDR Under N.C.G.S. § 7A-31 (COA22-596)	Denied
172P23	State v. Bobby Dean Abee, III	Def's PDR Under N.C.G.S. § 7A-31 (COA22-832)	Denied
173P23	Southland National Insurance Corporation, et al. v. Lindberg, et al.	1. Defs' Motion for Temporary Stay (COA22-1049) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Universal Life Insurance Company's Conditional Motion for Leave to File Amicus Brief 5. Plts' Motion to Expedite Petition for Writ of Supersedeas and PDR	1. Allowed **07/13/2023** 2. 3. 4. 5.
174P23	State v. Davon Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA22-719)	Denied
178P23	Jasmine Ivey v. Octavious Elmore	Def's Pro Se Motion for PDR (COAP23-252)	Denied
184P23	City Block Apartments, LLC d/b/a City Block Apartments v. Lance Brown	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Motion for Notice of Appeal	1. Denied **07/31/2023** 2. Denied **07/31/2023** 3. Dismissed **07/31/2023**
185P23	24 Hour Affordable Towing v. Forke Auctioneers; Brian Parks	1. Plt's Pro Se Motion for Discretionary Review 2. Plt's Pro Se Amended Motion for Discretionary Review	1. Dismissed as moot 2. Dismissed
186P23	City of High Point v. Loving Care Cremations, LLC	1. Def's Pro Se Emergency Petition for Writ of Mandamus and/or Prohibition 2. Def's Pro Se Motion for Emergency Stay of All Proceedings	1. Denied **08/02/2023** 2. Denied **08/02/2023**
189A22	Bottoms Towing & Recovery, LLC v. Circle of Seven, LLC	1. Respondent's Notice of Appeal Based Upon a Dissent (COA21-513) 2. Respondent's PDR as to Additional Issues 3. Respondent's Motion to Amend PDR	1. --- 2. Denied 3. Allowed
189P23	State v. Travis Baxter	Def's Pro Se Motion to Drop Charges	Dismissed

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191P23	State v. Wang Meng Moua	1. State's Motion for Temporary Stay (COA22-839) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/07/2023** 2. 3.
194A23	In the Matter of A.H.	1. Petitioner and Guardian ad Litem's Notice of Appeal Based Upon a Dissent 2. Petitioner and Guardian ad Litem's Motion for Temporary Stay 3. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas	1. --- 2. Dismissed as moot **08/09/2023** 3. Allowed **08/09/2023**
200P07-12	State v. Kenneth E. Robinson	Def's Pro Se Motion for Notice of Appeal	Dismissed
201P23	In the Matter of Z.A. and M.P.	1. Petitioner's Motion for Temporary Stay 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's Petition for Writ of Certiorari to Review Order of District Court, Orange County 4. Guardian ad Litem's Petition for Writ of Certiorari to Review Order of the COA	1. Allowed **08/16/2023** 2. 3. 4.
204P23	Ganna Shepenyuk v. Youssef Abdelilah	1. Plt's Motion for Temporary Stay (COA22-702) 2. Plt's Petition for Writ of Supersedeas	1. Denied **08/18/2023** 2.
205P23	Travis Wayne Baxter v. North Carolina State Highway Patrol Troop F District V, et al.	Plt's Pro Se Motion for Relief	Dismissed
206P23	In the Matter of A.J., J.C., J.C.	1. Petitioner and Guardian ad Litem's Motion for Temporary Stay (COA22-522) 2. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad Litem's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/23/2023** 2. 3.

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208P23	Kalishwar Das v. State of North Carolina	1. Plt's Pro Se Motion for Stay of All Proceeding 2. Plt's Pro Se Petition for Writ of Mandamus 3. Plt's Pro Se Amended Motion for Stay of All Proceeding	1. Dismissed **08/25/2023** 2. Dismissed **08/25/2023** 3. Dismissed **08/25/2023** **Dietz, J., recused**
212P22-2	Davis v. NC Board of Governors, et al.	1. Plt's Pro Se Petition for Writ of Certiorari 2. Plt's Pro Se Motion for Certificate of Appealability 3. Plt's Pro Se Motion for Certificate of Appealability	1. Denied **12/13/2022** 2. Dismissed 3. Dismissed
219P22	State v. Charles Thomas Stacks	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-167) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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225P21-2	North State Deli, LLC d/b/a Lucky's Delicatessen, Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria, Mateo Tapas, LLC d/b/a Mateo Bar De Tapas, Saint James Shellfish, LLC d/b/a Saint James Seafood, Calamari Enterprises, Inc. d/b/a Parizade, Bin 54, LLC d/b/a Bin 54, Arya, Inc. d/b/a City Kitchen and Village Burger, Grasshopper LLC d/b/a Nasher Cafe, Verde Cafe Incorporated d/b/a Local 22, Floga, Inc. d/b/a Kipos Greek Taverna, Kuzina, LLC d/b/a Golden Fleece, Vin Rouge, Inc. d/b/a Vin Rouge, Kipos Rose Garden Club LLC d/b/a Rosewater, and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern v. The Cincinnati Insurance Company; The Cincinnati Casualty Company; Morris Insurance Agency Inc.; and Does 1 Through 20, Inclusive	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA21-293) 2. Plts' Motion to Amend PDR 3. Plts' Motion to Amend PDR	1. Allowed 2. Allowed 3. Allowed
230P21-3	State v. Jordan Nathaniel Mitchell	Def's Pro Se Motion to Review Case	Dismissed
240PA21-2	Executive Office Park of Durham Association, Inc. v. Rock	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA20-405-2)	Denied
247P16-9	State v. Jonathan Eugene Brunson	1. Def's Pro Se Motion for PDR (COAP21-420) 2. Def's Pro Se Motion for Amended PDR 3. Def's Pro Se Motion to Withdraw Amended Petition	1. Denied 2. --- 3. Allowed

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260P22	Singleton, et al. v. N.C. Department of Health and Human Services, et al.	1. Plts' Notice of Appeal Based Upon a Constitutional Question	1. ---
		2. Plts' PDR Under N.C.G.S. § 7A-31	2. Allowed
		3. John Locke Foundation and Coalition of North Carolina Physicians' Motion for Leave to File Amicus Brief in Support of Notice of Appeal Based Upon a Constitutional Question and PDR	3. Dismissed as moot
		4. Treasurer Dale R. Folwell, CPA's Motion for Leave to File Amicus Brief in Support of PDR	4. Dismissed as moot
		5. Certificate of Need Scholars' Motion for Leave to File Amicus Brief in Support of Notice of Appeal Based Upon a Constitutional Question and PDR	5. Dismissed as moot
		6. Defs' Motion to Dismiss Appeal	6. Allowed
		7. Plts' Motion to Admit Renee D. Flaherty Pro Hac Vice	7. Allowed
		8. Plts' Motion to Withdraw Benton Sawrey as Counsel	8. Allowed **12/21/2022**
		9. Amicus' Motion to Withdraw R. Daniel Gibson as Counsel	9. Allowed **12/21/2022**
		10. Plts' Motion to Amend the Notice of Appeal or, in the Alternative, PDR	10. Allowed
263P22-3	State v. David Anthony Harris	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **07/12/2023**
263P22-4	David Anthony Harris v. Mary J. Wilson, Todd E. Ishee (Secretary of Prisons)	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **08/08/2023**
267P21	State v. Francisco Edgar Tirado	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-213)	1. Special Order
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Special Order
		3. State's Motion to Dismiss Appeal	3. Special Order
		4. Def's Motion to Amend PDR	4. Special Order
272A14	State v. Jonathan Douglas Richardson	Def's Pro Se Motion to Preserve Defendant's Position	Dismissed

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278P22	State v. Randall Lee Joyner	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-83) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Amend Notice of Appeal and PDR	1. Dismissed *ex mero motu* 2. Denied 3. Allowed **Dietz, J., recused**
279PA22	Walker v. Wake County Sheriff's Department, et al.	Plt's Consent Motion to Dismiss Appeal	Special Order
292A22	In the Matter of H.B.	Respondent-Mother's Petition for Rehearing	Denied **06/19/2023**
302P22-2	State v. Dametri O. Dale	1. Def's Pro Se Emergency Petition for Writ of Certiorari to Review Order of the COA (COAP22-434) 2. Def's Pro Se Motion to Withdraw Previously Filed Petition	1. --- 2. Allowed
303P22	State v. Jonathan Adam Haywood	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COAP22-106) 2. North Carolina Justice Center's Conditional Motion for Leave to File Amicus Brief	1. Dismissed 2. Dismissed as moot
311P22	In the Matter of B.W.C.	Juvenile's PDR Under N.C.G.S. § 7A-31 (COA22-124)	Denied
321P22	State v. Cheita Charles	Def's PDR Under N.C.G.S. § 7A-31 (COA21-792)	Denied
334P09-2	State v. Christopher N. Gooch	1. Def's Pro Se Motion for Notice of Appeal (COAP23-135) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed
342P22	State v. Dedric Michelle Mason	Def's PDR Under N.C.G.S. § 7A-31 (COA22-216)	Denied **Dietz, J., recused**
350P22	State v. Harold Lee Williams, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-217)	Denied
353P21-5	State v. Travis Wayne Baxter	Def's Pro Se Motion for Default in Sheriff's Official Duty for Failing to Show Cause and Appear in Lincoln County Court	Dismissed
356P22	State v. Gerardo Ambriz	Def's PDR Under N.C.G.S. § 7A-31 (COA21-674)	Denied

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365P22-2	State v. Montavius A. Johnson	Def's Motion for Petition for Rehearing	Dismissed
377P20-5	State v. Andrew Ellis	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Motion for Appropriate Relief 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed as moot
379P22	Ricky Spoon Builders, Inc., Ricky Spoon, and Melissa K. Spoon v. EmGee, LLC	Plts' PDR Under N.C.G.S. § 7A-31 (COA22-391)	Denied
395P20-3	State v. Michael Anthony Sheridan	Def's Pro Se Motion for Discretionary Review	Denied
398PA21	Duke Energy Carolinas, LLC v. Kiser, et al.	Defs' (Sunset Keys, LLC, Michael L. Kiser, and Robin S. Kiser) Petition for Rehearing	Denied **06/20/2023**
417P21-2	State v. Kenneth Lewis Powell, Jr.	Def's Pro Se Motion to Dismiss	Dismissed
449P11-28	In re Charles Everette Hinton	Petitioner's Pro Se Motion for an Ex Parte Hearing and Proceeding for an Opportunity to be Heard	Dismissed
487P96-2	State v. Robert Louis Davis	Def's Pro Se Petition for Writ of Mandamus	Dismissed
516P09-2	Dennis Alexander Player v. David Cassidy, Warden of Caswell Correctional Center, and State of North Carolina	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus 2. Petitioner's Pro Se Motion to Appoint Counsel	1. Denied **08/09/2023** 2. Dismissed as moot **08/09/2023**
580P05-29	In re David Lee Smith	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Motion for Court En Banc Rehearing of Demand for Emergency Consolidation of Corona Victim Consecutive Sentences 3. Def's Pro Se Motion for Emergency Reconsideration En Banc 4. Def's Pro Se Emergency Petition for Writ of Mandamus	1. Denied 2. Dismissed 3. Dismissed 4. Denied

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		5. Def's Pro Se Emergency Petition for Writ of Mandamus	5. Denied
		6. Def's Pro Se Petition for Writ of Mandamus	6. Denied
		7. Def's Pro Se Motion for Emergency Demand for Writ of Mandamus to Consolidate Consecutive Sentences	7. Dismissed
		8. Def's Pro Se Petition for Writ of Mandamus	8. Denied
584P99-7	State v. Harry James Fowler	1. Def's Pro Se Motion for Supersedeas	1. Dismissed
		2. Def's Pro Se Motion for Stay	2. Dismissed
		3. Def's Pro Se Motion for Supersedeas	3. Dismissed
		4. Def's Pro Se Motion to Vacate Caldwell Superior Court Rulings	4. Dismissed

BATSON v. COASTAL RES. COMM'N

[385 N.C. 328 (2023)]

HOLLIS L. BATSON AND CAROL D. BATSON; LAWRENCE F. BALDWIN AND ELIZABETH C. BALDWIN; BALDWIN-BATSON OWNERS' ASSOCIATION, INC.
v.
COASTAL RESOURCES COMMISSION AND NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 94A22

Filed 20 October 2023

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

I. Clark Wright Jr. for petitioner-appellees.

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

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

PER CURIAM.

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

AFFIRMED.

McKNIGHT v. WAKEFIELD MISSIONARY BAPTIST CHURCH, INC.

[385 N.C. 329 (2023)]

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

v.

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

WAKEFIELD MISSIONARY BAPTIST CHURCH, INC., COUNTERCLAIM PLAINTIFF

v.

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

No. 290A22

Filed 20 October 2023

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion on motions for summary judgment entered on 18 February 2022, a permanent injunction and final judgment entered on 2 June 2022, and an order for award of costs entered on 2 June 2022 by Judge Adam M. Conrad, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). On 16 June 2023, the Supreme Court allowed in part and denied in part defendants' and counterclaim plaintiff's motion to dismiss the appeal, dismissing all issues arising from the 18 February 2022 order and opinion on motions for summary judgment. Heard in the Supreme Court on 20 September 2023.

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

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

PER CURIAM.

AFFIRMED.[1]

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

STATE OF NORTH CAROLINA
v.
ROGER ARTHUR, JR.

No. 393PA21

Filed 20 October 2023

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

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

Anne Bleyman for defendant-appellant.

PER CURIAM.

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

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. JULIUS

[385 N.C. 331 (2023)]

STATE OF NORTH CAROLINA
v.
JOANNA KAYE JULIUS

No. 95A22

Filed 20 October 2023

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

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

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

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

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

Chief Justice NEWBY concurring in part and dissenting in part.

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

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

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

BERGER, Justice.

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

I. Background

Based upon the trial court's unchallenged findings of fact and testimony at the suppression hearing, on 20 May 2018, Trooper Justin Sanders of the North Carolina State Highway Patrol and Deputy Jesse Hicks of the McDowell County Sheriff's Office were dispatched to the scene of an automobile accident in McDowell County. Trooper Sanders was advised prior to arrival that the driver had fled the scene. Upon

arrival, Trooper Sanders and Deputy Hicks observed a vehicle resting partially submerged in a ditch. Trooper Sanders and Deputy Hicks both testified that the vehicle could not have been driven out of the ditch and it ultimately had to be towed from the scene.

Defendant informed Trooper Sanders that she was a passenger in the vehicle, which was owned by her parents, but that someone she could only identify as Kyle had been driving. Witnesses confirmed that defendant was the passenger and that the driver fled on foot after stating that he could not remain at the scene because he had outstanding warrants against him.[1]

Defendant provided Trooper Sanders with her identification and told Trooper Sanders that she did not know whether Kyle left any form of identification in the vehicle. Based on the information received to that point, Trooper Sanders testified that he was conducting an investigation for a hit-and-run.

Without obtaining consent or a search warrant, Trooper Sanders searched the vehicle for evidence of Kyle's identity. Trooper Sanders testified that he was "looking for Kyle's driver[']s license or ID" because he "needed a last name [of the driver]" to potentially prepare a wreck report. Upon locating a green and black Nike bag in the front passenger floorboard, Trooper Sanders looked inside the bag and discovered a black box the size of an electric razor case which was large enough to contain a driver's license. Trooper Sanders opened the black box and found scales, two cell phones, and two clear bags containing more than forty grams of methamphetamine. Defendant stated that the bag belonged to Kyle.

Trooper Sanders was unable to locate an identification for Kyle, and the search of the vehicle did not produce any additional evidence relating to the hit-and-run or other criminal activity. Based upon descriptions of Kyle provided by the witnesses, Deputy Hicks was subsequently able to determine that the driver was William Kyle Lytle.

As a result of the discovery of the contraband during the search of the vehicle, defendant was arrested and a pink backpack in her

1. There is no information in the record concerning the charges set forth in the outstanding warrants. Deputy Hicks testified at the suppression hearing that "Chris Taylor" later confirmed that there were outstanding warrants for Kyle's arrest. The transcript from the hearing on the motion to suppress contains no additional information as to the identity or employment of Chris Taylor. A transcript of defendant's trial shows that Chris Taylor was a detective with the McDowell County Sheriff's Office. In addition, there was no evidence offered at the suppression hearing as to the offenses charged in the warrants.

possession was searched. Trooper Sanders located several plastic bags containing a clear crystalline substance, a pistol, a glass pipe, and $1,785 in cash in defendant's bag.

Defendant was subsequently indicted for trafficking methamphetamine by possession, trafficking methamphetamine by transportation, possession with intent to manufacture, sell, or deliver a Schedule II controlled substance, possession of methamphetamine, and possession of drug paraphernalia. Before trial, defendant moved to suppress the evidence discovered at the scene, arguing that the search violated the Fourth Amendment.

Based upon the findings of fact above, the trial court concluded as a matter of law that because Kyle fled the scene of the accident and the officers did not know his identity:

> 4. . . . It was reasonable for [Trooper] Sanders to conclude that the vehicle may contain evidence of the true identity of the driver, the cause of the collision, and/or the reason for the driver fleeing the scene, and he therefore had probable cause to search the vehicle for that evidence. Furthermore, Trooper Sanders had probable cause to arrest "Kyle" on suspicion that he had unserved orders for his arrest. As a result, Trooper . . . Sanders had legal authority to search the vehicle and every place within the vehicle where any form of identification for Kyle Lytle could be found. Trooper . . . Sanders' subsequent search of the black and green Nike bag and the black box inside it were therefore constitutional searches. [2]
>
> 5. The discovery of what appeared to be methamphetamine and drug paraphernalia inside of the black and green Nike bag found in the passenger floorboard provided Trooper Sanders and Deputy Hicks with probable cause to arrest the defendant and search her pink backpack. The defendant had recently been an occupant of the vehicle wherein the contraband was discovered, and moreover she had recently occupied the seat near which it was found. Therefore there

2. We note that defendant correctly asserted that conclusion of law #4 contains both findings of fact and conclusions of law. However, even if the challenged portions were supported by competent evidence, this finding would not change our analysis.

> existed a fair probability that the controlled substances discovered were in the defendant's custody, care, or control, and also that the pink backpack she retained might contain further controlled substances or other paraphernalia.

After the trial court denied the motion to suppress, defendant's case came on for trial on 15 April 2019. A McDowell County jury found defendant guilty of trafficking in methamphetamine by possession and possession of methamphetamine with intent to manufacture, sell, or deliver. On 17 April 2019, defendant pleaded guilty to possession of methamphetamine, and pursuant to an agreement with the State, the possession of drug paraphernalia charge was dismissed. The trial court imposed a seventy to ninety-three month active sentence for trafficking in methamphetamine and a probationary sentence for the remaining convictions. Defendant timely appealed.

At the Court of Appeals, defendant argued in part that the trial court erred in concluding that the warrantless search was supported by probable cause. Nevertheless, the majority affirmed the trial court's denial of defendant's motion to suppress and found no error in additional issues which are not before us in this appeal. *State v. Julius*, 282 N.C. App. 189, 194 (2022). In affirming the trial court's order, the majority relied primarily on the search incident to arrest exception to the warrant requirement. *Id.* at 192. The Court of Appeals also opined that the "[o]fficers had reasonable suspicion to search the vehicle" and that "the officers were justified in searching the wrecked vehicle to get it out of the ditch for an inventory [search] or for officer safety." *Id.* at 193. However, the opinion below only mentions these exceptions to the warrant requirement in a cursory fashion.

The dissent in the Court of Appeals disagreed with the majority's conclusion, reasoning that "the evidence and argument presented to the trial court did not establish probable cause for the warrantless search" of the vehicle and the search incident to arrest exception did not apply because Kyle was not arrested. *Id.* at 195, 197–98 (Inman, J., dissenting). Additionally, the dissent maintained that because "the vehicle was in a ditch and inoperable," the justification behind the automobile exception to the warrant requirement was nullified. *Id.* at 199. Reasoning that the theories of officer safety, inventory search, and search for other people did not apply, as the State did not produce evidence to support any justification for the warrantless search, the dissent concluded that all of the evidence should have been excluded because the search and arrest of defendant stemmed from the initial illegal vehicle search.

Defendant appealed based upon the dissent in the Court of Appeals pursuant to N.C.G.S. § 7A-30. See N.C.G.S. § 7A-30(2) (2021).

II. Standard of Review

We review a trial court's order on a motion to suppress to determine "whether the trial court's underlying findings of fact are supported by competent evidence and whether those factual findings in turn support the trial court's ultimate conclusions of law." *State v. Parisi*, 372 N.C. 639, 649 (2019) (cleaned up). "Findings of fact not challenged on appeal 'are deemed to be supported by competent evidence and are binding on appeal.' " *State v. Tripp*, 381 N.C. 617, 625 (2022) (quoting *State v. Biber*, 365 N.C. 162, 168 (2011)). The trial court's "[c]onclusions of law are reviewed de novo." *Biber*, 365 N.C. at 168.

III. Analysis

The Fourth Amendment declares that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. "Searches conducted by governmental officials in the absence of a judicial warrant are presumptively unreasonable." *State v. Terrell*, 372 N.C. 657, 665 (2019) (cleaned up). However, because "the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

"When seeking to admit evidence discovered by way of a warrantless search in a criminal prosecution, the State bears the burden of establishing that the search falls under an exception to the warrant requirement." *Terrell*, 372 N.C. at 665 (cleaned up). It is "well established that the State bears the burden of proving the reasonableness of the warrantless search" and a court "cannot simply assume" that evidence exists when the State has not met its burden. *State v. Grady*, 372 N.C. 509, 543–44 (2019); *see also Doe v. Cooper*, 842 F.3d 833, 846 (4th Cir. 2016) ("[N]either anecdote, common sense, nor logic, in a vacuum, is sufficient to carry the State's burden of proof.").

Here, the Court of Appeals held that the search incident to arrest exception justified the warrantless search and merely noted without further explanation that the search still could have been justified as "an inventory [search] or for officer safety." *Julius*, 282 N.C. App. at 193. In contrast, the dissenting opinion stated that neither the search incident to arrest exception nor the automobile exception applied to the case at hand. *Id.* at 197–200 (Inman, J., dissenting in part and concurring in result only in part). We analyze these exceptions.

A. Search Incident to Lawful Arrest Exception

[1] When an individual is lawfully arrested, officers may search "the arrestee's person and the area within his immediate control" without first obtaining a warrant. *Arizona v. Gant*, 556 U.S. 332, 339 (2009) (cleaned up). This exception to the warrant requirement, known as a "search incident to a lawful arrest . . . derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Id.* at 338.

Likewise, law enforcement "may search a vehicle incident to a recent occupant's arrest," but "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 351. Vital to the proper application of this exception is the "possibility that an arrestee could reach into the area that law enforcement officers seek to search." *Id.* at 339. In fact, "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.*

This Court has recognized that "a search may be made before an actual arrest and still be justified as a search incident to arrest[ ] if . . . the arrest is made contemporaneously with the search." *State v. Brooks*, 337 N.C. 132, 145 (1994) (citing *Rawlings v. Kentucky*, 448 U.S. 98 (1980)). However, we agree with the Court of Appeals' previous holding that a search incident to arrest needs a lawful arrest to be valid. *See State v. Fisher*, 141 N.C. App. 448, 456 (2000) ("Because defendant was never arrested, the search of his vehicle was not justified as a search incident to a lawful arrest.").

In this case, the Court of Appeals' reasoning was based upon the search incident to lawful arrest exception, as applied in *State v. Wooten*, 34 N.C. App. 85 (1977). *Julius*, 282 N.C. App. at 192. In *Wooten*, the Court of Appeals held that:

> [W]here a search of a suspect's person occurs before instead of after formal arrest, such search can be equally justified as 'incident to the arrest' provided probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish the probable cause.

34 N.C. App. at 89. The *Wooten* Court reasoned that there was "no value in a rule which invalidates the search merely because it precedes actual

arrest" and that a search incident to arrest is permissible due to "the need for immediate action to protect the arresting officer from the use of weapons and to prevent destruction of evidence of the crime." *Id.* at 89–90.

While the reasoning in *Wooten* was correct, although perhaps more akin to inevitable discovery, the Court of Appeals' application of *Wooten* in the opinion below was not. The Court of Appeals appears to have reasoned that because probable cause existed such that Kyle *could* have been arrested, the search incident to lawful arrest exception was applicable. *Julius*, 282 N.C. App. at 192–93. However, in light of well-established case law, this holding was erroneous.

First, the justifications supporting the search incident to lawful arrest exception did not exist because Kyle was not "within reaching distance" of the vehicle which Trooper Sanders sought to search because he had fled the scene and posed no threat of entering the vehicle. *See Gant*, 556 U.S. at 351. Additionally, the State presented no evidence that the vehicle contained evidence of the crime of hit-and-run which would risk destruction by Kyle if not immediately seized. Therefore, it is not only imprudent but contrary to precedent to extend the search incident to lawful arrest exception to a situation in which the potential arrestee has fled the scene and cannot reach the vehicle.

Further, this Court has stated that a search may occur prior to the arrest of an individual only if the arrest "is made contemporaneously with the search." *Brooks*, 337 N.C. at 145. On the record before us, Deputy Hicks testified that "if I'm not mistaken, [Detective Taylor] took out a warrant for Joanna Julius and William Kyle Lytle." However, the State presented no evidence at the suppression hearing that Kyle was ever arrested, let alone arrested contemporaneously with the search of the vehicle. The fact that an arrest could have been made at a later time is not enough; to justify this exception an arrest must occur.

Moreover, but for the unlawful search of the vehicle, officers would not have had probable cause to search defendant's backpack nor to arrest her. *See Smith v. Ohio*, 494 U.S. 541 (1990). Here, defendant was a mere bystander amongst the witnesses at the scene. There was no evidence presented at the suppression hearing that the interior of the vehicle was accessible to defendant or that there were any safety concerns for the officers. *See Gant*, 556 U.S. at 351. Therefore, relying on defendant's arrest to justify this exception is equally unavailing, as the exception first requires a lawful arrest.

Thus, the search incident to lawful arrest exception is inapplicable to the case at hand.

B. Automobile Exception

Both the dissent below and defendant on appeal contend that the search here cannot be justified by the automobile exception to the warrant requirement. Specifically, defendant argues that the automobile exception applies only to the extent "the nature of the automobile creates an exigency making a warrant, otherwise required by the Fourth Amendment, impracticable."

Under the automobile exception, law enforcement may search a vehicle without a warrant "[w]hen the[ ] justifications for the automobile exception come into play" and law enforcement has "probable cause to do so." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (cleaned up). Essential to the existence and proper application of this exception are two basic principles: first, the "inherent mobility of motor vehicles," and second, the "decreased expectation of privacy" which an individual has in a motor vehicle due to the extensive regulations imposed on vehicles by the state. *State v. Isleib*, 319 N.C. 634, 637 (1987); *see also United States v. Ross*, 456 U.S. 798 (1982).

Mobility of the vehicle is a fundamental prerequisite to the application of the automobile exception. *See Collins*, 138 S. Ct. at 1669 ("The 'ready mobility' of vehicles served as the core justification for the automobile exception for many years."). This Court has opined that "the inherent mobility of the automobile is itself the exigency." *Isleib*, 319 N.C. at 639. Further, the Supreme Court of the United States has elaborated that it is "the ready mobility of the automobile" which distinguishes it from the higher degree of protection afforded to "stationary structures." *California v. Carney*, 471 U.S. 386, 390 (1985). It follows then that a valid application of the automobile exception requires that the vehicle must be in a condition in which ready use is possible.

In the present case, the testimony of the State's witnesses established that defendant's vehicle was immobile at the time of the search due to the accident, wholly negating the mobility requirement underlying the automobile exception.[3] The vehicle was "down in a ditch" and partially submerged in water, and both Trooper Sanders and Deputy Hicks testified that the vehicle could not have been driven from the scene. In fact, Deputy Hicks testified that he called a tow truck to remove the vehicle

3. Although not before us, we note that there may be a distinction between immobile and inoperable when reviewing automobile exception cases.

from the ditch. Thus, because the record demonstrates that the vehicle was immobile, an exigency did not exist and the automobile exception does not apply.

C. Other Exceptions to the Warrant Requirement

The Court of Appeals further suggested that the search of the vehicle may have been justified as "an inventory [search] or for officer safety," yet failed to elaborate on how these exceptions might be applicable given the State's evidence in the case. *Julius*, 282 N.C. App. at 193. For example, both Trooper Sanders and Deputy Hicks testified that their agencies had policies in place to inventory impounded vehicles, but there is no testimony that such a search was attempted or completed. In addition, even though a firearm was recovered, no testimony was elicited regarding officer safety concerns.

Although the evidence here aligns closely with several recognized exceptions to the warrant requirement, the State did not meet its burden because the evidence simply falls short in certain respects. Absent such evidence in the record demonstrating the existence of factors which would have justified the warrantless intrusion, the entry into the vehicle and subsequent search cannot be justified under Fourth Amendment jurisprudence.

D. Exclusionary Rule

[2] Defendant next argues that because the search violated the Fourth Amendment, the exclusionary rule requires suppression of the seized evidence.[4] We disagree that exclusion is mandated by the text of the Fourth Amendment or Supreme Court precedent.

Once a court determines that an illegal search has occurred, it must then analyze whether exclusion of the evidence seized is appropriate. *See Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Although courts have often reflexively suppressed evidence obtained in violation of the United States Constitution, "the government[s'] use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998). In fact, "whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question of whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983)).

4. Defendant did not argue that the search violated the North Carolina Constitution.

There is no express provision in the United States Constitution that demands evidence obtained in violation of the Fourth Amendment be excluded. *See Davis v. United States*, 564 U.S. 229, 236 (2011). To the contrary, the exclusionary "rule is prudential rather than constitutionally mandated." *Pa. Bd. of Prob. & Parole*, 524 U.S. at 363. Importantly, the Supreme Court of the United States has "rejected indiscriminate application of the rule," because suppression of evidence should "always be[ ] our last resort, not our first impulse." *Hudson*, 547 U.S. at 591 (cleaned up).

"[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence" by law enforcement. *Herring v. United States*, 555 U.S. 135, 144 (2009). The Supreme Court of the United States has emphasized that the exclusionary rule should only be applied in cases "where it results in appreciable deterrence" and where "the benefits of deterrence . . . outweigh the costs." *Id.* at 141 (cleaned up); *see also Hudson*, 547 U.S. at 591 ("[The exclusionary rule is] applicable only where its remedial objectives are thought most efficaciously served—that is, where its deterrence benefits outweigh its substantial social costs.").

In essence, this "cost-benefit analysis . . . [focuses on] the flagrancy of police misconduct," *Davis*, 564 U.S. at 238 (cleaned up), as "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it[,]" *Herring*, 555 U.S. at 144. Application of the exclusionary rule where there is no "corresponding societal or constitutional gain" only serves to "punish the public by impeding the truth-finding function" of the courts, thus "diminish[ing] the integrity of the judicial branch." *State v. Carter*, 322 N.C. 709, 729–30 (Mitchell, J., dissenting). Ultimately, "unless evidence was obtained by sufficiently deliberate and sufficiently culpable police misconduct, '[r]esort to the massive remedy of suppressing evidence of guilt is unjustified.' " *State v. Burch*, 2021 WI 68, ¶ 21, 398 Wis. 2d 1, 961 N.W.2d 314 (alteration in original) (quoting *Hudson*, 547 U.S. at 599), *cert. denied*, 142 S. Ct. 811 (2022).

Here, the search for evidence violated the Fourth Amendment. However, because suppression is "our last resort, not our first impulse[,]" *Hudson*, 547 U.S. at 591, the question is whether the exclusionary rule is the proper remedy for this particular violation. The trial court never reached the issue of whether exclusion of the evidence was appropriate, and if so, whether any exceptions to the exclusionary rule would be applicable, because it concluded that a valid search occurred. We therefore reverse the Court of Appeals and remand to the trial court to determine if the evidence should be suppressed pursuant to the exclusionary rule.

REVERSED AND REMANDED.

Justice RIGGS did not participate in the consideration or decision of this case.

Chief Justice NEWBY concurring in part and dissenting in part.

The Fourth Amendment protects against unreasonable searches and seizures. The touchstone of the analysis is reasonableness. Because the steps taken by the law enforcement officers were reasonable under all the circumstances, the search did not violate defendant's constitutional rights. The officer's warrantless search was based on probable cause that evidence needed to identify the driver of a car involved in the crime of a hit-and-run accident was located in the car. The search was justified by the exigent circumstances of immediately needing to identify the perpetrator of the crime who had told bystanders he was fleeing because he had outstanding warrants. Were I to conclude, however, that the search violated defendant's constitutional rights, I would agree with the majority's decision to remand the case to the trial court to determine whether exclusion of the evidence is appropriate. *See State v. Welch*, 316 N.C. 578, 587–89, 342 S.E.2d 789, 794–95 (1986) (concluding that the good faith exception was applicable and therefore "decline[d] to apply the exclusionary rule to [a] good-faith violation of the [F]ourth [A]mendment").

We glean the following facts from the trial court's uncontested oral and written findings. On 20 May 2018, Trooper Sanders and Deputy Hicks responded to a one-car accident and hit-and-run in McDowell County. Dispatch informed the officers that the driver reportedly fled the scene on foot. Upon arriving at the scene, the officers observed a silver Suzuki SUV partially submerged in a ditch, as well as property damage to the landscaping and premises at the accident scene. The officers began their investigation by speaking with defendant. Defendant, who was thirty-three years old at the time of the hit-and-run car accident, told Trooper Sanders that she was a passenger in the wrecked vehicle, which belonged to her parents. She said that she had allowed a person to drive the car, whom she knew only as Kyle, and that he fled on foot after the collision. Defendant, however, did not know Kyle's last name nor whether he had a driver's license or other forms of identification in the car. At this point, Trooper Sanders only knew the driver's alleged first name and did not have additional information to identify or locate the driver of the hit-and-run car accident.

The officers also spoke with two bystanders at the scene of the accident. The bystanders similarly identified the driver only as "Kyle" and described him with several physical characteristics. The bystanders informed the officers that the driver stated he had to leave the scene because he had multiple outstanding warrants for his arrest. The bystanders, however, also did not know Kyle's last name and could not provide additional information about the driver's identity or location.

Because defendant was uncertain as to whether the driver left identifying information in the car, Trooper Sanders subsequently searched it for anything that would help determine Kyle's identity. Upon entering the vehicle, Trooper Sanders discovered a black and green Nike bag in the front passenger seat of the vehicle. When asked, defendant stated the black and green Nike bag did not belong to her. He opened the bag looking for the driver's identification and saw a black box large enough to contain a driver's license. Upon opening the box, Trooper Sanders discovered two clear plastic bags containing a crystal-like substance that he believed to be methamphetamine. The black box also contained two cell phones and a set of scales. As a result of discovering the drugs and drug paraphernalia in the front passenger seat, the officers placed defendant in handcuffs and searched defendant's pink backpack located by her feet outside of the vehicle. The officers found several clear, plastic bags containing a crystal-like substance later confirmed to be methamphetamine, a pistol, a glass pipe, and cash inside the pink backpack. The officers notified defendant she was under arrest. Defendant was charged with trafficking methamphetamine by possession, trafficking methamphetamine by transportation, possession with intent to sell and deliver a Schedule II controlled substance, and possession of methamphetamine.

Arguing that the search of the vehicle and her pink backpack violated her constitutional rights, defendant filed a motion to suppress the evidence obtained as a result of the search. After a hearing on the motion, the trial court provided an oral ruling denying the motion to suppress and filed a written order on 17 April 2019 memorializing the oral ruling. As relevant to the vehicular search, the trial court determined in conclusion of law #4 that

> Trooper J.L. Sanders did not know . . . the true identity of the suspect, the cause of the collision, the extent of any damage caused by the collision, or the reason the alleged perpetrator had fled, if any. . . . It was reasonable for J.L. Sanders to conclude that the vehicle may contain evidence of the true identity of the driver, the cause of the collision, and/or the reason for the

> driver fleeing the scene, and he therefore had probable cause to search the vehicle for that evidence. Furthermore, Trooper Sanders had probable cause to arrest "Kyle" on suspicion that he had unserved orders for his arrest. As a result, Trooper J.L. Sanders had legal authority to search the vehicle and every place within the vehicle where any form of identification for Kyle Lytle could be found.

As relevant to the search of defendant's pink backpack, the trial court determined in conclusion of law #5 that

> [t]he discovery of what appeared to be methamphetamine and drug paraphernalia inside of the black and green Nike bag found in the passenger floorboard provided Trooper Sanders and Deputy Hicks with probable cause to arrest the defendant and search her pink backpack. The defendant had recently been an occupant of the vehicle wherein the contraband was discovered, and moreover she had recently occupied the seat near where it was found. Therefore there existed a fair probability that the controlled substances discovered were in the defendant's custody, care, or control, and also that the pink backpack she retained might contain further controlled substances or other paraphernalia.

At trial, defendant was found guilty of trafficking in methamphetamine by possession and possession of methamphetamine with the intent to manufacture, sell, or deliver. Defendant appealed.

On appeal, the Court of Appeals held the trial court properly denied defendant's motion to suppress. *State v. Julius*, 282 N.C. App. 189, 193, 869 S.E.2d 778, 782 (2022). The Court of Appeals explained that the officers "had reasonable suspicion to search the vehicle to verify" defendant's claims and "determine th[e] alleged driver's identity" because the driver's identification "may have reasonably been determined from looking inside the wrecked vehicle." *Id.* Additionally, according to the Court of Appeals, the officers were justified in searching the vehicle for an inventory or for officer safety. *Id.* As to the search of defendant's pink backpack, the Court of Appeals concluded that once the officers discovered the drugs and drug paraphernalia in the black and green Nike bag, the officers had probable cause to arrest defendant and were therefore justified in searching the pink backpack. *Id.* at 192–93, 869

S.E.2d at 781–82; *see State v. Wooten*, 34 N.C. App. 85, 89–90, 237 S.E.2d 301, 305 (1977).

The dissenting judge at the Court of Appeals, however, contended that the evidence "did not establish probable cause for the warrantless search" of the vehicle and that the officers were not justified in searching the vehicle without a warrant. *Julius*, 282 N.C. App. at 195, 869 S.E.2d at 783 (Inman, J., dissenting in part and concurring in result only in part). Accordingly, the dissenting judge would have held that "[b]ecause the probable cause to arrest [d]efendant and search her pink backpack arose only from the illegal search of the vehicle, the evidence seized from [d]efendant's backpack also should have been excluded . . . ." *Id.* at 199–200, 869 S.E.2d at 786. Defendant appealed to this Court based on the dissent in the Court of Appeals. *See* N.C.G.S. § 7A-30(2) (2021).

The issue here is whether the trial court erred in denying defendant's motion to suppress evidence found during a search of the vehicle and defendant's pink backpack. This Court reviews a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Malone*, 373 N.C. 134, 145, 833 S.E.2d 779, 786 (2019) (quoting *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011)). The trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Id.* (quoting *State v. Saldierna*, 371 N.C. 407, 421, 817 S.E.2d 174, 183 (2018)). The trial court's conclusions of law are reviewed de novo.[1] *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (citing *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993)).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. U.S. Const. amend. IV. The Fourth Amendment prohibits only unreasonable searches. *State v. Hilton*, 378 N.C. 692, 700, 862 S.E.2d 806, 812 (2021). To be constitutionally compliant, generally an officer needs a warrant to search. The Supreme Court of the United States and this Court, however, have recognized exceptions to the warrant requirement where there is probable cause and exigent circumstances. *See Welch*, 316 N.C. at 585, 342 S.E.2d at 793 ("[A] search warrant must be procured . . . unless

1. On appeal, defendant challenges only the trial court's conclusion of law #4 as being unsupported by the evidence and contends conclusion of law #4 includes both findings of fact and conclusions of law. To the extent conclusion of law #4 includes findings of fact, there is substantial evidence to support the findings of fact. The conclusions of law are addressed further herein.

probable cause and exigent circumstances exist that would justify a warrantless search.").

" '[T]he exigencies of the situation' [may] make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. 452, 460, 131 S. Ct. 1849, 1856 (2011) (third alternation in original) (quoting *Mincey v. Arizona*, 437 U.S. 385, 394, 98 S. Ct. 2408, 2414 (1978)). The exigent circumstances exception enables law enforcement officers to act quickly in order to handle "situations presenting a compelling need for [swift] official action and no time to secure a warrant." *Lange v. California*, 141 S. Ct. 2011, 2017 (2021) (internal quotations omitted). "Such exigencies [may] include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2022) (citing *King*, 563 U.S. at 460, 131 S. Ct. at 1856); *see Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943 (2006) (preventing the destruction of evidence); *United States v. Santana*, 427 U.S. 38, 42, 43, 96 S. Ct. 2406, 2409, 2410 (1976) (engaging in hot pursuit of a fleeing suspect). "In those circumstances, the delay required to obtain a warrant would bring about 'some real immediate and serious consequences'—and so the absence of a warrant is excused." *Lange*, 141 S. Ct. at 2017 (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 751, 104 S. Ct. 2091, 2098 (1984)).

"[W]e 'examin[e] the totality of the circumstances,' " including the location, nature, and purpose of the search, to determine whether a search based on exigent circumstances is reasonable within the meaning of the Fourth Amendment. *Samson v. California*, 547 U.S. 843, 848, 126 S. Ct. 2193, 2197 (2006) (second alteration in original) (quoting *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 591 (2001)). "[T]he fact-specific nature of the reasonableness inquiry," *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 421 (1996), requires that we evaluate each case based on "the facts and circumstances of the particular case" from the perspective of an objective, reasonable officer, *Missouri v. McNeely*, 569 U.S. 141, 150–51, 158, 133 S. Ct. 1552, 1559–60, 1564 (2013) (recognizing that a "case-by-case approach is hardly unique within . . . Fourth Amendment jurisprudence"). We look at the circumstances through the eyes of an objectively reasonable officer, not the subjective views of a specific officer. *Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661–62 (1996). Additionally, the location of the search is significant as individuals generally have a "decreased expectation of privacy" in automobiles. *State v. Isleib*, 319 N.C. 634, 637, 356 S.E.2d 573, 576 (1987).

In evaluating the reasonableness of a search, we examine whether the law enforcement officers acted with probable cause at each step of the investigation. The existence of probable cause is a "commonsense, practical question" that should be answered using a "totality-of-the-circumstances approach." *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 2328 (1983). Probable cause requires a "reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971) (quoting 5 Am. Jur. 2d *Arrests* § 44 (1962)). Probable cause to search exists when an objective officer would reasonably believe that a search would reveal information which would aid in the investigation. *United States v. Ross*, 456 U.S. 798, 824, 102 S. Ct. 2157, 2172 (1982). Thus, an objectively reasonable officer may search a vehicle without a warrant when the exigencies of the specific circumstances present a compelling need for swift official action, and the officer has "probable cause to believe that incriminating evidence will be found within." *Payton v. New York*, 445 U.S. 573, 587–88, 100 S. Ct. 1371, 1381 (1980). In conducting this inquiry, we are bound by the trial court's unchallenged findings of fact.

Here the steps taken by the law enforcement officers were reasonable under all of the objective circumstances, and each step of the officers' investigation was supported by probable cause. First, the officer's search of the vehicle for the driver's identification was reasonable and supported by probable cause. The trial court found that the officers responded to a vehicular accident in which dispatch informed them that the driver may have fled the scene. Upon arriving at the scene, the officers observed a vehicle partially submerged in a ditch and property damage to the surrounding premises. The officers then confirmed that there had been a hit-and-run and were told that defendant loaned her parents' car to an unknown person, identified only as "Kyle." Based on the objective circumstances, it was reasonable for the officers to seek to fully identify the unknown, fleeing suspect allegedly responsible for the hit-and-run car accident as a person's identity is relevant information regarding the criminal violation. The search was of a vehicle, to which there is less constitutional protection. Defendant informed the officers that she did not know if information to identify the driver remained in the car.

The officers learned only minimal identifying information from the bystanders and defendant. Specifically, the trial court found that the bystanders and defendant told the officers that the driver of the vehicle fled but provided the officers only with the driver's alleged first

name and several physical characteristics. The bystanders and defendant could not provide a complete physical description of the driver or provide the driver's last name. They could not tell the officers where the driver fled. In addition, and significantly, the officers learned that the unknown suspect fled the scene because he had multiple, active warrants for his arrest. The officers, however, did not know the nature of the driver's outstanding warrants. Accordingly, the officers could not assess the potential danger that the unknown suspect presented to the surrounding community. These circumstances presented a compelling need for the officers to act quickly in order to determine Kyle's true identity and assess the potential threat that he presented. The officers therefore had probable cause to arrest Kyle for the hit-and-run car accident and, if verified, the outstanding warrants.

Thus, the officers were presented with an unusual set of circumstances in which they had little information about the identity, location, and potential threat posed by the fleeing driver of the wrecked vehicle. Moreover, defendant did not know whether information to identify "Kyle" was located in the vehicle. Without additional information from the bystanders and defendant, it was reasonable for the officers to conclude that information existed in the vehicle that would identify "Kyle."[2] Therefore, because the officers developed probable cause to arrest Kyle for the hit-and-run car accident and the outstanding warrants, and because the officers had probable cause to believe evidence of Kyle's identity may reasonably be located in the car, the officers had probable cause to search the car for the alleged driver's identification.[3]

The totality of the circumstances reveals the exigencies justifying the officer's warrantless search of the car. First, the officers had probable cause to arrest Kyle as the hit-and-run driver. The officers also knew Kyle was in the neighborhood and learned that Kyle had outstanding warrants, but the officers did not know the nature of Kyle's active warrants. Furthermore, the officers had probable cause to believe that information to identify the driver remained in the car. Also, the location of

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2. The officers' ultimate identification of "Kyle" did not occur until after the officers had been at the scene for some time, attempted to learn the driver's full identity from the bystanders and defendant, and had already searched the car.

3. Not only did the officers have probable cause to search the car for information that would aid the officers in quickly identifying and locating the unknown suspect, but the evidence also indicates that defendant did not object when Trooper Sanders informed defendant that he was going to search the car for such information. Therefore, an objective officer may reasonably conclude that defendant impliedly consented to the search of the car.

the search was significant as a car has less protection from governmental intrusion than other places. If the officers left the car at the scene of the hit-and-run accident, it was reasonable to believe the driver's identifying information could be removed or destroyed. Thus, an objective officer would reasonably conclude that an immediate search was necessary to prevent the destruction of information that could lead to Kyle's identification. Given the exigencies, an immediate search of the vehicle could aid the officers in promptly identifying and locating the suspect and in quickly assessing any immediate threat that he posed to the community. Taken together, these facts created exigent circumstances justifying the officer's warrantless search of the car. *See Carpenter*, 138 S. Ct. at 2223 (noting three exigencies—the need to pursue a fleeing suspect, to protect individuals who are threatened with imminent harm, and to prevent the imminent destruction of evidence—that may justify a warrantless search).

Next, the officers acted reasonably and with probable cause in searching the black and green Nike bag.[4] Based on the probable cause to search the vehicle and the exigencies, Trooper Sanders located a black and green Nike bag in the front, passenger area of the vehicle while looking for the driver's identification. Trooper Sanders had probable cause to believe the Nike bag may contain information that would aid the officers in identifying the driver. As a result, Trooper Sanders searched the Nike bag, found a black box large enough to contain a driver's license in the bag, and upon opening the black box, discovered the illegal drugs and drug paraphernalia.

Finally, upon discovering the contraband in the Nike bag, the officers developed probable cause to arrest defendant for possession of the contraband in the car. Because the officers found the Nike bag in the passenger area where defendant was sitting, they had probable cause to believe defendant and Kyle were together involved with the drugs. Further, they had probable cause to believe defendant may be in possession of additional contraband. The officers therefore had probable cause to search defendant's pink backpack for additional contraband based on

4. "[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S. Ct. 469, 472 (1998). Defendant testified that Kyle brought the black and green Nike bag to the car with him and that he placed it in the vehicle. Defendant explained that she did not touch or open the bag while it was in the car. Based on defendant's testimony, it appears defendant did not have a reasonable expectation of privacy in the Nike bag justifying her challenge to the search of the bag.

the discovery of the contraband in the vehicle. Any uncertainty as to the timing of defendant's arrest and search of the pink backpack—namely, whether the arrest occurred before or after the officers searched the pink backpack—is thus immaterial here because the officers developed probable cause to arrest defendant and search her pink backpack based on the contraband discovered in the vehicle. *See Wooten*, 34 N.C. App. at 89–90, 237 S.E.2d at 305 ("[W]here a search of a suspect's person occurs before instead of after formal arrest, such search can be equally justified as 'incident to the arrest' provided probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish the probable cause. . . . [W]e see no value in a rule which invalidates the search merely because it precedes actual arrest.").

The primary command of the Fourth Amendment is that law enforcement officers act reasonably. Because the officers here acted reasonably during each step of the search, defendant's constitutional rights were not violated. Nonetheless, were I to find that the search violated defendant's constitutional rights, I would agree with the majority's decision to remand to the trial court to determine whether exclusion of the evidence is appropriate and, if so, whether any exceptions to the exclusionary rule apply. Notably, since 1986, we have recognized the good faith exception is applicable to violations of the Fourth Amendment. *Welch*, 316 N.C. at 587–89, 342 S.E.2d at 794–95. Thus, I respectfully concur in part and dissent in part.

STATE v. PICKENS

[385 N.C. 351 (2023)]

STATE OF NORTH CAROLINA
v.
TROY LOGAN PICKENS

No. 276A22

Filed 20 October 2023

1. Evidence—other crimes, wrongs, or acts—prior sexual assaults of a child—similarity to charged sexual offenses against another child

In a prosecution for statutory rape and other sexual offenses inflicted upon an eleven-year-old girl, the trial court properly admitted testimony under Evidence Rule 404(b) of defendant's prior sexual assaults of a different, fourteen-year-old girl, where the prior assaults were sufficiently similar to the charged crimes in that (1) both girls were middle-school-aged children attending schools where defendant taught, (2) defendant used his position as a middle school teacher to gain access to both girls, (3) defendant exerted control over both girls during the assaults despite their protests and tears, (4) defendant either engaged in or tried to engage in vaginal intercourse with both girls, (5) each assault took place during school hours or during school-related activities, (6) defendant only removed his pants and underwear halfway during each assault, and (7) defendant threatened both girls after assaulting them.

2. Sentencing—presumption of regularity—consideration of improper factors—defendant's exercise of right to demand jury trial

After defendant was convicted of first-degree statutory rape and first-degree statutory sexual offense with a child, defendant's sentences were upheld on appeal where it could not be clearly inferred from the court's statements at sentencing that, in deciding to impose consecutive sentences, the court had improperly considered defendant's exercise of his constitutional right to demand a trial by jury; thus, the presumption of regularity afforded to sentences within statutory limits was not overcome in this case. Specifically, the court stated that "[the victims] didn't have a choice and you, [defendant], had a choice," but when viewed in context, the statement gave rise to two equally reasonable inferences: that the court was referring to defendant's choice to plead not guilty and to demand a jury trial, or that the court was referencing defendant's choice to commit egregious sexual crimes against children.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 284 N.C. App. 712 (2022), finding no error in part and vacating in part judgments entered on 1 November 2019 by Judge Carl R. Fox in Superior Court, Wake County, and remanding the case for resentencing. On 13 December 2022, the Supreme Court allowed the State's petition for discretionary review. Heard in the Supreme Court on 12 September 2023.

Joshua H. Stein, Attorney General, by Sherri Horner Lawrence, Special Deputy Attorney General, for the State-appellee.

Michael E. Casterline for defendant-appellant.

EARLS, Justice.

This case involves Troy Logan Pickens, a former chorus teacher at Durant Middle School, and his convictions for first-degree rape and first-degree statutory sexual offense with a child, Ellen,[1] a Durant Middle School student. While this trial involved defendant's assaults on Ellen, the first question before this Court is whether evidence of Pickens's alleged rape of another student, Kathleen,[2] was properly admitted at trial pursuant to Rule 404(b) of the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 404(b) (2021). The second issue this Court must address is whether the trial court improperly considered Pickens's decision to exercise his constitutional right to a jury trial when it imposed consecutive sentences. We find that the trial court properly admitted Kathleen's Rule 404(b) testimony and that the trial court did not improperly consider Pickens's choice not to plead guilty and exercise his right to a jury trial in sentencing Pickens.

I. Procedural History

Pickens was indicted for one count of first-degree statutory rape of a child by an adult offender and two counts of first-degree statutory sexual offense with a child by an adult offender. These cases were tried during the 21 October 2019 criminal session of Superior Court, Wake County. Before the trial began, Pickens filed a motion in limine to exclude evidence of the offense involving Kathleen pursuant

1. This is a pseudonym used to protect the identity of the minor victim in this case.

2. This is a pseudonym used to protect the identity of the minor Rule 404(b) witness in this case.

to Rule 404(b) of the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 404(b). This motion was denied, and the jury found Pickens guilty of all charges. Pickens was sentenced to three consecutive active sentences of 300 to 420 months in prison. Pickens entered notice of appeal.

On appeal, the Court of Appeals determined Kathleen's Rule 404(b) testimony had been properly admitted. *State v. Pickens*, 284 N.C. App. 712, 719 (2022). Judge Murphy dissented on this issue, *see id.* at 722–35 (Murphy, J., dissenting), and Pickens filed a Notice of Appeal with our Court on 2 September 2022. On the sentencing issue, the Court of Appeals found the trial court improperly considered Pickens's exercise of his constitutional right to a jury trial during sentencing. *Id.* at 722 (majority opinion). The State filed a petition for discretionary review on this issue, which our Court allowed on 13 December 2022.

II. Background

Ellen was born in 2004 and lived with her parents and brother in Raleigh, North Carolina. She enjoyed playing soccer, riding bikes with her family and friends, participating in gymnastics, and singing in the church choir. In 2012, when Ellen was eight years old and in the third grade, her teachers began noticing she had difficulty focusing in class. This prompted her parents to consult a neuropsychiatrist, Dr. Jordana Werner, who ultimately diagnosed Ellen with attention-deficit/hyperactivity disorder (ADHD), inattentive type, with features of anxiety. Ellen was prescribed methylphenidate, a form of liquid Ritalin, as treatment.

In October 2014, after Dr. Werner moved out of state, Ellen began seeing Katherine Myers, a psychiatric physician assistant (PA), every three months. PA Myers testified that during that time, Ellen experienced anxiety about beginning middle school, which manifested as physical symptoms in the form of stomachaches and headaches. And while Ellen preferred eating some types of foods over others, she "didn't have problems with the act of eating." To treat Ellen's anxiety, PA Myers prescribed an antidepressant, Lexapro, which is commonly used to treat anxiety and depression. According to PA Myers, Ellen appeared to be doing "very well" at her follow-up appointment in February 2015, as "[s]he was much less anxious[,] . . . was going to other people's houses[, and] . . . wasn't as scared." PA Myers's testimony regarding Ellen's subsequent follow-up appointment in June 2015 was similar, and PA Myers explained Ellen was adjusting to her medication well, without any reported side effects. Furthermore, while Ellen still had some anxiety about starting middle school, PA Myers did not consider this abnormal, and Ellen's anxiety subsided shortly after classes began.

In July 2015, at age eleven, Ellen began attending Durant Middle School. The school nurse administered Ellen's daily dose of Ritalin around 12:00 p.m. or 12:10 p.m., while other students were in class. This required Ellen to walk down the sixth-grade hallway alone. From 15 August 2015 to 14 September 2015, Pickens, a Durant Middle School chorus teacher, had a planning period from 12:15 p.m. to 1:00 p.m. This meant that Pickens was not teaching class around the time Ellen left her classroom and walked to the school nurse's office.

Soon after Ellen's anxiety about starting school subsided, her mother noticed a change in Ellen's behavior. Ellen began withdrawing from her neighborhood friends, her eating decreased, she stopped wanting to play outside, and she asked not to attend soccer practice. She began texting her mother around 11:30 a.m., just before she was scheduled to leave her classroom to receive her daily dose of Ritalin, asking that her mother pick her up from school. In her texts, Ellen would provide different reasons for wanting her mother to pick her up. She would say her "tummy hurts" or that she was "really tired." In addition to asking to leave school frequently, Ellen also pleaded with her mother, "Please don't make me go to school. Please don't make me go to school. I don't want to go to school."

Ellen testified that she first met Pickens in the sixth-grade hallway, approximately one to two months after school began, while she was on her way to receive or on the way back from receiving her Ritalin from the school nurse. There was no one else in the hallway at the time. Ellen stated that Pickens motioned to her with his hand, gesturing for her to "come over" to him. When Ellen asked what Pickens needed, he responded, "I need you to be quiet." Pickens then grabbed the back of Ellen's shirt and took her into the largest stall in the sixth-grade bathroom, where he sexually assaulted her. This incident lasted approximately five minutes. Ellen did not report this incident because Pickens had threatened to hurt her or her family if she told anyone. Because Ellen was afraid Pickens would "do it again," she did not want to return to school.

Ellen's next encounter with Pickens was "worse than the first time." He grabbed the back of her shirt and her ponytail and took her back into the same bathroom stall where he had assaulted her previously. This time he raped her. While the encounter lasted only "[a] couple minutes," Ellen testified that "it felt . . . like[ ] forever." She also testified that she cried during the assault. Ellen did not tell anyone what happened but asked her parents to keep her home from school.

Regarding Ellen's third encounter with Pickens, she reported that the "[s]ame first sequence" of events occurred and Pickens again raped

her. However, this time Pickens also asked Ellen to defecate in the toilet and pick up the feces. Ellen testified that she "didn't want to touch [the feces]" but complied because Pickens had threatened her and her family. Pickens took the feces from Ellen and put it in her mouth, which caused Ellen to gag repeatedly. The feces was then smeared on the wall of the bathroom stall. According to Ellen's testimony, Pickens assaulted her in a similar manner almost every other day when she left class to take her medication. Some of Pickens's assaults also involved forcing Ellen to perform fellatio.

Glenn Moss, the former head custodian at Durant Middle School, testified that in August or September 2015, he noticed feces was being smeared on the wall of the largest bathroom stall in the sixth-grade girl's bathroom. This was the same bathroom stall where Ellen reported Pickens's assaults took place. Moss reported the smeared feces to the school administration, and in September 2015, Nancy Allen, the Durant Middle School principal, questioned Ellen about the smeared feces. Ellen denied smearing the feces on the bathroom wall and began to cry. Principal Allen spoke with Ellen's parents and explained that Ellen must receive a mental health evaluation before returning to school.

Around this time, Ellen exhibited even more troubled behavior. As mentioned above, Ellen withdrew from her friends and refused to go to school. She also followed her mother everywhere, began sleeping with her mother each night, experienced flashbacks of her trauma, and began exhibiting disordered eating. As a result, Ellen experienced significant weight loss, so much so that her ribs and other bones were visible. Ellen was diagnosed with avoidant restrictive food intake disorder (ARFID), which involves a fear of eating, such as vomiting or choking, that is unrelated to weight gain. Ultimately, Ellen required inpatient psychiatric treatment, and due to her ARFID and resulting weight loss causing her to be below normal weight, it was necessary for her physicians to insert a feeding tube for proper nutrition.

In April 2017, Ellen disclosed to her mother that Pickens had hurt her. While she did not disclose the full extent of the sexual conduct Pickens forced her to engage in, she did disclose that Pickens had touched her inappropriately.

III. Standard of Review

This Court's review of whether Rule 404(b) evidence is properly admitted is a question of law and is reviewed de novo on appeal. *State v. Beckelheimer*, 366 N.C. 127, 130 (2012).

IV. Rule 404(b) of the North Carolina Rules of Evidence

[1] Under Rule 404(b) of the North Carolina Rules of Evidence, "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." N.C.G.S. § 8C-1, Rule 404(a) (2021). There is a good reason for this. Namely, if a jury chooses to convict a defendant, then that conviction must be based on the evidence before the jury, not the jury's view of the defendant's character. In other words, a jury must convict a defendant because the State has met its burden to show that the defendant committed the alleged offense beyond a reasonable doubt, not because the jury believes the defendant may have committed similar crimes. *See* N.C.P.I.—Crim. 101.10 (Burden of Proof and Reasonable Doubt).

While evidence of a defendant's character is not admissible to prove he "acted in conformity therewith," N.C.G.S. § 8C-1, Rule 404(a), "[e]vidence of other crimes, wrongs, or acts . . . may, however, be admissible [to prove] motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident," N.C.G.S. § 8C-1, Rule 404(b). Thus, Rule 404(b) has been characterized as a rule of inclusion, and evidence of prior bad acts is admissible unless the only reason that the evidence is introduced is to show the defendant's propensity for committing a crime like the act charged. *State v. Coffey*, 326 N.C. 268, 278–79 (1990). However, "Rule 404(b) is still constrained by the requirements of similarity and temporal proximity." *Beckelheimer*, 366 N.C. at 131 (cleaned up). To be admissible, prior bad acts do not need to "rise to the level of the unique and bizarre" and instead will be considered sufficiently similar and admissible "if there are some unusual facts present in both crimes that would indicate that the same person committed them." *Id.* (cleaned up).

A. Kathleen's Rule 404(b) Testimony

At trial, Kathleen testified that she met Pickens when she was in seventh grade at Neal Middle School in Durham, North Carolina. Pickens was Kathleen's chorus teacher. One day, while Kathleen was leaving class Pickens put his hands on Kathleen's waist and touched her bottom. This occurred while other students were present, and it made Kathleen so uncomfortable that she ran out of the classroom.

When Kathleen was in eighth grade, Pickens asked Kathleen to participate in a singing and dancing performance called Evening of Entertainment, which was held at Riverside High School. When Kathleen declined to participate, Pickens called Kathleen's mother and received

her consent. The practices for this event were held at Riverside High School, and Pickens drove Kathleen to each practice.

Kathleen turned fourteen on 1 February 2015. The following day, Pickens drove Kathleen to practice but stopped at his apartment to change his clothes. Kathleen initially stated she would wait for Pickens in the car, but Pickens said she "should come up" and Kathleen complied. When Kathleen arrived in Pickens's apartment, she sat on the couch and watched the cartoon "Teen Titans Go!" while Pickens made sandwiches for himself and Kathleen. After eating the sandwich and putting the dishes in the sink, Pickens returned to the couch, sat down next to Kathleen, and began to touch her left thigh. Kathleen moved Pickens's hand and "asked him not to do that." However, Pickens continued to touch Kathleen's leg, pulled her up by her arm, and took her into his bedroom. Kathleen testified that while she tried to pull away from Pickens, she was 5'2" and 100 pounds at the time and was unable to get away from him. Pickens threw Kathleen onto his bed and forced her pants and underwear off completely. Pickens pulled his pants halfway down and vaginally raped Kathleen. During the rape, Kathleen reported crying and asking Pickens to stop and to move away from her. But Pickens refused to stop. Afterwards, Pickens apologized to Kathleen and threatened her, stating that if she told anyone, he would rape her again.

In 2016, when Kathleen was in tenth grade, she was asked to write about an incident that changed her life. There, for the first time, she described what Pickens had done to her. After reading the paper, Kathleen's teacher reported the incident, and Kathleen spoke with law enforcement about what had occurred.

B. Application of Rule 404(b) to Kathleen's Testimony

The State contends that Kathleen's Rule 404(b) testimony was offered for proper reasons: to prove Pickens's intent, motive, plan, and design to sexually assault middle school students from schools where he was a teacher. In support, the State shows that Pickens used his position as a teacher at Durant Middle School and Neal Middle School to gain access to both Ellen and Kathleen. Moreover, both of Pickens's victims were middle school students at a school where Pickens was employed. Ellen's and Kathleen's assaults also both happened during school-related activities or school hours. In Ellen's case, she was either on her way to receive medication from the school nurse or on her way back to class when the assaults occurred. For Kathleen, although Pickens's alleged rape of her occurred off the school campus and in Pickens's apartment, the State contends that Pickens committed the assault while acting in

his official capacity as a teacher as he was taking Kathleen to an after-school activity.

Furthermore, some of the assaults happened during school hours: namely, the sexual conduct Ellen described, which took place exclusively in the school bathroom, and Pickens's touching of Kathleen on her waist and bottom in the classroom. The State also notes that even though Pickens only engaged in vaginal intercourse with Kathleen, he attempted to do the same with Ellen but was unable to do so because of her small size. Only then did Pickens resort to anal intercourse and fellatio with Ellen.

According to the State, Pickens also asserted control over both Ellen and Kathleen through his position as a teacher. In Kathleen's case, (1) Pickens insisted she come up to his apartment despite Kathleen having stated she would wait in the car; (2) Pickens touched Kathleen's thigh even though she asked him to stop; (3) Pickens physically pulled Kathleen into his bedroom, threw her down on his bed, and raped her; (4) Pickens removed Kathleen's pants and underwear; and (5) Pickens continued to rape Kathleen despite her crying and asking him to stop. In Ellen's case, Pickens (1) physically pulled Ellen into the bathroom; (2) continued to sexually assault Ellen despite her tears; and (3) directed Ellen to remove her pants and underwear. Moreover, the State asserts that in both Ellen's and Kathleen's assaults, Pickens only removed his pants and underwear halfway down. Additionally, he threatened both girls after the assaults occurred. Accordingly, the State contends that Kathleen's Rule 404(b) testimony meets the required standard and was properly admitted.

In response, Pickens argues that Kathleen's Rule 404(b) testimony was not sufficiently similar to be admissible. Namely, that there were "no unusual [distinguishing] similarities" between Ellen's and Kathleen's accounts. Pickens focuses on the differences between the victims and disparities in the incidents, noting that while Ellen was eleven years old, Kathleen was significantly older at fourteen years old. The girls had different physical builds in that Ellen was shorter than Kathleen by at least four inches, weighed thirty-five pounds less than Kathleen, and had not reached puberty at the time of the assault. Pickens also argues that his relationship with Kathleen was different from his relationship with Ellen, namely that Pickens knew Kathleen well because she had been in his class for two years, but the same was not true of Ellen who only attended the school where Pickens worked.

Furthermore, Pickens contends that the sex acts in Kathleen's case were substantially different from those Ellen described. This is because

Kathleen's rape took place outside of school, in Pickens's apartment, and only involved vaginal intercourse. But Ellen's assault occurred on the school campus, in the girls' restroom, and included attempted vaginal intercourse, anal intercourse, and fellatio. Importantly, Pickens argues that there are no common facts between Ellen's and Kathleen's sexual assaults except for those common in any case involving a sex offense by an adult against a child, and those facts cannot meet the admissibility standard required under Rule 404(b).

Our Rule 404(b) standard does not require identical or even near-identical circumstances between the charged offense and the prior bad act for evidence of the prior bad act to be admissible. *Beckelheimer*, 366 N.C. at 132. Instead, Rule 404(b) requires that the incidents share "some unusual facts that go to a purpose other than propensity for the evidence to be admissible." *Id.* (cleaned up). Here, as the State points out, the evidence was admitted to show an intent, motive, plan, and design to assault middle school students. The unique facts common to both victims include that: (1) the girls were middle-school-aged children attending schools where defendant taught; (2) defendant used his position as a middle school teacher to gain access to both victims; (3) defendant exerted control over both victims during the assaults despite their protests, tears and resistance; (4) defendant engaged in vaginal intercourse or tried to engage in vaginal intercourse with both victims; (5) defendant committed the offenses during school hours or during school-related activities; (6) defendant only removed his pants and underwear halfway during both assaults; and (7) defendant threatened the girls after the assaults were completed.

In *Beckelheimer*, this Court explained that the correct analysis for the admissibility of Rule 404(b) evidence involves focusing on the similarities and not the differences between the two incidents. *Id.* at 131–32. The same is true here. Because the similarities in this case are sufficient to show "some unusual facts present in both crimes that would indicate that the same person committed them," *id.* at 131 (cleaned up), Kathleen's Rule 404(b) testimony was properly admitted. The trial court did not err in admitting this evidence and the Court of Appeals was correct in concluding the same. Accordingly, we affirm the Court of Appeals' decision regarding the admissibility of Kathleen's Rule 404(b) testimony.

V. Sentencing

A. Standard of Review

"The general rule is that a judgment is presumed to be valid and will not be disturbed absent a showing that the trial judge abused

his discretion." *State v. Bright*, 301 N.C. 243, 261 (1980). "A decision entrusted to a trial judge's discretion may be reversed only if it is manifestly unsupported by reason or so arbitrary that it could not have been a reasoned decision." *State v. Brown*, 314 N.C. 588, 595 (1985) (cleaned up).

B. Consideration of Improper Factors During Sentencing

[2] When a sentence imposed by the trial court is within statutory limits it is "presumed regular and valid." *State v. Boone*, 293 N.C. 702, 712 (1977). However, the presumption of regularity is overcome "[i]f the record discloses that the court considered [an] irrelevant and improper matter in determining the severity of the sentence." *Id.* (citing *State v. Swinney*, 271 N.C. 130 (1967)).

Under Article I, Section 24 of the North Carolina Constitution, "[n]o person shall be convicted of any crime but by unanimous verdict of a jury in open court."[3] N.C. Const. art. I, § 24. "No other right of the individual has been so zealously guarded over the years and so deeply embedded in our system of jurisprudence as an accused's right to a jury trial." *Boone*, 293 N.C. at 712. Accordingly, "[t]his right ought not to be denied or abridged nor should the attempt to exercise this right impose upon the defendant an additional penalty or enlargement of his sentence." *Id.*; *see also State v. Cannon*, 326 N.C. 37, 39 (1990) ("A criminal defendant may not be punished at sentencing for exercising this constitutional right to trial by jury."). Thus, "[w]here it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant . . . insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result." *Id.*

C. Background

The trial court made the following statement before sentencing Pickens:

> To say the facts of this case are egregious is putting it mildly. The facts of this case are among the worst I've ever seen, and I've seen a lot of cases, thousands as a prosecutor, thousands as a judge. One of the things that one has to understand — I was thinking about

3. This right may be waived through procedures prescribed by the General Assembly and with the consent of a trial judge in cases where the State is not seeking a death sentence in superior court. N.C. Const. art. I, § 24. Additionally, "[t]he General Assembly may . . . provide for other means of trial for misdemeanors, with the right of appeal for trial de novo." *Id.*

> this earlier — is that children the age of 11, unless they are really in an [un]usual environment, have no idea about sex acts. They just don't. I mean, I'm sure — I've seen girls who were pregnant at that age, but they shouldn't have been, but were raped. They weren't consensual acts.
>
> The Legislature did something several years ago when they enacted this structured sentencing that I totally agreed with and I advocated for for ten years before they did it, and that was to make — send a clear message that there was a difference between a violent crime and crimes against — and nonviolent crimes, crimes against property, because the effect is totally different. I mean, just seeing these children testify in this case was just evidence to anyone who opened their eyes who had listened to it as to how damaged these children were by their experience. I don't — given the number of women out here in the world, I don't understand why some people choose underage girls, but it's wrong. It's morally wrong. It's legally wrong, and there's no justification for it.
>
> It would be difficult for an adult to come in here and testify in front of God and the country about what those two girls came in here and testified about. It would be embarrassing. It would be embarrassing to testify about consensual sex in front of a jury or a bunch of strangers. And in truth, they get traumatized again by being here, but it's absolutely necessary when a defendant pleads not guilty. They didn't have a choice and you, Mr. Pickens, had a choice.

Following these remarks, the trial court sentenced Pickens to a minimum of 300 months and a maximum of 420 months for each of the three charges the jury found him guilty of. Each sentence was ordered to run consecutively.

On appeal, the Court of Appeals determined that the trial court's statements to Pickens revealed that it had improperly considered Pickens's exercise of his constitutional right to a jury trial when imposing Pickens's sentence. Namely, the Court of Appeals explained that while a trial court may use its discretion to impose consecutive sentences, in this case, there was a "clear inference that a greater sentence

was imposed because Defendant did not plead guilty." *Pickens*, 284 N.C. App. at 722.

D. Mr. Pickens's Sentencing

The language at issue is the trial court's statement during sentencing that: "They didn't have a choice and you, Mr. Pickens, had a choice." Mr. Pickens argues that it can be reasonably inferred that these words referred to his decision to plead not guilty and to exercise his right to a jury trial. However, the State argues that the trial court's statement was not related to Pickens's choice to proceed with a jury trial but instead referred to his choice to commit egregious sexual assaults on Ellen and Kathleen against their will. The State supports its argument by highlighting the context in which the court's statement was made. Namely, that before using these particular words, the trial court was discussing Pickens's choice to sexually assault Ellen and Kathleen. Thus, according to the State, it can be reasonably inferred that in making the statement at issue, the trial court was referring to Pickens's decision to assault Ellen and Kathleen and not Pickens's decision to exercise his right to a jury trial. It is frequently difficult to prove intent in this context. We must be vigilant to protect the right to a jury trial and ensure that individuals who choose to assert that right are not punished for doing so. *See Boone*, 293 N.C. at 712 (providing that the right to a jury trial "ought not to be denied or abridged nor should the attempt to exercise this right impose upon the defendant an additional penalty or enlargement of his sentence").

Nevertheless, our precedents in *Boone*, 293 N.C. 702; *State v. Langford*, 319 N.C. 340 (1987); and *Cannon*, 326 N.C. 37, provide some guidance. In *Boone*, we determined that the trial court had improperly used the defendant's choice not to plead guilty against the defendant during sentencing. 293 N.C. at 712. There, in open court, the trial court "indicated that [it] would be compelled to give the defendant an active sentence due to the fact that the defendant had pleaded not guilty." *Id.* Similarly, in *Cannon*, this Court found that the trial court had violated each defendant's right to a jury trial. 326 N.C. at 40. There, after being "advised that defendants demanded a jury trial, the trial judge told counsel in no uncertain terms that if defendants were convicted he would give them the maximum sentence." *Id.* at 38. However, this case is not like *Boone* or *Cannon*. The trial court in Pickens's case did not explicitly state that it was giving Pickens a harsher sentence because he chose to exercise his right to a jury trial. *See Boone*, 293 N.C. at 712; *Cannon*, 326 N.C. at 38.

The Court of Appeals has also addressed this issue more recently in *State v. Hueto*, 195 N.C. App. 67 (2009), and *State v. Haymond*, 203 N.C. App. 151 (2010). The facts in both cases illustrate that the entire context of a trial judge's statements must be examined when determining whether a reasonable inference can be made that the court had improperly considered the defendant's decision not to plead guilty when sentencing him. *See Hueto*, 195 N.C. App. at 74–78 (examining pre-trial and post-verdict statements by the trial court); *Haymond*, 203 N.C. App. at 169–71 (considering statements relating to sentencing made at several hearings in the case).

Pickens's case is also not analogous to *Hueto* or *Haymond* because those cases involved pretrial and posttrial statements that referenced the defendant's sentencing, which when taken together and in conjunction with the sentence the trial court imposed, created an inference that the defendant's choice to go to trial was considered during sentencing. *See Hueto*, 195 N.C. App. at 78; *Haymond*, 203 N.C. App. at 171. In this case, the only statement at issue occurred during sentencing, and the parties have not asked this Court to consider any other statements made by the trial court.

In *Langford*, this Court determined that the trial court's statements did not show an intent to penalize the defendant for exercising his right to a jury trial. 319 N.C. at 346. The defendant argued that the following statement by the trial court showed the court sentenced him to a consecutive sentence because he chose not to plead guilty: "I'm aware that I could have avoided this trial had I been willing at the outset of the trial to commit myself to concurrent sentences." *Id.* This Court noted that while the defendant pointed to this statement "in isolation," the whole record did not evidence that a harsher penalty was imposed based on the defendant's choice to exercise his right to a jury trial. *Id.* Moreover, while the trial court's statement may have been "an unnecessary statement," it referenced nothing more than a "historical fact." *Id.* This was because the record showed that the "defendant was forced to plead not guilty and to proceed to trial [because] . . . the prosecutor and trial court refused to agree in advance to a concurrent sentence." *Id.* Accordingly, there was no indication that the trial court would have made the sentence concurrent had the defendant pleaded guilty. *Id.* In essence, all the record showed was that the trial court's statements reflected its refusal to decide whether the defendant's sentence would be concurrent or consecutive until it heard the evidence presented at trial. *Id.*

Langford is particularly instructive and stands for the proposition that the statement at issue cannot be reviewed in isolation but instead

must be considered with the remainder of the record. 319 N.C. at 346. Pickens points out that the trial court discussed "the act of the trial itself" and the victims' need to testify at trial immediately before stating, "They didn't have a choice and you, Mr. Pickens, had a choice." He contends this context means it can be inferred that during sentencing the trial court improperly considered his choice to plead not guilty. However, when the trial court's statement is reviewed alongside other portions of that same discussion, an equally reasonable inference could be drawn that the court was not referring to Pickens's exercise of his right to a jury trial and instead was referring to the egregious nature of Pickens's crimes and his decision to commit those crimes.

With the ambiguous statement capable of multiple interpretations, the "presumption of regularity" is not overcome, *Boone*, 293 N.C. at 712, and we conclude the trial court did not violate Pickens's constitutional right to a jury trial when it imposed Pickens's sentence or when it imposed consecutive sentences on Pickens. *See Cannon*, 326 N.C. at 39. Thus, we affirm the Court of Appeals' holding that the Rule 404(b) evidence of Pickens's assault on Kathleen was properly admitted and reverse the Court of Appeals' decision to vacate Pickens's sentence, resulting in a reinstatement of the original sentence imposed by the trial court.

AFFIRMED IN PART AND REVERSED IN PART.

TOWN OF MIDLAND, A NORTH CAROLINA MUNICIPAL CORPORATION
v.
TONEY L. HARRELL AND T.L. HARRELL'S LAND DEVELOPMENT COMPANY, INC., A NORTH CAROLINA BUSINESS CORPORATION

No. 120A22

Filed 20 October 2023

1. Jurisdiction—standing—development enforcement action—town—compliance with state law and ordinance

A town had standing to file its lawsuit for a mandatory injunction, abatement order, and collection of civil penalties from developers of a residential subdivision (who continued to violate a requirement under the town's development ordinance to maintain roads within the subdivision until the town accepted the roads for public maintenance) and did not deprive the trial court of subject matter jurisdiction where, although the town council did not pass a resolution approving of the complaint until after the complaint was filed, the council's approval was not required. The town's action complied with N.C.G.S. § 160A-12, which authorizes a town to enforce its powers "as provided by ordinance or resolution of the town council," and with its development ordinance, which authorized the town's zoning administrator to refer violators to the town's attorney for the filing of a civil action.

2. Appeal and Error—scope of appeal—enforcement of development ordinance—violation determined in prior appeal—binding

In the second appeal arising from a town's enforcement of its development ordinance—by filing a lawsuit for a mandatory injunction, abatement order, and collection of civil penalties from developers of a residential subdivision (defendants) who continued to violate a requirement under the ordinance to maintain roads within the subdivision until the town accepted the roads for public maintenance—the Court of Appeals correctly determined that it was bound by a different panel's earlier decision in the same case that defendants were responsible for the roads. Moreover, the question of defendants' ongoing responsibility was not before the current panel because defendants had not raised the issue in their brief.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 282 N.C. App. 354 (2022), affirming in part and reversing in part orders entered on 17 August 2020 and 18 December

2020 by Judge Martin B. McGee in the Superior Court, Cabarrus County, and remanding the case. Heard in the Supreme Court on 14 March 2023.

Anthony Fox, Daniel Peterson, and Jasmine Little for plaintiff-appellee Town of Midland.

Scarbrough, Scarbrough & Trilling, PLLC, by James E. Scarbrough and John F. Scarbrough, for defendants-appellants Toney L. Harrell and T.L. Harrell's Land Development Company, Inc.

ALLEN, Justice.

The primary issue in this case is whether the Town of Midland satisfied certain procedural requirements of state law and its own ordinances in filing a lawsuit against defendant developers over their failure to repair the streets in a subdivision located within the Town's corporate limits. We hold that the Town complied with the relevant provisions, and we therefore affirm the judgment of the Court of Appeals.

I. Background

Defendants Toney L. Harrell and T.L. Harrell's Land Development Company are the developers of Bethel Glen, a residential subdivision located inside the corporate boundaries of the Town of Midland. In an earlier round of litigation, defendants challenged a notice of violation (NOV) issued by the Town's zoning administrator on 18 March 2014. *Harrell v. Midland Bd. of Adjustment* (*Midland I*), 251 N.C. App. 526, 2016 N.C. App. LEXIS, at *8–9 (2016) (unpublished). The NOV alleged that the subdivision's streets were "in a state of continuous deterioration" that could "pose a potential threat to public safety." According to the NOV, the poor condition of the streets violated the requirement in the Midland Development Ordinance (MDO) that developers "*maintain streets until acceptance by adoption of a resolution accepting the street(s) for public maintenance.*"

Defendants sought review by the Town's board of adjustment, which upheld the NOV. *Id.* at *9. After an appeal to the Superior Court, Cabarrus County, resulted in an order affirming the board's decision, defendants took their case to the Court of Appeals. *Id.* On 30 December 2016, the Court of Appeals issued its opinion in *Midland I*, affirming the trial court's order and concluding that, because the Town had never assumed responsibility for the subdivision's roads, defendants remained under a "continuing responsibility to maintain [those] roads." *Id.* at *17,

*21. On 8 June 2017, this Court denied defendants' petition for discretionary review. *Harrell v. Midland Bd. of Adjustment*, 369 N.C. 751, 800 S.E.2d 418 (2017).

While defendants' appeal in *Midland I* was pending at the Court of Appeals, the Town's zoning administrator issued civil citations to defendants on 14 October 2016, 10 December 2016, and 11 December 2016 imposing civil penalties of $100.00, $300.00, and $500.00, respectively. Each citation alleged that the roads in Bethel Glen remained in need of repair and stated that each day's continuing violation of the MDO constituted "a separate and distinct offense." Thereafter, the zoning administrator issued defendants a civil citation with a $500.00 civil penalty every day from 12 December 2016 until 16 January 2017.

On 17 January 2017, the zoning administrator sent defendants a demand letter informing them that they owed civil penalties totaling $18,900.00. The letter threatened defendants with litigation unless they paid the civil penalties and brought the subdivision's roads into compliance with the MDO within thirty days. Defendants took no action in response to the letter, and the zoning administrator issued additional citations.

On 22 June 2017, the Town filed suit against defendants in the Superior Court, Cabarrus County, seeking a mandatory injunction and an order of abatement requiring defendants to repair the subdivision's roads. The complaint further requested that the court order defendants to pay the Town a total of $97,400.00 in civil penalties, "plus interest, costs and attorneys' fees as allowed by law." In calculating defendants' civil penalties, the Town added to the $18,900.00 allegedly due as of 17 January 2017 further penalties of $500.00 per day for each day between 17 January 2017 and 22 June 2017, the filing date of the action. The parties subsequently filed motions for summary judgment. Before the trial court ruled on the motions, defendants filed a motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. The motion to dismiss asserted that the trial court lacked subject matter jurisdiction because the Town Council had not voted to authorize the lawsuit against defendants. On 10 September 2019, the Town Council passed a resolution "retroactively approv[ing] and ratif[ying] the filing of the Complaint effective June 22, 2017."

In two orders dated 17 August 2020, the trial court denied defendants' summary judgment motion but granted the Town's summary judgment motion and entered a mandatory permanent injunction and an order of abatement that essentially directed defendants to bring the roads in the

Bethel Glen subdivision into compliance with standards promulgated by the North Carolina Department of Transportation. Defendants filed a notice of appeal to the Court of Appeals from those orders. They also filed a motion for relief with the trial court, again claiming that it lacked subject matter jurisdiction over the Town's complaint. The motion for relief further asserted that defendants were entitled to recover attorney's fees from the Town under N.C.G.S. § 6-21.7 because the Town had unlawfully continued to assess civil penalties while defendants' appeal in *Midland I* was pending.[1]

The trial court entered an order on 18 December 2020 denying the motion for relief and noting that the Town had agreed to dismiss all civil penalties assessed prior to this Court's 8 June 2017 denial of defendants' petition for discretionary review in *Midland I*. Defendants filed a notice of appeal from the trial court's order denying their motion for relief.

On 15 March 2022, a divided panel of the Court of Appeals affirmed "the trial court's entry of summary judgment in the Town's favor regarding civil penalties." *Town of Midland v. Harrell*, 282 N.C. App. 354, 370 (2022). The Court of Appeals majority rejected defendants' argument that the trial court lacked subject matter jurisdiction. Under the majority's reading of the MDO, the "Town Council was not required to adopt a resolution before the Town filed its complaint." *Id*. at 361–62.

The trial court's mandatory permanent injunction and abatement order did not survive appellate scrutiny, however. The Court of Appeals majority concluded that the order was not detailed enough to satisfy Rule 65(d) of the Rules of Civil Procedure, which requires "[e]very order granting an injunction . . . [to] be specific in terms" and to "describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained[.]" N.C. R. Civ. P. 65(d). The majority remanded the order to the trial court with instructions that it "make further findings of fact identifying the specific NCDOT standards that [defendants] ha[d] failed to meet and . . . provide a specific decree for repairs necessary to bring the roads into compliance." *Town of Midland*, 282 N.C. App. at 368.

Finally, the Court of Appeals majority reversed the trial court's denial of defendants' request for attorney's fees. The majority agreed

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1. In their motion for attorney's fees, defendants relied on the following language in N.C.G.S. § 6-21.7 (2020): "In any action in which a city or county is a party, upon a finding by the court that the city or county violated a statute or case law setting forth unambiguous limits on its authority, the court shall award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action. . . ."

with defendants that state law did not allow the Town to impose civil penalties while defendants' appeal of the NOV was pending.[2] *Id.* at 369. Although the Town later dismissed the penalties unlawfully assessed during that period, its action did "not relieve the Town of its liability [under N.C.G.S. § 6-21.7] for [defendants'] attorney's fees incurred contesting those penalties." *Id.* at 370. The majority therefore remanded the matter so that the trial court could "determine and make appropriate findings regarding what attorney's fees [defendants] reasonably incurred in challenging the civil penalties imposed during the pendency of their first appeal." *Id.*

The dissenting judge at the Court of Appeals would have held that the Town lacked standing to file its complaint against defendants because the Town Council did not adopt its resolution authorizing the lawsuit before the complaint was filed. *Id.* at 371, 376–77 (Tyson, J., concurring in part and dissenting in part). In reaching this conclusion, the dissenting judge noted that "subject matter jurisdiction is determined by 'the state of affairs existing at the time it is invoked.' " *Id.* at 376 (quoting *Shearon Farms Townhome Owners Ass'n II v. Shearon Farms Dev., LLC*, 272 N.C. App. 643, 655 (2020), *disc. rev. denied*, 377 N.C. 566 (2021)).

The dissenting judge agreed with the majority that the mandatory permanent injunction and abatement order did not satisfy Rule 65(d) and that the Town was liable for attorney's fees. *Id.* at 377–78, 380. He argued, though, that the Court of Appeals should reconsider whether defendants remained responsible for the roads in the Bethel Glen

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2. In reaching this conclusion, the majority relied on the version of N.C.G.S. § 160A-388(b1)(6) in effect during the pendency of defendants' appeal in *Midland I*: "An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from unless the official who made the decision certifies to the board of adjustment after notice of appeal has been filed that because of the facts stated in an affidavit, a stay would cause imminent peril to life or property or because the violation is transitory in nature, a stay would seriously interfere with enforcement of the ordinance." N.C.G.S. § 160A-388(b1)(6) (2017). The General Assembly subsequently repealed and recodified the provision as N.C.G.S. § 160D-405(f): "An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from and accrual of any fines assessed . . . ." An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111, § 2.4, 2019 N.C. Sess. Laws 424, 459 (Reg. Sess. 2020). This language was further amended by S.L. 2020-25, §10, 2020 N.C. Sess. Laws 152, 165 (2019) and S.L. 2022-62, §59(a), 2022 N.C. Sess. Laws. 72, 103–04 (Reg. Sess. 2022) and currently reads: "An appeal of a notice of violation or other enforcement order to the board of adjustment and any subsequent appeal in accordance with [N.C.]G.S. [§] 160D-1402 stays enforcement of the action appealed from and accrual of any fines assessed during the pendency of the appeal or during the pendency of any civil proceeding authorized by law or related appeal." N.C.G.S. § 160D-405(f) (2023).

subdivision. *See id.* at 379 ("The Town has collected *ad valorem* taxes from [defendants] and the property owners of Bethel Glen subdivision since bringing the subdivision into the Town's limits. The Town cannot now shirk its maintenance and repair obligations for normal wear and tear to the streets and shift them onto [defendants].").

On 19 April 2022, defendants filed a notice of appeal with this Court based on the dissent in the Court of Appeals. *See* N.C.G.S. § 7A-30(2) (2021) ("[A]n appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent when the Court of Appeals is sitting in a panel of three judges."). Because the dissenting judge agreed with the majority's decision to remand the mandatory permanent injunction and abatement order and the attorney's fees issue to the trial court, the only matters before us are (1) the trial court's subject matter jurisdiction over the Town's complaint and (2) defendants' continued responsibility for the roads in the Bethel Glen subdivision. *See* N.C. R. App. P. 16(b) ("When the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs . . . filed in the Supreme Court.").

II. Standard of Review

"Because standing is a question of law, we review the issue de novo." *Violette v. Town of Cornelius*, 283 N.C. App. 565, 569 (2022), *disc. rev. denied*, 384 N.C. 33 (2023). When reviewing a matter *de novo*, this Court "considers the matter anew and freely substitutes its own judgment" for that of the lower courts. *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647 (2003).

III. Analysis

In their principal brief to this Court, defendants contend that the trial court should have dismissed the Town's lawsuit for lack of standing. According to defendants, N.C.G.S. § 160A-12 required the Town Council to adopt a resolution authorizing the lawsuit *before* the Town filed the complaint against defendants. Defendants argue that, even if it were possible for the Town Council to delegate approval authority to the zoning administrator, the MDO contains no such delegation. They observe that the particular MDO provision under which the Town proceeded does not expressly authorize the zoning administrator to initiate civil actions. Defendants further argue that they should no longer bear responsibility for the roads in the Bethel Glen subdivision.

They allege that "the Town expressly agreed to take over maintenance of the roads once it had confirmation that the roads had been built to NCDOT standards [and t]he requested confirmation from NCDOT was provided to the Town in [a] district engineer's letter of April 25, 2006."

In arguing that it had standing to file suit against defendants, the Town points out that N.C.G.S. § 160A-12 allows a city council to act by ordinance *or* resolution. When viewed in context, the Town insists, the pertinent MDO provisions clearly did not require Town Council approval before the zoning administrator referred the matter of defendants' nonpayment of civil penalties to the Town's attorney for institution of a civil action. Additionally, because the Court of Appeals ruled in *Midland I* that defendants remained responsible for the roads in the Bethel Glen subdivision, the Town argues that defendants should be barred from raising that issue in this case.

A. The Town's Standing to File a Civil Action Against Defendants

[1] "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Am. Woodland Indus. v. Tolson*, 155 N.C. App. 624, 626 (2002). As we have explained elsewhere, "[t]he standing requirements articulated by this Court are not themselves mandated by the text of the North Carolina Constitution." *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 206 (2023). Rather, "[t]his Court has developed standing requirements out of a 'prudential self-restraint' that respects the separation of powers by narrowing the circumstances in which the judiciary will second guess the actions of the legislative and executive branches." *Id.* at 206–07 (quoting *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 599 (2021)).

If a plaintiff does not have standing to assert a claim for relief, the trial court lacks subject matter jurisdiction over the claim. *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 561 (2018). "[S]tanding is measured at the time the pleadings are filed." *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123 (2009). In other words, a plaintiff must have standing at the time of filing to have standing at all. Subsequent events cannot confer standing retroactively. *See Simeon v. Hardin*, 339 N.C. 358, 369 (1994) ("When standing is questioned, the proper inquiry is whether an actual controversy existed 'at the time the pleading . . . is filed.' " (quoting *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584 (1986))); *Sharpe*, 317 N.C. at 585 ("[T]he basic rule [is] that 'the jurisdiction of a court depends upon the state of affairs existing at the time it is invoked.' " (quoting *In re Peoples*, 296 N.C. 109, 144 (1978))).

In arguing that the Town lacked standing to file its complaint, both the dissent in the Court of Appeals and defendants emphasize that the Town Council did not adopt a resolution authorizing the action until two years *after* the complaint was filed. *Town of Midland*, 282 N.C. App. at 377 (Tyson, J., concurring in part and dissenting in part). According to them, the Town's failure to obtain the Town Council's approval prior to filing deprived the trial court of subject matter jurisdiction over the complaint. We disagree.

"In North Carolina there is no legal distinction between a *city*, a *town*, or a *village*. Each is a *municipality* . . . ." David M. Lawrence, *An Overview of Local Government*, *in County and Municipal Government in North Carolina* 5 (2d ed. 2014). Municipalities are entirely creations of the General Assembly and have only those powers delegated to them by legislative enactments.[3] *King v. Town of Chapel Hill*, 367 N.C. 400, 404 (2014). Such legislative enactments can take the form of local acts or laws of statewide application.

Many of the statewide laws granting powers to municipalities reside in Chapter 160A (titled "Cities and Towns") of the General Statutes. *See*, *e.g.*, N.C.G.S. § 160A-174(a) (2021) ("A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances."). At the time of the events giving rise to this litigation, Chapter 160A included extensive provisions conferring an array of powers on municipalities over zoning and other land development matters. In 2019, the General Assembly enacted legislation recodifying those provisions as Chapter 160D (titled "Local Planning and Development Regulation"). *See* An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111, 2019 N.C. Sess. Laws 424, 439–539, *as amended by* An Act to Complete the Consolidation of Land-Use Provisions into One Chapter of the General Statutes as Directed by S.L. 2019-111, as Recommended by the General Statutes Commission, S.L. 2020-25, 2019 N.C. Sess. Laws 152, 165 (Reg. Sess. 2020).

Chapter 160A likewise endows municipalities with substantial authority to enforce their ordinances through criminal or civil proceedings. In general, if the text of an ordinance so provides, a violation of

3. To create a municipality, "[t]he General Assembly incorporates an area by enacting a local bill consisting of a charter for the new city [or town or village] and a description of the . . . initial boundaries [of the city, town, or village]." Frayda S. Bluestein, *Incorporation*, *Annexation*, *and City-County Consolidation*, *in County and Municipal Government in North Carolina* 16 (2d ed. 2014).

the ordinance constitutes a Class 3 misdemeanor. N.C.G.S. §§ 14-4(a), 160A-175(b) (2021). On the civil side, "[a]n ordinance may provide that violation [of its requirements] shall subject the offender to a civil penalty to be recovered by the [municipality] in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period of time." *Id.* § 160A-175(c). When an ordinance prohibits a condition on or use of real property, a municipality may respond to violations by asking the proper court to issue "a mandatory or prohibitory injunction and order of abatement commanding the defendant to correct the unlawful condition . . . or cease the unlawful use." *Id.* § 160A-175(e). Because an ordinance "may provide, when appropriate, that each day's continuing violation shall be a separate and distinct offense," an offender who refuses to correct a violation risks multiple criminal charges and mounting civil penalties. *Id.* § 160A-175(g).

Of particular importance to this case are the mechanisms by which municipalities may exercise the regulatory and enforcement powers bestowed on them by the General Assembly. According to N.C.G.S. § 160A-12, "[a]ll powers, functions, rights, privileges, and immunities of the corporation shall be exercised by the city council and carried into execution as provided by the charter or the general law." N.C.G.S. § 160A-12 (2023). When "[a] power, function, right, privilege, or immunity . . . is conferred or imposed by charter or general law without directions or restrictions as to how it is to be exercised or performed[, it] shall be carried into execution as provided by ordinance or resolution of the city council." *Id.*

In arguing that N.C.G.S. § 160A-12 required the Town Council to adopt a resolution approving the lawsuit against defendants, both the dissent in the Court of Appeals and defendants cite *State ex rel. City of Albemarle v. Nance*, 266 N.C. App. 353 (2019). There a private attorney claiming to represent the city filed a lawsuit against the defendants alleging that their hotel constituted a public nuisance under Chapter 19 of the General Statutes. *City of Albemarle*, 266 N.C. App. at 354. The trial court granted the defendants' motion to dismiss the lawsuit because the lawsuit had not been authorized by a vote of the city council. *Id.* at 355. A panel of the Court of Appeals unanimously affirmed. *Id.* at 360–62. The city's ordinances stated that "the Council" could employ outside legal counsel. *Id.* at 359. Reading this ordinance provision alongside N.C.G.S. § 160A-12, the Court of Appeals concluded that, "[i]n order to bring suit through outside counsel, the city council must adopt a resolution." *Id.* at 361. Inasmuch as "[t]he City failed to follow the requirements of the statutes and ordinances in effect or to provide evidence of outside counsel's

authority to file suit on its behalf . . . [t]he trial court properly concluded [that] it lacked subject matter jurisdiction to address the City's claims against the [defendants]." *Id.* at 362.

This Court is not bound by *City of Albemarle*, but we do not read that decision to hold that a municipality's elected governing board must always act by resolution to authorize a lawsuit. Section 160A-12 allows the board to act "by ordinance or resolution." (Emphasis added.) As the Court of Appeals majority in this case correctly remarked, the city lost in *City of Albemarle* because, "[*p*]*ursuant to its ordinances*, [the city council] was required to adopt a resolution to bring suit through outside counsel." *Town of Midland*, 282 N.C. App. at 362 (emphasis added). Hence, even if we assume that *City of Albemarle* was rightly decided, no resolution by the Town Council was needed to authorize the lawsuit in this case if the MDO allowed the Town to file suit against defendants without one. We must therefore turn our attention to the text of the MDO.

"The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." *Cogdell v. Taylor*, 264 N.C. 424, 428 (1965). Accordingly, when a court is called upon to interpret a municipal ordinance, "[t]he basic rule is to ascertain and effectuate the intention of the municipal legislative body." *George v. Town of Edenton*, 294 N.C. 679, 684 (1978). If the words of the ordinance "are plain and unambiguous, the court need look no further" in search of legislative intent. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 304 (2001). On the other hand, "if the language is unclear, judicial construction may be required." *Id.* Judicial construction typically involves examining the ordinance's other provisions or the text of related ordinances for evidence of what the ambiguous provision was intended to accomplish. *See George*, 294 N.C. at 684 ("We must therefore consider this section of the ordinance as a whole, and the provisions *in pari materia* must be construed together[.]" (citations omitted)).

Here the key MDO provision in dispute reads in pertinent part:

> If payment [of a civil penalty] is not received or equitable settlement reached within thirty (30) days after demand for payment is made, the matter *shall be referred* to legal counsel for institution of a civil action in the appropriate division of the General Courts of Justice for recovery of the civil penalty. Provided, however, if the civil penalty is not paid

> within the time prescribed, the *Planning, Zoning, & Subdivision Administrator* may have a criminal summons or warrant issued against the violator.

Town of Midland, N.C., Dev. Ordinance art. 23, § 23.7-6 (2021) [hereafter nonpayment provision] (first emphasis added).

The use of the passive voice in the first sentence of the nonpayment provision creates the need for judicial interpretation. The first sentence declares that at a certain point the matter of nonpayment "shall be referred" to legal counsel for the filing of a lawsuit, but the text does not expressly assign responsibility for making the referral. *Id.* Given this omission, we must look to other parts of the MDO for guidance as we attempt to identify which official, if any, the Town Council contemplated would make the referral.

When the nonpayment provision's first and second sentences are read together, they strongly imply that the duty of making the referral belongs to the zoning administrator. The second sentence endows the zoning administrator with discretion over whether to pursue criminal charges against offenders who fail to pay their civil penalties. This is significant authority that the Town Council cannot have granted lightly. Unquestionably, then, the Town Council had the zoning administrator in mind when it adopted the nonpayment provision.

Other sections in Article 23 (titled "Administration and Enforcement") of the MDO reinforce this view. Perhaps most tellingly, subsection 23.2-1 provides: "*Unless specifically set forth otherwise in this ordinance*, the Town of Midland [zoning administrator] shall be the Enforcement Officer *with the duty of administering and enforcing the provisions of this Ordinance*." *Id.* § 23.2-1 (emphases added). Consistent with this general assignment of responsibility, the zoning administrator's primary duties listed in subsection 23.2-2 include "enforc[ing] the provisions of [Article 23]" and "us[ing] the remedies provided in [Article 23] to gain compliance." *Id.* § 23.2-2(H), (J). The act of referring nonpayment of civil penalties to the Town's attorney for the institution of a civil action certainly qualifies as an attempt to enforce Article 23 and obtain compliance with its provisions. Since the nonpayment provision does not direct anyone else to make the referral mandated by its first sentence, the duty of making that referral lies by default with the zoning administrator.

In arguing to the contrary, defendants assert *expressio unius est exclusio alterius*, "*i.e.*, the expression of one thing is the exclusion of another." *Baker v. Martin*, 330 N.C. 331, 337 (1991). Under this canon of statutory construction, "when a statute lists the situations to which

it applies, it implies the exclusion of situations not contained in the list." *Evans v. Diaz*, 333 N.C. 774, 780 (1993). Defendants note that various provisions in Article 23 expressly invest the zoning administrator with specific enforcement powers and duties. *E.g.*, Town of Midland, N.C., Dev. Ordinance art. 23, §§ 23.6-3 (zoning administrator may deny permits), 23.6-4 (zoning administrator may condition permits), 23.6-5 (zoning administrator may issue stop work orders), 23.6-6 (zoning administrator may revoke permits), 23.7-5 (zoning administrator must make written demand for payment of civil penalty). Consequently, according to defendants, "[h]ad the Town Council desired to delegate its authority to institute civil actions in zoning matters, it could have easily done so in the same manner as the other tasks assigned to the Zoning Administrator."

Canons of construction are interpretive guides, not metaphysical absolutes. They should not be applied to reach outcomes plainly at odds with legislative intent. We disagree with defendants' application of *expressio unius est exclusio alterius* to the nonpayment provision, in part because, as we have already remarked, subsection 23.2-1 unambiguously charges the zoning administrator with administering and enforcing Article 23 except where Article 23 expressly assigns a particular task to someone else. *See, e.g.*, *id.* § 23.5-4 (board of adjustment to hear appeal from NOV within thirty-six days of receiving appeal in writing). Moreover, defendants ignore the fact that other sections in Article 23 also employ the passive voice. For instance, under subsection 23.7-2, if a person who has violated the MDO "fails to take corrective action within the prescribed period of time, a civil penalty *may be imposed* . . . in the form of a citation." *Id.* § 23.7-2 (emphasis added). Were we to adopt the same approach to subsection 23.7-2 that defendants urge for the nonpayment provision, we would have to conclude that the use of the passive voice in subsection 23.7-2 means that the zoning administrator is prohibited from imposing the civil penalties authorized therein, a thoroughly implausible interpretation.

In their reply brief to this Court, defendants quote N.C.G.S. § 160D-402, which the General Assembly enacted in 2019 as part of its recodification of the statutes governing local government regulation of land development. Although N.C.G.S. § 160D-402 did not become law until after the Town filed its lawsuit in 2017, defendants maintain that the statute should inform our analysis.

Section 160D-402 sets out a nonexclusive list of duties that may be assigned to employees charged with administering and enforcing a county or municipal development ordinance. These duties include

"recommending bringing judicial actions against actual or threatened violations." N.C.G.S. § 160D-402(b) (2021). According to defendants, "[b]y enacting N.C.G.S. § 160D-402, the General Assembly has expressed its intent that municipalities may only delegate to zoning administrators the authority to 'recommend bringing judicial actions.' The Town has never had the authority to delegate to its Zoning Administrator the power to unilaterally initiate judicial actions."

Accepting defendants' reading of N.C.G.S. § 160D-402 for the sake of argument, we perceive no grounds for holding that the Town lacked standing to sue defendants. The nonpayment provision does not endow the zoning administrator with "the power to unilaterally initiate" civil actions to recover unpaid civil penalties. Under its terms, the zoning administrator merely refers the matter to the Town's attorney. It is the nonpayment provision itself—not the zoning administrator—that requires the Town's attorney to file a complaint against the offender.

The MDO authorized the Town to file suit against defendants without first obtaining approval of the Town Council. There is no merit to defendants' argument that the Town lacked standing.

B. Responsibility for Road Maintenance in Bethel Glen

[2] As explained above, a different panel of the Court of Appeals concluded in *Midland I* that defendants remained responsible for maintaining the roads in the Bethel Glen subdivision inasmuch as the Town "had not taken [that] responsibility . . . from [defendants]." *Midland I*, 2016 N.C. App. LEXIS 1351, at *17. Here the dissenting judge at the Court of Appeals attempted to revive the issue of defendants' ongoing responsibility for the roads, and defendants in their primary brief to this Court argue that the Court of Appeals majority erred by continuing to impose that duty on them.

The Court of Appeals majority considered itself bound by the earlier panel's ruling, observing that the panel had based its decision "on the same record relied upon by our dissenting colleague." *Town of Midland*, 282 N.C. App. at 365.

> This Court previously upheld the Town's notice of violation against [defendants] and concluded [defendants] have an "ongoing obligation to maintain the subdivision streets pursuant to [Town] ordinance." *In re Harrell*, 251 N.C. App. 526, 2016 WL 7984233, at *5 (emphasis added). This Court's prior determination that [defendants], and not the Town, are obligated

> to maintain the subdivision roads until the Town has approved a petition by [defendants] to assume responsibility, is binding on our decision today. *See N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) ("Once a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. Further, since the power of one panel of the Court of Appeals is equal to and coordinate with that of another, a succeeding panel of that court has no power to review the decision of another panel on the same question in the same case.").

Id. (third alteration in original).

We agree with the Court of Appeals majority that it was bound by *Midland I*. Nothing in the record indicates that the Town agreed to accept responsibility for the roads in the Bethel Glen subdivision after the panel in *Midland I* issued its decision in 2016. Furthermore, the question of defendants' ongoing responsibility for the roads was not properly before the Court of Appeals in this case because defendants did not argue it in their brief to that tribunal. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

IV. Conclusion

The Town complied with state law and the MDO when it filed suit against defendants over their failure to maintain the roads in the Bethel Glen subdivision. The Court of Appeals majority rightly determined that it was bound by the prior decision of another panel holding defendants responsible for those roads. We therefore affirm the judgment of the Court of Appeals.

AFFIRMED.

Justice RIGGS did not participate in the consideration or decision of this case.

ASKEW v. CITY OF KINSTON

[385 N.C. 379 (2023)]

JOSEPH ASKEW; CHARLIE GORDON WADE III; AND CURTIS WASHINGTON

v.

CITY OF KINSTON, A MUNICIPAL CORPORATION

From N.C. Court of Appeals
22-407

From Lenoir
19CVS525

No. 55A23

ORDER

Defendant's motion to dismiss plaintiffs' appeal is denied. This Court retains jurisdiction over this matter to address whether the Court of Appeals erred in requiring plaintiffs to exhaust administrative remedies prior to bringing direct constitutional claims under Article I, Section 19. The other issues raised in plaintiffs' notice of appeal that include arguments neither considered nor decided by the Court of Appeals are dismissed ex mero motu.

By order of the Court in Conference, this the 18th day of October 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of October 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

HOKE COUNTY BOARD OF EDUCATION, ET AL., PLAINTIFFS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

AND

RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS

V.

STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

AND

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS

FROM N.C. COURT OF APPEALS
22-86, 23-788

From Wake
95CVS1158

NO. 425A21-3

ORDER

On the petition for discretionary review prior to a determination by the Court of Appeals filed by intervenor-defendants on 20 September 2023, the Court hereby allows the petition solely on the question of whether the trial court lacked subject matter jurisdiction to enter its order of 17 April 2023. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580 (1986) ("The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court.").

By order of the Court in Conference, this the 18th day of October 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice BERGER concurring.

The premise of the dissent is that this Court already "resolved the question of subject-matter jurisdiction in [*Hoke County III*]."[1] The dissent is wrong.

Take, for example, the question of standing. My dissenting colleague previously served as the lawyer for some of the parties in this case, known as the Penn Intervenors.[2] Those parties, in filings while my dissenting colleague was their counsel, requested to intervene in this matter. The lawsuit, at that point, focused on educational deficiencies in rural counties in the eastern part of our State. The Penn Intervenors sought intervention to "enforce their constitutional rights to a sound basic education" against the Charlotte-Mecklenburg School System. Core to their rationale for intervention was that every public school district faces its own unique educational challenges and groups of students or school districts in one area of our state are ill-suited to address the educational deficiencies in others.

This raises questions that our Court has not yet addressed: If public school students or local school boards who are not parties to this case believe the remedial order does not sufficiently address the educational

1. "Because the distinction is meaningful, we refer to *Hoke County Board of Education v. State* as *Hoke County*, not *Leandro* [ ]. See discussion at *Hoke County Board of Education v. State*, 367 N.C. 156, 158 n.2, 749 S.E.2d 451, 453 n.2 (2013)." *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 480 n.1 (Berger, J., dissenting) (2022).

2. To be clear, not a lawyer for those parties in some other case, but the lawyer for them *in this case*.

failure in their districts, are they bound by the remedial order? If so, how were their rights adjudicated without their presence in the suit—an elementary principle of jurisdictional law. *See Martin v. Wilkes*, 490 U.S. 755, 759 (1989) ("[T]he general rule" is "that a person cannot be deprived of his legal rights in a proceeding to which he is not a party."). Moreover, if they are not bound by the remedial order and may bring their own claims (as the Penn Intervenors did in this case with my dissenting colleague as their counsel), how did the trial court have jurisdiction to enter a judgment purportedly adjudicating their rights? *See id.*

There are many other unresolved issues of subject matter jurisdiction as well. How did so many crucial issues get ignored when many of these issues were addressed at length in the *Hoke County III* dissent? *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 477–536 (2022). The Court never explained.

However, as my dissenting colleague acknowledges, this Court rushed to complete its earlier opinion in this incredibly complex, novel case (one that has spanned decades) so that it could be released in November of last year. The failure to resolve these jurisdictional questions is not the first oversight from this Court's rush to judgment in *Hoke County III*. As other filings have acknowledged, there is another pending appeal at this Court, involving the same parties and related issues.

My dissenting colleague laments that subject matter is now being addressed because it will cause various harms to judicial integrity and "snuff out legal finality." Once again, we endure ad nauseum these fanciful protestations. But it is black letter law that courts cannot ignore potential defects in subject matter jurisdiction. "Where there is no jurisdiction of the subject matter the whole proceeding is void ab initio and may be treated as a nullity anywhere, at any time, and for any purpose." *High v. Pearce*, 220 N.C. 266, 271 (1941). Even if we again failed to address jurisdictional concerns, these issues could be raised later in a collateral attack on the trial court's order, causing tremendous chaos if steps are already being taken to execute the novel relief in the remedial order. *See Pulley v. Pulley*, 255 N.C. 423, 429 (1961).

In sum, the Legislative-Intervenors argued various jurisdictional theories in their briefs and arguments to this Court that were left unresolved. This court is duty-bound to address any potential subject matter jurisdiction issues, even those that are not raised by the parties. *In re Sauls*, 270 N.C. 180, 187 (1967). However, in its rush to publish an opinion in the prior matter, the majority declined to address fundamental subject matter jurisdiction questions. To be sure, these issues were

raised, but the majority chose to ignore the bedrock legal principle that courts must examine jurisdiction to act. Even legal neophytes understand that subject matter jurisdiction can never be waived and can be raised at any time. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580 (1986).

Because these crucial issues of subject matter jurisdiction cannot be waived and must be addressed by this Court, it is a sound exercise of this Court's constitutional role to take this case and permit the parties to brief the various issues including standing, joinder of necessary parties, adverseness, intervention, and jurisdiction of the trial court to provide the requested relief, all of which are necessary jurisdictional prerequisites to execution of the trial court's remedial order.

Justice DIETZ and Justice ALLEN join in this concurring opinion.

Justice EARLS dissenting.

Legislative-Intervenors' bypass petition should be denied because it is substantively hollow and procedurally improper. This Court resolved the question of subject-matter jurisdiction in *Leandro IV*. *See Hoke Cty. Bd. of Educ. v. State*, 382 N.C. 386 (2022) ("*Leandro IV*"). In that case—just 11-months old—the Legislative-Intervenors raised the same arguments they do in their bypass petition: That the trial court lacked jurisdiction to remedy constitutional deficiencies in public education. *See id.* at 469-70. We examined that claim and "unequivocally rejected" it. *See id.* at 469-71.

Legislative-Intervenors could have asked us to reconsider our ruling at that time. In fact, North Carolina's Rules of Appellate Procedure gave them a specific mechanism to do so. *See* N.C. R. App. P. 31(a). They did not. And now, they seek a belated "do over"—a result foreclosed by our procedural rules and long-standing practice. *See*, *e.g.*, *Davis v. S. Ry. Co.*, 176 N.C. 186 (1918) (denying request to reconsider an earlier decision because the "only method" to do so was a "petition to rehear" and defendant had not timely filed one); *accord Newton v. State Highway Com.*, 194 N.C. 303 (1927). In short, the majority grants an untimely petition to reopen a settled question. Because I think that action is unsound in principle and destabilizing in practice, I dissent.

Our decision in *Leandro IV* shows that the issue of jurisdiction is not new to this case. The Legislative-Intervenors previously have raised the same jurisdictional arguments they now seek to raise in their bypass

petition. *See Leandro IV*, 382 N.C. at 391, 469-70. There, as here, they disputed the trial court's authority to order a statewide remedy because, in their view, that court never found a statewide constitutional violation. *Id.* We found those assertions "untimely, distortive, and meritless." *Id.* at 391.

The trial court, we explained, focused on "one foundational question": Whether North Carolina was complying with its "constitutional mandate to provide all children with the opportunity to receive a sound basic education." *Id.* at 398. To answer it, the court spent "several years" immersed in "fact finding, research, and hearings" on public education across the State. *Id.* And that was *before* the court held a "fourteen-month trial" where it heard from "over forty witnesses," sifted through "thousands of pages of exhibits," and considered the parties' arguments. *Id.* Based on its exhaustive, years-long review, the court concluded that "there were at-risk students failing to achieve a sound basic education statewide." *Id.* at 398-99. It included those findings in its final judgment. *Id.* at 400-01.

Since the trial court found a statewide constitutional violation, we explained, it had subject-matter jurisdiction to order a statewide remedy. *Id.* at 391, 398-401 (pointing to the trial court's Second and Third Memorandums of Decision); *id.* at 405-08 (noting four trial court orders). But the Legisative-Intervenors ignored the trial court's sound analysis and solid conclusion. They instead argued before us—as they do now in their petition—that "there has never been a finding" of a constitutional violation "beyond Hoke County." *See id.* at 471. We rebuffed that argument. And we went further, decrying it as "a fundamental misunderstanding of the history of this case and the State's constitutional obligations." *Id.*; *see also id.* at 470 ("Based on an abundance of clear and convincing evidence, the trial court repeatedly concluded that the State's *Leandro* violation was not limited to Hoke County but was pervasive statewide. Time and time again, the trial court observed that the evidence indicated that in way too many school districts across the state, thousands of children in the public schools have failed to obtain, and are not now obtaining a sound basic education as defined by and required by the *Leandro* decisions." (cleaned up)). Our holding in *Leandro IV* is the "law of the case"—we should reject Legislative-Intervenors' efforts to relitigate it.

Although parties waive some arguments if they do not timely object, subject-matter jurisdiction may be raised at any time. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580 (1986). As we have explained:

> When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*. Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction.

Id. (cleaned up). But the calculus is different where—as here—this Court has already reached and resolved the issue. In that case, a dissatisfied party may not simply cry "jurisdiction" to reopen the dispute. Instead, we may properly revisit our decisions when a "direct authority" or "material point was overlooked" in our analysis, or the case has meaningfully changed since we last heard it. *See Watson v. Dodd*, 72 N.C. 240 (1875). If, for instance, new evidence or intervening developments alter the nature of the dispute and our subject-matter jurisdiction over it, then we may properly reexamine that question. *See Devereux v. Devereux*, 81 N.C. 12, 17 (1879). But a "partial change in the personnel of the Court affords no reason for a departure from the rule." *Weisel v. Cobb*, 122 N.C. 67, 69 (1898) (rejecting petition for rehearing because "neither the record nor the briefs disclose anything relating to the only points now before us that was not apparently considered when the former judgment was rendered").

A different approach would sow chaos and snuff out legal finality. If parties can reopen a case by casting their disagreement in the language of "jurisdiction," then our courts will be nothing but revolving doors and our decisions nothing but paper tigers. This case shows the danger of that approach. In substance, "[n]othing has changed" since *Leandro IV*: The "legal issues are the same; the evidence is the same; and the controlling law is the same." *See Harper*, 384 N.C. at 5 (Earls, J., dissenting). We already grappled with and resolved the question of subject matter jurisdiction in this case—nothing imperils that decision or requires us to revisit it. But by alchemizing its disagreement with *Leandro IV* into a "jurisdictional" issue, the majority gives itself a tool to rewrite—and litigants to resist—our earlier decisions. In my view, that move is destabilizing and unmoored from precedent.[1]

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1. *See also Gainesville & Alachua Cty. Hosp. Ass'n v. Atl. C. Co.*, 157 N.C. 460, 461 (1911) (declining to overturn earlier decision because "[t]here is no practical difference between this case and the one we formerly heard"); *Weston v. John L. Roper Lumber Co.*, 168 N.C. 98 (1914) (finding "no reason to reverse our former judgment" because the "grounds of error assigned in the petition are substantially the same as those argued and passed upon on the former hearing" and "no new fact has been called to our attention,

Moreover, granting this petition creates an end-run around established appellate procedure. Legislative-Intervenors—like all litigants before this Court—are bound by our Rules of Appellate Procedure. If Legislative-Intervenors had proper grounds to ask this Court to reconsider its decision in *Leandro IV*, they had the same option as every other litigant: To seek a rehearing under N.C. R. App. P. 31(a).[2] They did not. And now they cannot, as their request would be nine months too late. *See* N.C. R. App. P. 27(c) (The "Court *may not* extend the time for… filing… a petition for rehearing") (emphasis added).

Instead, Legislative-Intervenors repackage their request to rehear *Leandro IV* as a petition for discretionary review prior to determination by the Court of Appeals. Their filing makes clear their true goal: Again and again, Legislative-Intervenors urge this Court to revisit and reverse *Leandro IV*'s ruling on subject-matter jurisdiction. *See* Petition at 41, 42, 45, 47. By granting the petition, the majority allows Legislative-Intervenors to improperly—and belatedly—relitigate our precedent.

Mere months ago, the majority declared a Rule 31 petition to be the sole mechanism to revisit "alleged errors of law" in a "recently issued opinion." *See Harper v. Hall*, 384 N.C. 1, 3 (2023). A "petition to rehear," the majority explained, is "the appropriate method of obtaining redress from errors committed by this Court." *Id.* Now, for the second time in this case, it allows a party that "failed to seek rehearing" to "do exactly that." *See Hoke Cnty. Bd. of Educ. v. State*, 384 N.C. 8, 11 (order allowing State Controller's motion to reinstate writ of prohibition) (Earls, J., dissenting). Our procedural rules—as well as basic principles of *stare decisis*—forbid a party from "request[ing] a 'do over' with a newly constituted Court" to "obtain a different result." *Id.* By charting a different course, the majority elevates political expedience over the even-handed application of the law.

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and no new case or authority cited, and no new position assumed"); *Strunks v. S. R. Co.*, 188 N.C. 567, 568 (1924) (noting that "a party who loses in this Court may not have the case reheard by a second or third appeal" because "[o]ur former decisions have become the law of the case so far as the questions then presented and decided are concerned").

2. Indeed, our rules set a high bar for rehearing by requiring that the litigants secure the certifications of two disinterested attorneys that the case merits rehearing: A petition for rehearing "shall be accompanied by a certificate of at least two attorneys who for periods of at least five years, respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified." N.C. R. App. P. 31(a).

Equally disturbing is the majority's lopsided treatment of the parties here. In March 2023, the majority "reinstat[ed] the writ of prohibition, until this Court has an opportunity to address the remaining issues in this case." *See Hoke Cnty.*, 384 N.C. 8, 9. In effect, that move reversed *Leandro IV* by barring lower courts from ordering the State to comply with its constitutional duties. Mere hours after this Court's order, the Legislative-Intervenors filed a Renewed Conditional Petition for Writ of Certiorari. The other parties responded to that petition and urged this Court to deny it. They also sought to clarify the basis and scope of our decision to revive the writ of prohibition. To that end, some parties asked us to identify the "remaining issues in this case" and order briefing on them. *See Response of State of North Carolina*, dated 10 March 2023, at pp. 1, 3, 4.

Yet we did nothing. For months, this Court let those filings languish on our docket. But while the majority ignored those requests, it jumps at Legislative-Intervenors' wish to revisit *Leandro IV*. Although this Court is sworn to "administer justice without favoritism to anyone or to the State," *see* N.C.G.S. § 11-11 (2022), the majority's asymmetric treatment here is without justification.

And the Court's actions stretch beyond this case. As other jurists have explained, a court's legitimacy is "earned over time." *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2350 (Breyer, Sotomayor, and Kagan, JJ., dissenting). But it "can be destroyed much more quickly." *Id.* That is because our authority largely depends on the "public's willingness to respect and follow [our] decisions." *See Harper*, 384 N.C. at 7 (Earls, J., dissenting) (cleaned up). And the public's trust, in turn, hinges "on the fragile confidence that our jurisprudence will not change with the tide of each election." *Id.* When our decisions shift with the political headwinds, it "invite[s] the view that this institution is little different from the two political branches of the Government." *See Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (cleaned up).

That is especially true in "hotly contested cases" like this one. *Id.* at 2349. Beyond question, public education is an important issue that sparks strong beliefs. And when this Court rapidly reverses course on that topic, it "calls into question its commitment to legal principle." *Id.* It signals to North Carolinians "that their constitutional protections h[a]ng by a thread"—that "a new majority" can "by dint of numbers alone expunge their rights." *Id.* at 2350. It poisons the public's faith in us. *See Harper*, 384 N.C. at 6 (Earls, J., dissenting).

Make no mistake: By granting the Legislative-Intervenors' petition, the majority agrees to revisit *Leandro IV* and ignore what we said just 11 months ago. By doing so, it tells "the public that our decisions are fleeting." *See id.* at 7. Across every meaningful metric, we have already resolved this dispute: The "legal issues are the same; the evidence is the same; and the controlling law is the same." *Id.* at 5. The only real difference: The "political composition of the Court." *Id.* Yet again, the majority signals that "our precedent is only as enduring as the terms of the justices who sit on the bench." *Id.* at 7. And yet again, I dissent.

Justice RIGGS joins in this dissenting opinion.

STATE v. HINES

[385 N.C. 389 (2023)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 22-824
v.	
WILLIE RAY HINES	From Lenoir 14CRS51201

No. 214P23

ORDER

Defendant's petition for discretionary review is allowed for the limited purpose of vacating the decision of the Court of Appeals and remanding the matter to that court for consideration of defendant's arguments based on the existing trial court record.

By order of the Court in Conference, this the 18th day of October 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of October 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. JONES

[385 N.C. 390 (2023)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 22-518
v.	
ERNEST PAUL JONES	From Columbus 19CRS478

No. 16A23

ORDER

Counsel for defendant informed the Court that defendant passed away on 9 September 2023 and moved to abate the action, dismiss the appeal, and vacate the trial court's judgment. In response, the State consented to abating the action and dismissing the appeal but argued that there was no need to vacate the trial court's judgment because "[t]he Court of Appeals' opinion effectively vacated the judgment . . ." Counsel for defendant then filed a conditional motion asking that if this Court did not vacate the trial court's judgment that it dissolve the temporary stay and writ of supersedeas.

In response, the Court takes the following actions: the action is abated and the appeal is dismissed. The Court of Appeals' opinion and the trial court's judgment in this matter are both vacated. Defendant's conditional motion to dissolve the temporary stay and writ of supersedeas is dismissed as moot.

By order of the Court in Conference, this the 3rd day of October 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of October 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

20 OCTOBER 2023

3P23-2	State v. Joseph Edwards Teague, III	Def's Pro Se Motion to Reconsider Motion for Temporary Stay, Petition for Writ of Supersedeas, and PDR (COA21-10)	Dismissed **09/18/2023**
16A23	State v. Ernest Paul Jones	1. Def's Motion to Abate Appeal (COA22-518) 2. Def's Conditional Motion to Dissolve Temporary Stay and Writ of Supersedeas	1. Special Order **10/03/2023** 2. Special Order **10/03/2023**
18A14-3	State v. Paris Jujuan Todd	1. Def's Motion for Temporary Stay (COA22-680) 2. Def's Petition for Writ of Supersedeas 3. Def's Amended Motion for Temporary Stay 4. Def's Amended Petition for Writ of Supersedeas 5. Def's PDR Under N.C.G.S. § 7A-31 6. Def's Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed **10/10/2023** 2. Dismissed **10/10/2023** 3. 4. 5. 6. **Dietz, J., recused** **Riggs, J., recused**
55A23	Joseph Askew; Charlie Gordon Wade III; and Curtis Washington v. City of Kinston, a Municipal Corporation	1. Plts' (Joseph Askew and Curtis Washington) Notice of Appeal Based Upon a Constitutional Question (COA22-407) 2. Def's Motion to Dismiss Appeal	1. Special Order 2. Special Order
63P23	Azevedo v. Onslow County DSS	1. Petitioner's Motion for Temporary Stay (COA22-376) 2. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/27/2023** Dissolved 2. Denied
66P23-2	Ed L. Harris v. North Carolina Department of Adult Correction	1. Plt's Pro Se Motion for Complaint 2. Plt's Pro Se Motion for Complaint	1. Dismissed 2. Dismissed
74P23	State v. Roland M. Petersen	Def's Pro Se Petition for Writ of Mandamus	Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

20 OCTOBER 2023

79P23	James Chandler Abbott, et al. v. Michael C. Abernathy, et al.	1. Defs' (Rodney and Lynne Worthington) Motion for Temporary Stay (COA22-162) 2. Defs' (Rodney and Lynne Worthington) Petition for Writ of Supersedeas 3. Defs' (Rodney and Lynne Worthington) PDR Under N.C.G.S. § 7A-31	1. Allowed **03/16/2023** Dissolved 2. Denied 3. Denied
85P23	State v. Michael Lawrence Martin	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-428) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Deem Notice of Appeal and PDR Timely Filed 4. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA 5. State's Motion to Dismiss Appeal	1. --- 2. Dismissed 3. Denied 4. Denied 5. Allowed
104P23-2	State v. Markus Odon McCormick	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-690) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Pro Se Motion for Appropriate Relief 4. Def's Pro Se Motion to Amend or Correct Record on Appeal 5. Def's Pro Se Motion to Compel Appellate Counsel to Surrender Complete Case File 6. Def's Pro Se Motion to Add Issues Presented in Appeal Involving Substantial Constitutional Questions 7. Def's Pro Se Petition for Writ of Habeas Corpus 8. Def's Pro Se Motion for Speedy Appeal 9. Def's Pro Se Motion to Dismiss Indictments on Grounds of Lack of Subject Matter Jurisdiction	1. 2. 3. 4. 5. 6. 7. Denied **09/26/2023** 8. 9.
108P23	D&B Marine, LLC, a Rhode Island Limited Liability Company v. AIG Property Casualty Company f/k/a Chartis Property Casualty Company	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA22-546) 2. Def's Motion to Admit John F. O'Connor Pro Hac Vice	1. Denied 2. Dismissed as moot **Allen, J., recused** **Riggs, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

20 OCTOBER 2023

109P01-3	State v. William Dawson	Def's Pro Se Petition for Writ of Mandamus	Denied **Riggs, J., recused**
114P23	State v. Johnny Ray Izard	Def's PDR Under N.C.G.S. § 7A-31 (COA22-312)	Denied
117P23	State v. Elijah Esatas Pacheco	Def's Pro Se Motion for Prayer for Review	Dismissed
131P23	State v. Torie Eugene Cuthbertson	Def's PDR Under N.C.G.S. § 7A-31 (COA22-92)	Denied
135P23	Katherine Aimee Brosnan v. George Geoffrey Cramer	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-654)	Denied **Riggs, J., recused**
136P23	State v. Mitchell Deangelo Holmes	Def's PDR Under N.C.G.S. § 7A-31 (COA22-783)	Denied **Riggs, J., recused**
146P23	Timothy Omar Hankins, Sr. v. New Hanover County Clerk of Court District Court Division, et al.	1. Petitioner's Pro Se Motion for Dismissal 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
156P23	Raleigh G. Rogers v. Wells Fargo Bank, N.A.	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-978) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Riggs, J., recused**
157P23	Brian Lambeth v. Amanda Story	1. Def's Pro Se Motion for Review of Custody Order 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
159P23	State v. Carlton Craig Harris	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-728) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Def's Motion to Amend Notice of Appeal and PDR	1. --- 2. Denied 3. Allowed 4. Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

20 OCTOBER 2023

163P23	Jasmine E. Golden v. Amazon	1. Plt's Pro Se Petition to Review Orders of Superior Court, Guilford County 2. Plt's Pro Se Petition to Move Civil Actions to Alamance County and Out of Jurisdiction of Guilford County Superior Court 3. Plt's Pro Se Motion for PDR 4. Plt's Pro Se Motion to Withdraw Petition to Move Civil Actions to Alamance County and Out of Jurisdiction of Guilford County Superior Court	1. Dismissed Outstanding Fees Waived 2. Withdrawn 3. Dismissed 4. Allowed
164P23	State v. Kurt Anthony Storm	1. State's Motion for Temporary Stay (COA22-685) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/26/2023** Dissolved 2. Dismissed as moot 3. Denied **Riggs, J., recused**
179P23	Jobel LLC, Jack Boots v. Jessica Godwin	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP23-256) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
181P23	State v. Damian Lewis Furtch	Def's PDR Under N.C.G.S. § 7A-31 (COA22-643)	Denied
182P23	In the Matter of the Foreclosure of a Deed of Trust Executed by Ramon Almanzar Dated May 8, 2006 and Recorded in Book 11946, Page 2377, Wake County Registry, to W. Thurston Debnam, Jr., Trustee	Respondent's PDR Under N.C.G.S. § 7A-31 (COA22-911)	Denied
186P23-2	City of High Point v. Loving Care Cremations, LLC	Def's Pro Se Motion for Rehearing	Dismissed
188P23	James O. Bradley v. Gov. Roy Cooper, et al.	Petitioner's Pro Se Motion for PDR	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

20 OCTOBER 2023

189P23-2	State v. Travis Baxter	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas	1. Dismissed **09/11/2023** 2. Dismissed **09/11/2023**
196P23	Kienus Perez Boulware v. the University of North Carolina Board of Governors, ex rel. Winston-Salem State University Board of Trustees	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA22-840)	Denied
198A22	Surgeon, et al. v. TKO Shelby, et al.	Plts' Motion to Amend Record on Appeal	Allowed **09/01/2023**
202P23	State v. Jerry Mitchell Banks	Def's PDR Under N.C.G.S. § 7A-31 (COA22-317)	Denied
202PA22	State v. Kenneth Louis Walker	Def's Motion to Postpone Oral Argument	Denied **10/11/2023**
204P23	Ganna Shepenyuk v. Youssef Abdelilah	1. Plt's Motion for Temporary Stay (COA22-702) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Proceed *In Forma Pauperis* 5. Plt's Motion for Consideration of Blog Post	1. Denied **08/18/2023** 2. Denied 3. Denied 4. Allowed 5. Allowed
205P23-2	Travis Wayne Baxter v. North Carolina State Highway Patrol Troop F District V, et al.	1. Plt's Pro Se Motion for Temporary Stay (COA23-605) 2. Plt's Pro Se Petition for Writ of Supersedeas	1. Denied **09/11/2023** 2. Denied **09/11/2023**
206PA23	In the Matter of A.J., J.C., J.C.	1. Petitioner and Guardian ad Litem's Motion for Temporary Stay (COA22-522) 2. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad Litem's PDR Under N.C.G.S. § 7A-31	1. Dissolved **09/07/2023** 2. Allowed **09/07/2023** 3. Allowed **09/07/2023** **Riggs, J., recused**
206P21	Town of Apex v. Beverly L. Rubin	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-305)	Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

20 OCTOBER 2023

207P23	State v. Dazis Davante Bonds	Def's PDR Under N.C.G.S. § 7A-31 (COA22-920)	Denied
209P23	State v. Travis Baxter	1. Def's Pro Se Motion for Appeal Involving Constitutional Question 2. Def's Pro Se Motion for Temporary Stay 3. Def's Pro Se Petition for Writ of Supersedeas	1. Dismissed *ex mero motu* 2. Dismissed **09/11/2023** 3. Dismissed **09/11/2023**
210P23	State v. William Kyle Lytle	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-968)	Denied
211P23	Kenneth E. French v. Highland Paving Co. LLC, John W. McCauley (CEO), Albert O. McCauley (Partner), and Brian Raynor (Manager)	Plt's Pro Se Motion for PDR (COA22-1073)	Dismissed
213A23	State v. Ryan Pierre Brown	1. Def's Notice of Appeal Based Upon a Dissent (COA22-525) 2. Def's Motion to Withdraw Counsel and Appoint the Office of the Appellate Defender 3. Def's Amended Motion to Withdraw and Appoint the Office of the Appellate Defender 4. Def's Notice of Appeal Based Upon a Dissent	1. Withdrawn 2. Dismissed as moot **09/01/2023** 3. Allowed **09/01/2023** 4. --- **Riggs, J., recused**
214P23	State v. Willie Ray Hines	Def's PDR Under N.C.G.S. § 7A-31 (COA22-824)	Special Order
217P23	State v. Clyde Junior Meris	Def's Pro Se Motion for Appeal (COAP23-395)	Dismissed **09/01/2023**
223P23	Tyqashia Sellers v. United States	1. Plt's Pro Se Petition for Writ of Certiorari 2. Plt's Pro Se Motion to Proceed *In Forma Pauperis* 3. Plt's Pro Se Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as moot

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

20 OCTOBER 2023

224P23	State v. Darnell W. King	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed
226P23	State v. Oeun San	Def's PDR Under N.C.G.S. § 7A-31 (COA22-664)	Denied
227P23	Jasmine E. Golden v. North Carolina Agricultural and Technical State University	1. Plt's Pro Se Motion for PDR 2. Plt's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
228P23	Jordan Mitchell v. Sheriff Danny Rogers/ DA John Stone	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County 2. Plt's Pro Se Motion to Appoint Counsel 3. Plt's Pro Se Motion for Subpoena	1. Dismissed 2. Dismissed as moot 3. Dismissed
230P23	James Opleton Bradley v. Douglas B. Sasser	1. Plt's Pro Se Motion for Appeal 2. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
232P23	Abbott, et al. v. Abernathy, et al.	1. Defs' (Rodney and Lynne Worthington) Motion for Temporary Stay 2. Defs' (Rodney and Lynne Worthington) Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **09/15/2023** 2. 3.
234P23	State v. Elwood Jo Cephus	Def's Pro Se Motion for PDR (COA22-886)	Denied
235P23	Thurman Crofton Savage v. N.C. Department of Transportation	1. Petitioner's Motion for Temporary Stay (COA22-673) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/21/2023** 2. 3.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

20 OCTOBER 2023

238A23	State v. Pedro Isaias Calderon	1. State's Motion for Temporary Stay (COA22-822) 2. State's Petition for Writ of Supersedeas 3. Def's Motion to Withdraw Attorney of Record and Appoint the Appellate Defender 4. State's Notice of Appeal Based Upon a Dissent 5. State's PDR as to Additional Issues 6. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/20/2023** 2. Allowed **09/28/2023** 3. Allowed **09/25/2023** 4. 5. 6.
251P23	State v. Fredrick L. Canady	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Robeson County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed **Berger, J., recused**
254P23	In re A.E., A.E., B.E., C.E., K.E.	1. Respondents' Motion for Temporary Stay (COA23-28) 2. Respondents' PDR Under N.C.G.S. § 7A-31	1. Allowed **10/02/2023** 2. **Riggs, J., recused**
255P23	Jessica Robinson v. Whitne Robinson	1. Def's Pro Se Emergency Ex Parte Petition for Writ of Supersedeas (COAP23-627) 2. Def's Pro Se Motion for Stay of Execution	1. Denied **10/03/2023** 2. Denied **10/03/2023**
258P23	State v. Eric Wayne Wright	1. State's Motion for Temporary Stay (COA22-996) 2. State's Petition for Writ of Supersedeas	1. Allowed **10/04/2023** 2. **Riggs, J., recused**
266P18-4	State v. Charles Antonio Means	Def's Pro Se Petition for Writ of Mandamus	Denied
278PA21	State v. Fernando Alvarez	Def's Motion to Postpone Oral Argument	Allowed **09/13/2023** **Dietz, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

20 OCTOBER 2023

281P06-14	Joseph E. Teague, Jr., P.E., C.M. v. N.C. Department of Transportation, J.E. Boyette, Secretary	1. Plt's Pro Se Motion for Appropriate Relief (COA05-522) 2. Plt's Pro Se Motion for Sanctions 3. Plt's Pro Se Motion to Rehear 4. Plt's Pro Se Motion to Consider Additional Evidence	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
358P22	State v. Darius Jamal Harris-Allen	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-87) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
376P22	State v. Raymond Woodley	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-670) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
410P18-2	Town of Apex v. Beverly L. Rubin	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA20-304) 2. Def's Conditional PDR N.C.G.S. § 7A-31	1. Allowed 2. Allowed
412P13-6	Henry Clifford Byrd, Sr. v. Superintendent John Sapper	1. Petitioner's Pro Se Motion for Complaint for Invidious Infliction of Racial Equity in the Enforcement of Constitutional Standards (COA17-288) 2. Petitioner's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed **09/22/2023** 2. Denied **09/22/2023**
417P21-3	Kenneth Lewis Powell, Jr. v. N. Lorrin Freeman, District Attorney	Plt's Pro Se Motion for Complaint (COAP21-195)	Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

20 OCTOBER 2023

425A21-3	Hoke County Board of Education; et al., Plaintiffs and Charlotte-Mecklenburg Board of Education, Plaintiff-Intervenor and Rafael Penn, et al., Plaintiff-Intervenors v. State of North Carolina and the State Board of Education, Defendants and Charlotte-Mecklenburg Board of Education, Realigned Defendant and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in His Official Capacity as Speaker of the North Carolina House of Representatives, Intervenor-Defendants	1. Legislative-Intervenors' PDR Prior to a Determination by the COA (COA23-788) 2. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit Maya Brodziak Pro Hac Vice 3. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit David Hinojosa Pro Hac Vice 4. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit Chavis Jones Pro Hac Vice 5. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit Michael Robotti Pro Hac Vice	1. Special Order 2. Allowed **10/09/2023** 3. Allowed **10/09/2023** 4. Allowed **10/09/2023** 5. Allowed **10/09/2023**
436PA13-5	Lake, et al. v. State Health Plan for Teachers and State Employees, et al.	Defs' Petition for Writ for Prohibition	Denied
438P09-5	Darron Jermaine Jones v. Benjamin Carver	Plt's Pro Se Petition for Writ of Habeas Corpus (COA08-1582)	Denied **09/01/2023**
479P11-3	State v. Charles O'Brien Teague	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Randolph County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed
510A99-3	State v. Daniel Cummings, Jr.	Def's Petition for Writ of Certiorari to Review Order of Superior Court, Robeson County	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

20 OCTOBER 2023

524P20-2	State v. William Charles Melton	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Jones County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed **Dietz, J., recused**
537P20-2	Joyce Williams, as Personal Representative of the Estate of Ruth Hedgecock-Jones v. Maryfield, Inc. d/b/a Pennybyrn at Maryfield	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-785)	Denied **Berger, J., recused** **Dietz, J., recused**
554P07-4	State v. Percy Allen Williams, Jr.	Def's Pro Se Motion to Correct Judgment	Denied **Dietz, J., recused** **Riggs, J., recused**
580P05-30	In re David Lee Smith	1. Def's Pro Se Motion for Emergency Class-Action Application for Writ of Mandamus Nonviolent Prisoner Sentencing Consolidation (COA04-1033) 2. Def's Pro Se Alternative Motion for Emergency Demand for En Banc Rehearing of Pro Se Petition 3. Def's Pro Se Emergency Petition for Writ of Mandamus Causing Consolidation 4. Def's Pro Se Motion for Emergency En Banc Court Review of Mandamus Action	1. Denied 2. Dismissed 3. Denied 4. Denied **Riggs, J., recused**

D.V. SHAH CORP.
v.
VROOMBRANDS, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY,
AND VICTOR OBAIKA

No. 351A22

Filed 15 December 2023

Appeal and Error—summary judgment hearing—failure to exercise discretion to allow testimony—mistake of law—remand

The Court of Appeals properly vacated the trial court's order granting plaintiff's motion for summary judgment (on plaintiff's claims for breach of a commercial lease) where the trial court had acted under a misapprehension of the law and failed to exercise its discretion when it erroneously determined that it was prevented by the Rules of Civil Procedure from receiving oral testimony (that defendant sought to introduce in support of his counterclaim for fraudulent inducement). The matter was remanded for the trial court to exercise its discretion as authorized by Civil Procedure Rule 43(e).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 286 N.C. App. 223 (2022), vacating an order entered on 10 June 2021 by Judge Karen Eady Williams in Superior Court, Mecklenburg County, and remanding the case. Heard in the Supreme Court on 1 November 2023.

Miller Austin Law, by Carol L. Austin, for plaintiff-appellant.

David P. Ferrell for defendant-appellees.

RIGGS, Justice.

This appeal asks us to consider whether a trial court reversibly errs when it declines to exercise its discretion to hear oral testimony at a summary judgment hearing under the misapprehension that the North Carolina Rules of Civil Procedure outright prohibit receipt of such testimony. We hold, consistent with our precedents, that a trial court's failure to exercise its discretion under the mistaken belief that no such discretion exists warrants vacatur, and we remand for reconsideration "in the true legal light." *Capps v. Lynch*, 253 N.C. 18, 22 (1960) (cleaned up). We

modify and affirm the decision of the Court of Appeals vacating the trial court's summary judgment order and remanding the case in accordance with our holding.

I. Factual Background and Procedural History

Plaintiff sued defendants by verified complaint for breach of a commercial lease in October 2019. Defendants filed an answer and counterclaim for fraud through counsel on 1 June 2020, alleging plaintiff fraudulently induced them to enter into the commercial lease. After the entry of several scheduling orders, limited discovery, and the withdrawal of defendants' counsel by consent, plaintiff moved for summary judgment in April 2021 on the claims alleged in its verified complaint.

Plaintiff's summary judgment motion was calendared for and heard on 24 May 2021. By that point unrepresented, Mr. Obaika appeared *pro se* and requested a continuance; the trial court denied that request for reasons of futility and judicial economy. Mr. Obaika also sought to introduce live testimony in opposition to plaintiff's motion and in support of his counterclaim for fraudulent inducement, but was interrupted by the trial court as follows:

> THE COURT: I can't—I can't accept your statements because it's—it's along the lines of, like, testimonial. I can't accept that in the context of a summary judgment hearing. It has to be provided to the Court or in response to her affidavit and her documents. It has to be provided by way of an affidavit. And so [that is] why I asked whether an affidavit was submitted.

The trial court ultimately granted summary judgment for plaintiff on all claims, and defendants appealed to the Court of Appeals.

In a divided decision, a majority of the Court of Appeals vacated the trial court's summary judgment order and remanded the case. *D.V. Shah Corp. v. VroomBrands, LLC*, 286 N.C. App. 223, 237–38 (2022). Judge Jackson concluded that vacatur and remand was required based on perceived violations of the trial court's scheduling orders, the Mecklenburg County Local Rules, and the North Carolina Rules of Civil Procedure. *Id.* at 232–37. According to Judge Jackson, these acts compelled the trial court to grant Mr. Obaika's request for a continuance. *Id.* at 237. Judge Dillon concurred in the result and wrote separately, reasoning that the trial court's failure to recognize and exercise its discretion to take oral testimony allowed by Rule 43(e) of the North Carolina Rules of Civil Procedure was reversible, prejudicial error. *Id.* at 238–39

(Dillon, J., concurring in result). Finally, Judge Tyson dissented, arguing that summary judgment was proper based on the evidence presented and that any errors committed by the trial court were not prejudicial. *Id.* at 241–46 (Tyson, J., dissenting). Plaintiff appeals to this Court based on the dissent.

II. Analysis

As Judge Dillon rightly noted in his concurrence, *id.* at 238–39 (Dillon, J., concurring in result), we have long held that "[w]here . . . the court is clothed with discretion, but rules as a matter of law, without the exercise of discretion, the offended party is entitled to have the proposition reconsidered and passed upon as a discretionary matter," *Capps v. Lynch*, 253 N.C. 18, 22 (1960). This is no less true when the discretion is afforded by our Rules of Civil Procedure. *See, e.g.*, *Byrd v. Mortenson*, 308 N.C. 536, 540 (1983) (vacating and remanding an order denying a Rule 55(d) motion to set aside entries of default "because it appears that rather than exercising his *discretion*, the trial judge erroneously ruled as a *matter of law* that defendants had not demonstrated 'good cause' to justify setting aside the entries of default against them"). We consider the record and ruling "in context" to discern whether the trial court's decision was made under such a mistaken belief. *State v. Cotton*, 318 N.C. 663, 668 (1987). We will vacate and remand where "[t]here is nothing in the record to support a conclusion that [the trial court] *discretionarily*" rendered its decision. *Byrd*, 308 N.C. at 540.

Turning to the specific rule of civil procedure at issue in this case, Rule 43(e) plainly allows for the introduction of live oral testimony at a summary judgment hearing in the trial court's discretion: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court *may* direct that the matter be heard wholly or partly on oral testimony or depositions." N.C.G.S. § 1A-1, Rule 43(e) (2021) (emphasis added). This Court has explicitly held as much. *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533 (1971).

The record here demonstrates the trial court believed it entirely lacked the discretion to hear oral testimony afforded to it by Rule 43(e). As in other cases remedying similar errors, *see, e.g.*, *Byrd*, 308 N.C. at 540, nothing in the transcript suggests that the trial court understood it possessed discretion to allow Mr. Obaika to testify. The natural effect of this ruling was to prohibit Mr. Obaika from introducing evidence concerning any fraudulent inducement, itself a defense to a breach of contract claim and a basis for a counterclaim for damages.

Fields v. Brown, 160 N.C. 295, 298 (1912). Having "failed to exercise its discretion regarding a discretionary matter and . . . ruled on it under the mistaken impression it [was] required to rule a particular way as a matter of law, [the trial court's] holding must be reversed and the matter remanded for the trial court to exercise its discretion." *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 277 (1988). Consistent with the rationale stated in Judge Dillon's concurring opinion—rather than that enunciated by Judge Jackson in the majority opinion for the court—we modify and affirm the decision of the Court of Appeals. We decline to address the parties' other arguments raised in this appeal given our dispositive holding that vacatur and remand is required.

MODIFIED AND AFFIRMED.

FREEDOM MORRIS
v.
DAVID RODEBERG, M.D., INDIVIDUALLY AND IN HIS INDIVIDUAL CAPACITY, AND PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED D/B/A VIDANT MEDICAL CENTER

No. 296A22

Filed 15 December 2023

Statutes of Limitation and Repose—medical malpractice—minor plaintiff—thirteen years old at time of accrual of claim—ordinary three-year limitations period

The Court of Appeals properly concluded that plaintiff's medical malpractice claim—in which he alleged that defendants negligently performed an appendectomy on him when he was thirteen years old—was time barred pursuant to N.C.G.S. §§ 1-15(c) and 1-17(c) because plaintiff did not file his action until more than five years after the surgery that gave rise to the claim. Although plaintiff argued that, since his injury accrued when he was still a minor, he had until the age of nineteen to file a claim, where none of the exceptions contained in section 1-17(c) applied to toll the limitations period, plaintiff's claim was subject to the standard three-year statute of limitations.

Justice EARLS concurring in part and dissenting in part.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 285 N.C. App. 143 (2022), reversing an order entered on 16 March 2021 by Judge J. Carlton Cole in the Superior Court, Pitt County. Heard in the Supreme Court on 19 September 2023.

Zaytoun Ballew & Taylor, PLLC, by Matthew D. Ballew and Robert E. Zaytoun; The Law Offices of John M. McCabe, P.A., by Spencer S. Fritts; and James A. Barnes IV and Ryan D. Oxendine for plaintiff-appellant.

Ellis & Winters LLP, by Alex J. Hagan, Michelle A. Liguori, and Chelsea Pieroni, for defendant-appellee David Rodeberg, M.D.; and Cranfill Sumner LLP, by Colleen N. Shea and Steven A. Bader, for defendant-appellee Pitt County Memorial Hospital, Incorporated d/b/a Vidant Medical Center.

Roberts & Stevens, PA, by David C. Hawisher, for NCADA, amicus curiae.

Tin Fulton Walker & Owen PLLC, by Sam McGee and Gagan Gupta, for North Carolina Advocates for Justice, amicus curiae.

ALLEN, Justice.

A divided panel of the Court of Appeals interpreted the relevant statute of limitations to bar the medical malpractice claims alleged by plaintiff against defendants. It also rejected plaintiff's argument that the statute of limitations so construed violates his constitutional right to the equal protection of the laws. We conclude that the Court of Appeals correctly applied the statute of limitations to plaintiff's claims. Plaintiff's equal protection argument is not properly before this Court, and we therefore decline to address it.

This case arises from defendants' motions to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, so we must take the complaint's factual allegations as true. *Blue v. Bhiro*, 381 N.C. 1, 2 (2022). According to those allegations, plaintiff Freedom Morris—then thirteen years old—sought emergency treatment on 23 February 2015 at defendant Vidant Medical Center for abdominal

pain caused by acute appendicitis. Defendant David Rodeberg, M.D., operated on plaintiff the next day to remove his appendix. Despite complaining of intense pain following surgery, plaintiff was discharged on 25 February 2015. He returned to defendant hospital one day later with a fever and sharp abdominal pain. A second surgery performed by a different doctor revealed that defendant Rodeberg had not removed the entire appendix. The remaining portion had ruptured, spreading infection inside plaintiff's body. Plaintiff was discharged from defendant hospital a second time on 4 March 2015. Severe abdominal pain and a high fever prompted a return visit on 17 March 2015. Plaintiff underwent a third surgery, this time to drain a pelvic abscess. He was discharged yet again on 20 March 2015.

More than five years later, on 14 September 2020, plaintiff filed a lawsuit against defendants in the Superior Court, Pitt County, alleging medical malpractice and medical negligence. Defendants responded with motions asking the trial court to dismiss the complaint. In their motions, defendants argued that plaintiff filed the complaint outside the statute of limitations for the medical malpractice claims of persons who are over ten years old but under eighteen years old when their claims accrue. Specifically, defendants asserted that, pursuant to N.C.G.S. § 1-15(c) and N.C.G.S. § 1-17(c), plaintiff had three years from 24 February 2015 —the date on which defendant Rodeberg operated on plaintiff—to file suit against defendants.

Plaintiff submitted a brief to the trial court opposing defendants' motions. Therein plaintiff argued that N.C.G.S. § 1-17(b) is the relevant statute of limitations for his claims and that, consequently, he had until age nineteen to commence this litigation. Plaintiff further contended that if the trial court were to interpret subsections 1-15(c) and 1-17(c) to require him to file suit before he turned eighteen and could make his own legal decisions, the result would be a violation of his right to the equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

On 16 March 2021, the trial court entered an order denying defendants' motions, thereby clearing the way for plaintiff to proceed with his lawsuit. Defendants filed a notice of appeal from the trial court's order. They also filed a petition for writ of certiorari with the Court of Appeals asking that body to review the order even if defendants lacked a legal right to an immediate appeal. *See* N.C. R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals

. . . when no right of appeal from an interlocutory order exists . . . .”). The Court of Appeals subsequently allowed defendants’ petition for certiorari. *Morris v. Rodeberg*, 285 N.C. App. 143, 147–48 (2022).

On 16 August 2022, a divided panel of the Court of Appeals issued an opinion reversing the trial court’s order. *Id.* at 144. The majority noted that although subsection 1-15(c) specifies a three-year statute of limitations for most claims of medical malpractice, the provisions in subsection 1-17(c) control when the cause of action accrued while the plaintiff was still a minor. *Id.* at 151. As interpreted by the majority, subsection 1-17(c) adopts the three-year limitations period in subsection 1-15(c) for the medical malpractice claims of minors except when the limitations period would expire before the minor’s tenth birthday, in which case the statute of limitations must be calculated in accordance with N.C.G.S. § 1-17(c)(1). *Id.* at 149–51. Inasmuch as plaintiff’s lawsuit did not fall under subdivision 1-17(c)(1), the majority held that it was time-barred under subsection 1-17(c) “because [plaintiff’s] medical malpractice action accrued when [plaintiff] was thirteen years old, and he filed suit five years later.” *Id.* at 151.

Turning to plaintiff’s constitutional argument, the majority found no merit in plaintiff’s contention that applying a three-year statute of limitations to his claims would deprive him of his constitutional right to equal protection. *Id.* at 151–52. For reasons discussed later in this opinion, this issue is not properly before us.

The dissenting judge at the Court of Appeals would have affirmed the trial court’s order denying defendants’ motions to dismiss the complaint. *Id.* at 158–59 (Hampson, J., dissenting). According to the dissenting judge, when a minor plaintiff’s medical malpractice claims are not subject to any of the exceptions in subdivisions 1-17(c)(1) through (c)(3), a court must resort to subsection 1-17(b) to assess their timeliness. *Id.* at 156–57. As applied by the dissenting judge to the facts of this case, subsection 1-17(b) “required [plaintiff] to bring this lawsuit before reaching age nineteen.” *Id.* at 158. Because plaintiff filed the complaint before his nineteenth birthday, the dissenting judge concluded that his claims were timely. *Id.* The dissenting judge also endorsed plaintiff’s argument that “if [subs]ection 1-17(c) did operate to require [p]laintiff to bring suit as a sixteen year old, while still under a legal disability and legally unable to do so, . . . such an application of the statute would violate his federal and state constitutional right to equal protection of the laws.” *Id.*

Plaintiff filed a notice of appeal from the decision of the Court of Appeals pursuant to N.C.G.S. § 7A-30(2), which then provided a right

of appeal to this Court "from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent when the Court of Appeals is sitting in a panel of three judges."[1] N.C.G.S. § 7A-30(2) (2021).

We review a lower court's interpretation of statutes *de novo*. *DTH Media Corp. v. Folt*, 374 N.C. 292, 299 (2020). "Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337 (2009) (quoting parenthetical and internal quotation marks omitted).

To resolve whether plaintiff's claims for medical malpractice and negligence are time-barred, we must construe N.C.G.S. § 1-15 and N.C.G.S. § 1-17 together. "It is, of course, a fundamental canon of statutory construction that statutes which are *in pari materia*, *i.e.*, which relate or are applicable to the same matter or subject, . . . must be construed together in order to ascertain legislative intent." *Carver v. Carver*, 310 N.C. 669, 674 (1984).

By enacting a statute of limitations, the General Assembly "establish[es] a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." *Statute of Limitations*, *Black's Law Dictionary* (11th ed. 2019). "Once a defendant properly raises a statute of limitations defense, the plaintiff must show that she initiated the action within the applicable time period." *King v. Albemarle Hosp. Auth.*, 370 N.C. 467, 469 (2018).

Statutes of limitations are blunt instruments. They bar claims filed outside their temporal boundaries regardless of whether the claims have merit. Nonetheless, such statutes exist to promote—not defeat—the ends of justice. Statutes of limitations represent the legislature's determination of the point at which the right of a party to pursue a claim must yield to competing interests, such as the unfairness of requiring the opposing party to defend against stale allegations. *Ord. of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944); *see also Estrada v. Burnham*, 316 N.C. 318, 327 (1986) ("With the passage of time, memories fade or fail altogether, witnesses die or move away, evidence is lost or destroyed; and it is for these reasons, and others, that statutes of limitations are inflexible and unyielding and operate

1. The General Assembly repealed N.C.G.S. § 7A-30(2) in 2023. An Act to Make Base Budget Appropriations for Current Operations of State Agencies, Departments, and Institutions, S.L. 2023-134, § 16.21.(d)–(e), https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v7.pdf. The repeal applies to all cases filed with the Court of Appeals on or after 3 October 2023, when the repealing legislation took effect. *Id.* § 16.21(e).

without regard to the merits of a cause of action."), *superseded by statute on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 163–64 (1989).

"Subsection 1-15(c) establishes [a] standard three-year statute of limitations for medical malpractice actions." *King*, 370 N.C. at 469. The General Assembly enacted the provision "in an attempt to preserve medical treatment and control malpractice insurance costs, both of which were threatened by the increasing number of malpractice claims." *Roberts v. Durham Cnty. Hosp. Corp.*, 56 N.C. App. 533, 541 (1982), *quoted in Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 237 (1985).

In general, the three-year statute of limitations imposed by subsection 1-15(c) begins running "at the time of the occurrence of the last act of the defendant giving rise to the cause of action." N.C.G.S. § 1-15(c) (2021). It can be extended to as many as four years if the plaintiff's injuries are "not readily apparent to the [plaintiff] at the time of [their] origin." *Id.*

This would be an easy case if subsection 1-15(c) were the only statutory provision on point. Plaintiff did not file his medical malpractice claims against defendants within three years of his first surgery, and this case does not involve latent injuries. Plaintiff's claims are undeniably time-barred if subsection 1-15(c) controls.

The legislature has recognized, however, "that individuals under certain disabilities are unable to appreciate the nature of potential legal claims and take the appropriate action." *King*, 370 N.C. at 470. For most kinds of civil claims, subsection 1-17(a) pauses the statute of limitations if the individual with the claim "is under a disability at the time the cause of action accrued." N.C.G.S. § 1-17(a) (2021). In such cases, the limitations period does not begin to run until "the disability is removed." *Id.*

Subsection 1-17(a) defines "a person [who] is under a disability" to include anyone who "is within the age of 18 years." N.C.G.S. § 1-17(a), (a)(1). "The disability of minority can be removed by the appointment of a [guardian ad litem] or by the passage of time, whichever occurs first." *King*, 370 N.C. at 471. Accordingly, when a statute of limitations has been tolled under subsection 1-17(a) based on a plaintiff's age, it starts running as soon as the court appoints a guardian ad litem to pursue the plaintiff's claims or the plaintiff turns eighteen years old.

"Whereas the tolling provision of subsection [1-17](a) focuses on general torts, the tolling provision of subsection [1-17](b) specifically addresses professional negligence claims . . . ." *Id.*

> *Notwithstanding the provisions of subsection (a) of this section, and except as otherwise provided in subsection (c) of this section*, an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c), *except that if those time limitations expire before the minor attains the full age of 19 years, the action may be brought before the minor attains the full age of 19 years.*

N.C.G.S. § 1-17(b) (2021) (emphases added).

On its face, the tolling provision in subsection 1-17(b) applies to the professional malpractice claims of minors, to the exclusion of subsection (a) and except as provided in subsection (c). This Court has described the interaction between subsections 1-17(a) and 1-17(b) as follows:

> [For a professional malpractice claim asserted by a minor, subs]ection 1-17(b) . . . reduces the standard three-year statute of limitations, after a plaintiff reaches the age of majority, to one year by requiring a filing before the age of nineteen. Thus, a minor plaintiff who continues under that status until age eighteen has one year to file her claim. The language of "Notwithstanding the provisions of subsection (a)" refers to this reduced time period to bring an action. Like subsection (a), subsection (b) still allows the minor to reach adulthood before requiring her to pursue her . . . malpractice claim, assuming her disability is otherwise uninterrupted. Removal of the disability either by reaching the age of majority or by appointment of a [guardian ad litem] triggers the running of the statute of limitations.

King, 370 N.C. at 471–72 (internal citations omitted).

Inasmuch as medical malpractice is a subcategory of professional malpractice, subsection 1-17(b) would supply the controlling statute of limitations for the medical malpractice claims of minors if the statute ended there. Indeed, prior to 2011, subsection 1-17(b) did govern such claims. *See id.* at 471 ("[W]hen a medical malpractice claim accrues while a plaintiff is a minor, N.C.G.S. § 1-17(b) tolls the standard three-year statute of limitations . . . ."); N.C.G.S. § 1-17 (2010).

In 2011, however, the General Assembly added subsection (c) to N.C.G.S. § 1-17. An Act to Reform the Laws Relating to Money Judgment Appeal Bonds, Bifurcation of Trials in Civil Cases, and Medical Liability, S.L. 2011-400, § 9, 2011 N.C. Sess. Laws 1712, 1716–17. As we acknowledged in *King*, subsection 1-17(c) "further narrow[s] the time period for a minor to pursue a medical malpractice claim." 370 N.C. at 471 n.2. *See generally LexisNexis Risk Data Mgmt. Inc. v. N.C. Admin. Off. of the Cts.*, 368 N.C. 180, 187 (2015) ("[A] specific provision of a statute ordinarily will prevail over a more general provision in that same statute. . . . [T]he later addition of a specific provision to a pre-existing more general statute indicates the General Assembly's most recent intent." (citations omitted)).

Subsection 1-17(c) reads in full:

> *Notwithstanding the provisions of subsection (a) and (b) of this section*, an action on behalf of a minor for injuries alleged to have resulted from malpractice arising out of a health care provider's performance of or failure to perform professional services *shall be commenced within the limitations of time specified in G.S. 1-15(c), except as follows*:
>
> (1) If the time limitations specified in G.S. 1-15(c) expire before the minor attains the full age of 10 years, the action may be brought any time before the minor attains the full age of 10 years.
>
> (2) If the time limitations in G.S. 1-15(c) have expired and before a minor reaches the full age of 18 years a court has entered judgment or consent order under the provisions of Chapter 7B of the General Statutes finding that said minor is an abused or neglected juvenile as defined in G.S. 7B-101, the medical malpractice action shall be commenced within three years from the date of such judgment or consent order, or before the minor attains the full age of 10 years, whichever is later.
>
> (3) If the time limitations in G.S. 1-15(c) have expired and a minor is in legal custody of the State, a county, or an approved child placing agency as defined in G.S. 131D-10.2, the medical malpractice action shall be commenced within

> one year after the minor is no longer in such legal custody, or before the minor attains the full age of 10 years, whichever is later.

N.C.G.S. § 1-17(c) (emphases added).

The first sentence in subsection 1-17(c) unambiguously declares that its tolling provision—not those in subsections 1-17(a) and 1-17(b)—applies to the medical malpractice claims of minors. It further states that such claims must be filed "within the limitations of time specified in G.S. 1-15(c)" unless they fit into one of the exceptions in subdivisions 1-17(c)(1) through (c)(3). In other words, subject to the exceptions in subdivisions 1-17(c)(1) through (c)(3), subsection 1-17(c) eliminates tolling of the medical malpractice claims of minors.

The parties agree that this case does not fall within any of the exceptions in subdivisions 1-17(c)(1) through (c)(3). We concur. Plaintiff was not under the age of ten when "the time limitations specified in [subsection] 1-15(c) expire[d]," nor does the record anywhere indicate that he has ever been adjudicated "an abused or neglected juvenile as defined in G.S. 7B-101" or placed "in legal custody of the State, a county, or an approved child placing agency." N.C.G.S. § 1-17(c)(1)–(3). Consequently, subsection 1-17(c) required plaintiff to commence his lawsuit within the time frame set out in subsection 1-15(c). Because plaintiff failed to do so, his claims are time-barred.

In reaching the opposite conclusion, the dissenting judge in the Court of Appeals reasoned in part:

> Section 1-17(c) is itself an exception to the general rule applicable to minors injured by professional negligence set forth in Section 1-17(b). Indeed, Section 1-17(b), as amended, makes this express. N.C. Gen. Stat. § 1-17(b) ("Notwithstanding the provisions of subsection (a) of this section, *and except as otherwise provided in subsection (c) of this section* . . ." (emphasis added)). As such, Section 1-17(b) remains generally applicable unless one of the exceptions under Section 1-17(c) applies. As in Section 1-17(b), the language in Section 1-17(c) of "Notwithstanding the provisions of subsection (a) and (b) of this section" references the reduced time period to bring an action in the three instances to which subsection (c) is applicable.

Morris, 285 N.C. App. at 156 (Hampson, J., dissenting) (alteration in original). Simply put, the dissent in the Court of Appeals would apply the tolling provision in subsection 1-17(b) to any medical malpractice claim alleged by a minor that does not fall within one of the exceptions in subdivisions 1-17(c)(1) through (c)(3).

The dissent's strained reading of N.C.G.S. § 1-17 cannot be squared with the statute's plain meaning. *See Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45 (1999) ("Where the language of a statute is clear, the courts must give the statute its plain meaning . . . ."). As we have seen already, subsection 1-17(c) exempts the medical malpractice claims of minors from the tolling provisions in subsections 1-17(a) and (b). *See* N.C.G.S. § 1-17(c) ("Notwithstanding the provisions of subsection (a) and (b) of this section . . . ."). Subsection 1-17(c) mandates that such claims "be commenced within the limitations of time specified in G.S. 1-15(c), except" when they fall under (c)(1), (c)(2), or (c)(3). *Id.* Put differently, subsection 1-17(c) is an exception to subsections 1-17(a) and (b), and subdivisions 1-17(c)(1) through (c)(3) are exceptions to subsection 1-17(c).

In his primary brief to this Court, plaintiff insists that interpreting subsection 1-17(c) to subject his medical malpractice claims and those of similarly situated individuals to the standard three-year limitations period in subsection 1-15(c) would produce "patently unfair and absurd" results. He points out that pursuant to subdivision 1-17(c)(1), a child who is injured through the medical malpractice of hospital staff on the day of his birth has ten years—or until he "attains the full age of 10 years"—to sue for medical malpractice. On the other hand, under the reading of subsection 1-17(c) adopted by the Court of Appeals and endorsed by this Court, if the injury occurs instead on the child's thirteenth birthday, he has only three years to bring a claim. According to plaintiff, the provisions of N.C.G.S. § 1-17 "cannot possibly be intended to yield this type of result, where a claim for one child brought ten years later is not considered stale but brought by an older child would be barred if filed three years and a day following the negligence."

In our view, the scenario posed by plaintiff cannot accurately be characterized as absurd. The legislature may have reasonably decided that young children should have more time to bring their claims because older children often are better able to understand and describe their injuries and to grasp the import of a legal proceeding. Whatever the reason, whether the law ought to distinguish between minor plaintiffs in this way is a separate issue, and one on which the courts must defer to the legislature's judgment so long as the legislature acts within constitutional bounds.

Plaintiff had three years from the accrual of his causes of action in February 2015 to sue defendants for medical malpractice. Because he waited until 14 September 2020 to file his complaint, the Court of Appeals correctly held that his lawsuit is barred by the statute of limitations.

In front of the Court of Appeals, plaintiff argued that, as applied to his claims, subsection 1-17(c) "violates the Equal Protection Clause of both the United States and North Carolina Constitutions." *Morris*, 285 N.C. App. at 151. The Court of Appeals majority held that "plaintiff's constitutional challenge to [subsection] 1-17(c) . . . lacks merit." *Id.* The dissenting judge disagreed:

> [p]laintiff has raised . . . the colorable argument if [subsection] 1-17(c) did operate to require [p]laintiff to bring suit as a sixteen year old, while still under a legal disability and legally unable to do so, that as applied to [p]laintiff, such an application of the statute would violate his federal and state constitutional right to equal protection of the laws . . . .

Id. at 158 (Hampson, J., dissenting).

When the Court of Appeals issued its decision, N.C.G.S. § 7A-30(2) still provided parties with an appeal of right to this Court based on a dissent in the Court of Appeals. In *Cryan v. National Council of YMCA*, we explained what was necessary for a dissent to confer jurisdiction on this Court pursuant to N.C.G.S. § 7A-30(2): "To confer appellate jurisdiction, a Court of Appeals dissent must specifically set out the basis for the dissent—meaning the reasoning for the disagreement with the majority. A dissent that does not contain any reasoning on an issue cannot confer jurisdiction over that issue." 384 N.C. 569, 570 (2023).

In this case, the dissent registers disagreement with the majority's analysis of plaintiff's constitutional challenge, but it offers no reasons for that disagreement. We therefore lack jurisdiction under N.C.G.S. § 7A-30(2) to review the constitutional issues raised by plaintiff.[2] *See id.*

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2. Our dissenting colleagues argue that *Cryan* does not apply here because the dissenting judge in the Court of Appeals "raised and explained his disagreement with the majority on whether plaintiff's constitutional challenge [to subsection 1-17(c)] has merit." In fact, the dissenting judge provided no such explanation. As noted above, he merely described plaintiff's equal protection challenge as "colorable" without making any argument in support of his position. *Morris*, 285 N.C. App. at 158–59 (Hampson, J., dissenting). Like the dissenting judge in *Cryan*, he "did not expressly . . . provide any explanation for why [the majority's] decision was wrong." 384 N.C. at 574.

The three-year statute of limitations bars plaintiff's medical malpractice claims. No other issue is properly before this Court. Accordingly, we affirm the judgment of the Court of Appeals reversing the trial court's denial of defendants' motions to dismiss.

AFFIRMED.

Justice EARLS concurring in part and dissenting in part.

I concur with the majority's holding that N.C.G.S. § 1-17(c) creates a three-year statute of limitations for medical-malpractice claims brought by minors injured after the age of seven, even though they are legally incapable of filing suit until they reach the age of eighteen.

The majority's further conclusion that this Court lacks jurisdiction over plaintiff's constitutional challenge to this interpretation of subsection 1-17(c) is wrong as a matter of precedent and constitutional law. It is true that questions about this Court's jurisdiction under N.C.G.S. § 7A-30(2) will have no significance under the new version of the statute which eliminates the right to appeal based on a dissent, *see* An Act to Make Base Budget Appropriations for Current Operations of State Agencies, Departments, and Institutions, S.L. 2023-134, § 16.21(d), https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v7.pdf (eliminating right of appeal based on a dissent for cases filed in the Court of Appeals on or after 3 October 2023). But it still matters to the litigants in this case.

As a matter of precedent, plaintiff has met all the requirements for us to consider his constitutional challenge. Plaintiff argued his claim in the Court of Appeals, the dissenting judge raised the constitutional question as grounds for "diverg[ing] from the opinion of the majority," and the parties briefed the issue in our Court. *See State v. Hooper*, 318 N.C. 680, 682 (1987); *see also State v. Norris*, 360 N.C. 507, 511 (2006). Under our case law, that is enough to invoke our review. As this Court has explained:

> In determining which specific issues are properly before the Court in an appeal based upon a dissent, we must consider whether the issue was raised at the trial court and the Court of Appeals, whether the error was properly assigned in the record on appeal, and whether the issue was a point of dispute set out in the dissenting opinion of the Court of Appeals.

In re R.L.C., 361 N.C. 287, 290, *cert. denied*, 552 U.S. 1024 (2007).

And when this Court has found a dissenting opinion insufficient to confer jurisdiction under section 7A-30(2), that dissent was far more threadbare than the one here. In *Cryan*, for instance, the dissent appended just one sentence to the end of the opinion: "Because I would determine jurisdiction to decide the constitutional issue is proper before the three-judge panel in Wake County, I would deny Defendant's petition for writ of certiorari." *Cryan v. Nat'l Council of YMCA of the United States*, 384 N.C. 569, 574 (2023) (cleaned up). We found that "single sentence" insufficient to trigger our review. *Id.* at 575. The "dissent did not expressly oppose the majority's" ruling that a party raised an as-applied constitutional challenge. *Id.* at 574. Even more, the opinion did not "provide any explanation for why that decision was wrong." *Id.* In view of those palpable deficiencies, we held that such a "vague, implied disagreement with the majority's decision" devoid of "any reasoning" could not confer jurisdiction on this Court. *Id.* at 575; *see also C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgmt. Corp.*, 311 N.C. 170, 176 (1984) (holding that when a dissenting judge "does not set out the issues upon which he bases his disagreement with the majority, the appellant has no issue properly before this Court").

Here, by contrast, the dissenting judge in the Court of Appeals raised and explained his disagreement with the majority on whether plaintiff's constitutional challenge had merit. *See Morris v. Rodeberg*, 285 N.C. App. 143, 158–59 (2022) (Hampson, J., dissenting). The dissent clarified why, in its view, plaintiff raised a "colorable argument" on his constitutional claim—that subsection 1-17(c), as interpreted, would "require [p]laintiff to bring suit as a sixteen year old, while still under a legal disability and legally unable to do so." *Id.* at 158. It flagged the constitutional problems with a three-year statute of limitations for plaintiff's medical-malpractice claim—that as applied to plaintiff, such a truncated window would violate his "federal and state constitutional right to equal protection of the laws including by depriving him of" a fundamental right. *Id.* And it specified the constitutional provision imperiled by subsection 1-17(c)—the Open Courts Clause. *See id.* at 158–59 (quoting N.C. Const. art. I, § 18 ("All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.")).

Justice does not require, nor does our precedent demand, that we split hairs about whether a dissent sufficiently parsed a constitutional issue that it plainly raised. The confusion that would follow from opening that door makes clear the problem: Is one paragraph enough? How

much detail is required? Must the dissent cite other authorities, and if so, how many? Those questions are not ones this Court should spend its time answering. Especially here where the parties themselves did not argue that the dissent in the Court of Appeals lacked enough reasoning to satisfy section 7A-30(2).

Second, as a matter of constitutional law, this Court is sworn to uphold the constitutional rights of all citizens, including minors. Indeed, that duty is at its zenith for parties who cannot vindicate their rights on their own. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90(3) Harv. L. Rev. 489, 498 (1977) ("The very lifeblood of courts is popular confidence that they mete out evenhanded justice and any discrimination that denies [disadvantaged] groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence."). In service of that principle, this Court wields jurisdiction to vary the provisions of any rule of appellate procedure "[t]o prevent manifest injustice to a party." N.C. R. App. P. 2; *see also Blumenthal v. Lynch*, 315 N.C. 571, 578 (1986) (explaining that Rule 2 grants us the "residual power to suspend or vary operation of our published rules" when "the justice of doing so or the injustice of failing to do so appears manifest to the Court"). We owe it to these parties to consider the constitutional issues that have been properly raised and briefed in this case.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.
v.
CASSIE HERRING AND CURTIS LEE TURMAN AND RUTH HERRING

No. 227A22

Filed 15 December 2023

Insurance—coverage under parents' policy—resident of household—time spent in the home—intent to form common household

In an action where an insurance company sought a declaratory judgment stating that defendant was not covered under her mother's and stepfather's underinsured motorist policy (for severe injuries resulting from a car accident), the trial court erred in granting summary judgment to defendant where a genuine issue of material fact existed regarding whether she was a "resident" of her mother's household entitled to coverage under the policy. Although defendant claimed in affidavits that she split her residency between her divorced parents' homes, she also gave sworn testimony indicating that she merely visited her mother's home for occasional, short periods of time without necessarily spending the night. Moreover, some of defendant's statements cast doubt on whether she and her mother intended to form a common household, indicating instead that she was part of her father's household only (she stated that she lived alone with her father for the fifteen-year period preceding her car accident; she depended on her father for financial support; all of her mail went to her father's home; and she treated her father's address as her home address for car title, property tax, and voter registration purposes).

Justice EARLS dissenting.

Justice RIGGS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 284 N.C. App. 334 (2022), affirming an order entered on 15 October 2021 by Judge G. Bryan Collins in Superior Court, Wake County. Heard in the Supreme Court on 14 September 2023.

Haywood, Denny & Miller, LLP, by Robert E. Levin and Frank W. Bullock, III, for plaintiff-appellant.

Martin & Jones, PLLC, by Huntington M. Willis for defendant-appellees.

ALLEN, Justice.

In upholding the trial court's order granting summary judgment for defendants, the Court of Appeals determined that defendant Cassie Herring (Cassie) resides with her mother and stepfather and thus qualifies for benefits under their automobile insurance policy. Because the evidence raises genuine issues of material fact about Cassie's residency, we reverse the judgment of the Court of Appeals and remand this case for further proceedings.

On 19 April 2019, Cassie was injured in a two-automobile collision in the Town of Wendell in Wake County while riding with her father, Franklin Herring, in his vehicle. The accident left Cassie with fractured ribs, injuries to her face and jaw, and a shattered knee. The driver of the other car was insured, and her insurance company ultimately tendered $100,000.00—the policy's limit per individual—to Cassie.

Cassie's mother, defendant Ruth Herring, and stepfather, defendant Curtis Lee Turman, maintained a personal automobile policy issued by plaintiff North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) for the period of 22 February 2019 to 22 August 2019. The policy included underinsured motorist (UIM) coverage of up to $100,000.00 per person payable to "an insured [who] is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of . . . bodily injury sustained by an insured and caused by an accident." The policy defined "insured" to include "any family member" of the named insureds (Ruth Herring and Curtis Lee Turman) and defined "family member" as "a person related to [a named insured] by blood, marriage or adoption who is a resident of [the named insured's] household." The policy did not define the term "resident."

On 26 May 2020, Cassie filed a lawsuit in the Superior Court, Wake County, seeking benefits under the Farm Bureau policy's UIM coverage. On 12 August 2020, the trial court entered a consent order staying the lawsuit so that the parties could participate in arbitration.

Prior to arbitration, and with her legal counsel in attendance, Cassie disclosed the following information while testifying under oath in an examination conducted by Farm Bureau's legal counsel. Afflicted by anxiety and bipolar disorder, Cassie was unemployed at the time of her accident and had worked only sporadically since graduating from high

school in 2003. Her parents divorced in 2006, after which Cassie and her father lived alone in the Town of Knightdale in Wake County for about ten years. She and her father then moved to her father's current home near the border of Wake and Johnston Counties. Cassie gave her father's address as her home address when obtaining a driver's license and registering to vote. She received all her mail, including bank statements and bills, at her father's address. Cassie used her father's address when purchasing her car and paying property taxes on the car. She saw a doctor and a dentist whose offices were located within a few miles of her father's home.

In 2007 Cassie's mother and stepfather took up residence in Bahama, an unincorporated community in Durham County. During the approximately five-year period between her move to her father's present home and the accident, Cassie would travel to her mother's home a couple of times each week. She sometimes visited for the day, but other times she stayed overnight. Cassie had a room at her mother's house and occasionally kept clothes there. She could not specify how many times per month she stayed overnight at her mother's home in 2019, though Cassie estimated that "all of the days" she spent there that year "probably" equaled roughly four months. When asked whether her mother supported her financially, Cassie responded, "My mom is on disability." She later added, though, that she was on her mother's cell phone plan. Cassie denied receiving any mail at her mother's home in 2019 or using her mother's address for any official correspondence.

On 2 December 2020, several days before the scheduled arbitration, Farm Bureau filed this action in the Superior Court, Wake County, seeking a judicial declaration that Cassie was not entitled to UIM coverage because, at the time of the accident, she lived with her father and "was not a resident of the household of Curtis Lee Turman and Ruth Herring." Farm Bureau subsequently filed a motion for summary judgment on its declaratory judgment claim based on Cassie's testimony.

Defendants responded with their own summary judgment motion, supported by affidavits executed by defendants and Cassie's father. Each affidavit asserted that Cassie maintained a split residence, dividing her time between her father's home and the home of her mother and stepfather. The affidavits alleged that long-term severe depression and anxiety disorder have impaired Cassie's ability to live independently. In their affidavits, Cassie's mother and stepfather further alleged that Cassie was listed as a driver on their automobile insurance policy and that she stored items at her mother's home, including "items of daily living such as clothing, toiletries, and bedding." All four affidavits claimed that Cassie "routinely" received mail at her mother's address.

On 15 October 2021, the trial court entered an order denying Farm Bureau's motion for summary judgment but granting defendants' motion. Farm Bureau timely appealed.

A divided panel of the Court of Appeals affirmed the trial court's order. *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 284 N.C. App. 334, 339 (2022). The majority "examine[d] the record to determine if, under any reasonable construction of the term, [Cassie] may be considered a 'resident' of her mother's household" and concluded that "at the very least" Cassie could establish that she maintained a split residency between the two homes. *Id.* at 338. The dissenting judge would have held that summary judgment was inappropriate because a genuine issue of fact existed as to whether Cassie was a resident of her mother's home. *Id.* at 343 (Dillon, J., dissenting). The dissenting judge argued that certain statements in Cassie's testimony could lead a jury to find that Cassie "is part of her father's household and merely visits her mother." *Id.* at 342–43.

On 26 July 2022, Farm Bureau filed a notice of appeal with this Court based on the dissent in the Court of Appeals. Although it has since been repealed, N.C.G.S. § 7A-30(2) then provided a right of appeal to this Court "from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent when the Court of Appeals is sitting in a panel of three judges." N.C.G.S. § 7A-30(2) (2021), *repealed by* An Act to Make Base Budget Appropriations for Current Operations of State Agencies, Departments, and Institutions, S.L. 2023-134, § 16.21.(d)–(e), https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v7.pdf.

The only issue before this Court is whether the Court of Appeals erred in affirming summary judgment for defendants.[1] "We review de novo an appeal of a summary judgment order." *N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 376 N.C. 280, 285 (2020). When reviewing a matter de novo, this Court "considers the matter anew and freely substitutes its own judgment" for that of the lower courts. *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647 (2003).

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1. In their brief to this Court, defendants additionally argue that Farm Bureau waived its right to decline coverage by, *inter alia*, paying Cassie $5,000.00 under the policy's no-fault medical payments coverage. Although the dissenting judge in the Court of Appeals addressed this issue, the majority expressed no view on it. *Herring*, 284 N.C. App. at 343–44 (Dillon, J., dissenting). Accordingly, the issue is not properly before this Court. *See State v. McKoy*, 385 N.C. 88, 94 (2023) ("When a case comes to us under N.C.G.S. § 7A-30(2) based solely on a dissent in the Court of Appeals, the scope of review is limited to those questions on which there was division in the intermediate appellate court." (internal quotation marks and citation omitted)).

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2021). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action . . . . The issue is denominated 'genuine' if it may be maintained by substantial evidence." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972). "A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018).

In the context of an insurance coverage dispute, summary judgment "is appropriate . . . where the material facts and the relevant language of the policy are not in dispute and the sole point of contention is 'whether events as alleged in the pleadings and papers before the court are covered by the policies.' " *Martin*, 376 N.C. at 285 (quoting *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690–91 (1986)). "The party seeking coverage under an insurance policy bears the burden 'to allege and prove coverage.' " *Id.* (quoting *Brevard v. State Farm Mut. Auto. Ins. Co.*, 262 N.C. 458, 461 (1964)).

"As with all contracts, the goal of construction [of an insurance policy] is to arrive at the intent of the parties when the policy was issued." *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505 (1978). "If no definition [of a term used in the policy] is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended." *Id.* at 506. When the meaning of a term "is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder." *Id.* In other words, we will construe ambiguous terms in favor of coverage. *Martin*, 376 N.C. at 286.

"[T]his Court has struggled in attempting to formulate a precise definition of the term 'resident' in connection with an insurance policy." *Id.* at 288. Nonetheless, consistent with our preference for extending coverage, we have construed the term to encompass a variety of living arrangements. *See, e.g.*, *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430 (1966) (holding that an adult son who had recently moved back in with his father qualified as a resident of his father's household under his father's automobile insurance policy); *Barker v. Iowa Mut. Ins. Co.*, 241 N.C. 397 (1955) (holding that a nineteen-year-old college student who lived in an apartment near campus remained a resident of his father's household for purposes of his father's fire insurance policy).

On the other hand, we have explained that an individual cannot qualify as a resident of an insured relative's household unless he can show that he "actually lived in the same dwelling as the insured relative for a meaningful period of time." *Martin*, 376 N.C. at 291; *see also id.* at 284, 294 (discerning no intent on the part of the policy holder and her granddaughter and daughter-in-law to form a common household even though the granddaughter and daughter-in-law (1) lived in a guest house located on the policy holder's farm and within one hundred feet of the policy holder's house; (2) visited the policy holder almost every day and occasionally stayed with her overnight; (3) possessed keys to the policy holder's house and enjoyed "unlimited access to enter her residence"; and (4) had many of their living expenses paid for by the policy holder out of the farm's business account).

Under this Court's decision in *Martin*, "the question [is] whether the party seeking coverage ha[s] stayed in the insured family member's residence on more than merely a temporary basis *and* whether the facts support[] a finding that the family members intended to form a common household." *Id.* at 292 (emphasis added). Answering this two-part question "can require a particularized, fact-intensive inquiry into the circumstances of the parties' current and prior living arrangements." *Id.* at 291.

Based on the record before us, the trial court should have denied defendants' motion for summary judgment. Even if an adult may be considered a resident of more than one household for purposes of the policy's UIM coverage,[2] the available evidence when viewed in the light most favorable to Farm Bureau—the nonmoving party—raises genuine issues of material fact as to whether Cassie was a resident of her mother's household at the time of the accident.

The Court of Appeals affirmed summary judgment for defendants largely because, according to the majority, Cassie testified that she "lives in her mother's home for 'four months out of the year,' an arrangement that she has 'always' had." *Herring*, 284 N.C. App. at 338. Of course, whether Cassie actually lived with—and did not merely visit—her mother is the very point in dispute. Some of the statements made by Cassie about her trips to her mother's home seem consistent with visitor status. Her testimony establishes that she did not stay with her mother for extended stretches. Cassie testified that she "saw her [mother] a

2. Farm Bureau has not argued to this Court that the policy issued to Cassie's mother and stepfather excludes the possibility of dual residency. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

couple of times a week" and that her trips sometimes involved overnight stays but sometimes not.

Moreover, even if Cassie stayed with her mother on "more than merely a temporary basis," other parts of her testimony appear to cast doubt on whether she and her mother "intended to form a common household." *Martin*, 376 N.C. at 292. When asked for her address at the outset of her testimony, Cassie gave her father's address and said nothing about living with her mother. She went on to testify that she had lived alone with her father for the fifteen-year period immediately preceding her accident. Cassie also stated that she depended on her father for financial support but did not claim to receive such aid from her mother.[3] Cassie testified that all her mail went to her father's address and that she treated her father's address as her home address for car title, property tax, and voter registration purposes. Despite her twice-weekly trips to her mother's home, Cassie said that she only occasionally kept clothes there. Taken as a whole and viewed in the light most favorable to Farm Bureau, this testimony would allow a jury to find that Cassie "is part of her father's household and merely visits her mother." *Herring*, 284 N.C. at 343 (Dillon, J., dissenting).

Defendants' affidavits do not overcome the hurdles to summary judgment erected by Cassie's testimony. To the contrary, as remarked by the dissenting judge in the Court of Appeals, they raise credibility issues that must be resolved by a jury at trial and not by a trial court at summary judgment. *Id*. at 341–42; *see also City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 655 (1980) ("[I]f there is any question as to the credibility of affiants in a summary judgment motion or if there is a question which can be resolved only by the weight of the evidence, summary judgment should be denied.").

This Court has outlined the circumstances in which a trial court may grant summary judgment to a moving party based on that party's own affidavits.

> [S]ummary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and

3. Cassie did testify that she was on her mother's cellular phone plan, but she did not provide any details regarding the cost to her mother of having Cassie on the plan.

> contradiction . . . ; and (3) when summary judgment is otherwise appropriate. This is not a holding that the trial court is required to assign credibility to a party's affidavits merely because they are uncontradicted. To be entitled to summary judgment the movant must still . . . show that there are no genuine issues of fact . . . . Further, if the affidavits seem inherently incredible; if the circumstances themselves are suspect; or if the need for cross-examination appears, the court is free to deny the summary judgment motion. *Needless to say, the party with the burden of proof, who moves for summary judgment supported only by his own affidavits, will ordinarily not be able to meet these requirements and thus will not be entitled to summary judgment.*

Kidd v. Early, 289 N.C. 343, 370–71 (1976) (emphasis added).

Here the affidavits submitted by defendants conflict with Cassie's testimony on key points, raising more than latent doubts regarding defendants' credibility. For instance, all four affidavits aver that Cassie "routinely" received mail at her mother's home. Yet, in her testimony Cassie more than once maintained without exception that her mail went to her father's address, and she expressly denied receiving any mail whatsoever at her mother's address in 2019, the year of her accident. Additionally, in her affidavit Cassie swears that she received financial support from both her father and her mother. When asked during her testimony whether her parents supported her financially, however, Cassie stated that she depended on her father for financial assistance but that her mother was on disability. Because the task of resolving such factual discrepancies lies with the jury, the trial court should have denied defendants' motion for summary judgment.

The evidence in the record raises genuine issues of material fact as to whether Cassie qualifies as a resident of her mother's household under the two-part test articulated by this Court in *Martin*. Accordingly, we reverse the decision of the Court of Appeals affirming summary judgment for defendants and remand this case for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice EARLS dissenting.

The law of this State, as established by the General Assembly in the North Carolina Motor Vehicle Safety-Responsibility Act of 1953, N.C.G.S. §§ 20-279.1 to 279.39 (2021), "is to compensate innocent victims of financially irresponsible motorists." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 266 (1989). That purpose "is best served when the statute is interpreted to provide the innocent victim with the fullest possible protection." *Proctor v. N.C. Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 225 (1989); *see also Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574 (2002) (same). It is also the intent of the General Assembly "that insurance policies and contracts be readable by a person of average intelligence, experience, and education." N.C.G.S. § 58-38-5 (2021). In this case, Ms. Herring's mother and stepfather purchased an underinsured motorist policy and listed Ms. Herring as an insured driver, and they had every reason to believe from the plain language of the policy that as a part-time resident of their household, Ms. Herring's injuries would be compensated if she was an innocent victim of a financially irresponsible motorist. The undisputed evidence, taken in the light most favorable to N.C. Farm Bureau, shows that Ms. Herring was a resident of her mother's household and that she is therefore entitled to summary judgment in this action.

This case asks us to determine if the trial court properly granted summary judgment in favor of Ms. Herring on the issue of whether she is a "resident" of her mother's home under her mother and stepfather's underinsured motorist policy. I agree with the majority that our law evinces a preference for extending insurance coverage, and accordingly the term "resident" encompasses a "variety of living arrangements." Included within the term "resident" are adult children like Ms. Herring, who depend on their parents for financial and emotional support. While it is true that under our precedent a person who has not lived with an insured relative "in the same dwelling . . . for a meaningful period of time" is not considered a resident of that home, *N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 376 N.C. 280, 291 (2020), the four months that Ms. Herring stays with her mother each year is sufficient to meet this standard, particularly when the evidence shows that her mother intended to form a common household with her, *see id.* at 292. There are adult children who, for a variety of reasons, may depend heavily on their parents. The fact that such an adult child's parents are divorced, live in different households, and yet share responsibilities for caring for that adult child does not invalidate the child's residency in those homes. *See id.* Thus "[t]he material question of fact in this case is not whether the mother's

home is [Ms. Herring's] *primary* residence; rather, it is whether [Ms. Herring] maintains *multiple* residences." *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 284 N.C. App. 334, 339 (2022).

Accordingly, I disagree with the majority's holding that summary judgment in favor of Ms. Herring was erroneous. Instead, I would affirm the decision of the Court of Appeals and instruct that court to reinstate the trial court's order granting summary judgment in favor of Ms. Herring.

On 19 April 2019, Ms. Herring and her father, Franklin Herring, were involved in a car accident while traveling down Wendell Boulevard in Wendell, North Carolina. Ms. Herring's father was operating the vehicle when Debbie Perry, who failed to yield the right of way, crashed into Ms. Herring and her father. As a result of the accident, Ms. Herring suffered multiple injuries including, rib fractures, a crushed kneecap, facial injuries, and jaw injuries. Due to her injuries, Ms. Herring required major surgery and hospitalization. Ms. Perry's insurance policy, issued by North Carolina Farm Bureau Insurance Company (Farm Bureau), provided Ms. Perry with $300,000 coverage per accident, and $100,000 coverage per person. Pursuant to Ms. Perry's policy, Farm Bureau paid Ms. Herring the $100,000 policy limit.

However, because Ms. Herring's injuries were substantial, Ms. Perry's $100,000 per person policy limit was inadequate, and Ms. Herring pursued additional compensation through both of her parents' underinsured motorist policies. The policy at issue here is an underinsured motorist policy issued by Farm Bureau and maintained by Ms. Herring's mother, Ruth Herring, and her stepfather, Curtis Lee Turman. Ms. Herring is listed as an insured driver on this policy, and in May 2020, she filed a lawsuit to recover under the policy's benefits. The parties agreed to arbitration, and in August 2020, the trial court stayed the lawsuit to allow the parties to participate in an arbitration hearing. On 23 November 2020, at Farm Bureau's request, Ms. Herring sat for an "Examination Under Oath." During this proceeding, she was asked about her home address, where she lived, and the fact that most of her documents, including her medical records, bank statements, and drivers' license only referenced her father's address.

In order to qualify for coverage pursuant to her mother and stepfather's policy, Ms. Herring must satisfy two requirements: (1) she must be the family member of a named insured related by blood, marriage, or adoption; and (2) she must be a "resident" of the insured's household. While the phrase "family member" is defined in the policy, and

Ms. Herring's classification as a family member is not disputed, the term "resident" is not defined in the policy and is the center of this dispute.

Ms. Herring contends that she is a resident of both her mother's home and her father's home and accordingly she is a "resident" of her mother's home pursuant to Farm Bureau's insurance policy. The record supports Ms. Herring's position and shows that while Ms. Herring is an adult and was thirty-three years old at the time of the crash, she has maintained residency in both homes due to being diagnosed with anxiety and depression, which has required medication management and inpatient and outpatient treatment. Ms. Herring's symptoms have also prevented her from maintaining employment and owning her own home. Due to the impact Ms. Herring's symptoms have on her daily life activities, she has relied on her parents' support since she was first diagnosed at age seventeen. In connection with her mental health diagnoses, Ms. Herring also depends on both of her parents for emotional comfort and financial support. Because neither parent can provide for Ms. Herring's financial support exclusively, particularly because her mother's primary source of income is derived from disability payments, both of her parents' households have shared this responsibility.

Moreover, Ms. Herring maintains a permanent room at both homes and keeps personal belongings at each residence. These belongings include toiletries, bedding, and clothing. Evidence from Ms. Herring's Examination Under Oath also showed that she has lived "between" her mother's and father's homes and that she spends "a couple of [days] a week" with her mother, which is a schedule she has "always" kept. There, Ms. Herring also noted that she stays the night at her mother's home "a lot," which she quantified as "[p]robably four months out of the year."

In response, Farm Bureau asserts that Ms. Herring is not a resident of her mother's home because: (1) her mother does not support her financially; (2) she receives her mail at her father's home; (3) she is registered to vote in Johnston County, where her father lives; (4) her doctor and dentist are located in Zebulon, North Carolina, near her father's home; and (5) her vehicle registration uses her father's address. However, none of this information invalidates or contradicts Ms. Herring's position that she is a resident of two homes, her father's and her mother's. While there are some legal purposes for which an individual must designate a primary residence under our precedent, residency for purposes of insurance is not one of those.

The record shows that Ms. Herring receives mail at both her mother's and father's homes. Because Ms. Herring resides with her mother

approximately four months out of the year and with her father approximately eight months out of the year, it is simply logical that she would not only receive mail at both residences,[1] but also that she would register to vote in the county where her father's home is located, register her vehicle using her father's home address, and visit medical professionals near her father's home. Furthermore, Ms. Herring's statement that her mother is "on disability" cannot be reasonably interpreted to mean that her mother does not provide her with financial support. After all, providing a child, adult or otherwise, with a roof over their head for four months out of the year is a form of financial support. Also, there is evidence that Ms. Herring's mother pays her phone bill. Indeed, Ms. Herring's mother and stepfather have her listed as a driver on their insurance policy and are thus financially supporting her by paying that bill.

As noted above, the question of material fact in this case is whether Ms. Herring maintains multiple residences, and not whether Ms. Herring's mother's residence is her primary home. Because the evidence here conclusively demonstrates that Ms. Herring held multiple residences at the time of her car accident, namely at her mother's and father's homes, summary judgment in favor of Ms. Herring was appropriate. Thus, I would affirm the Court of Appeals' decision and instruct that court to reinstate the trial court's order granting summary judgment for Ms. Herring.

Justice RIGGS joins in this dissenting opinion.

1. Additionally, at oral argument counsel for Farm Bureau conceded that Farm Bureau sent a $5,000 check for medical benefits in connection with Ms. Herring's claim under her mother's underinsured motorist policy to her mother's address.

STATE v. ALVAREZ

[385 N.C. 431 (2023)]

STATE OF NORTH CAROLINA
v.
FERNANDO ALVAREZ

No. 278PA21

Filed 15 December 2023

Search and Seizure—traffic stop—independent reasonable suspicion—traffic violation—impaired driving

Defendant's Fourth Amendment rights were not violated as a result of a traffic stop and search of his vehicle where law enforcement officers had independent reasonable suspicion—apart from a traffic checkpoint—to justify stopping defendant's vehicle, based on the officers' observation that defendant's car ran off the road and onto the grass alongside the road before coming to a stop at the checkpoint, which indicated a traffic violation of failure to maintain lane control and possible impaired driving.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA20-611 (N.C. Ct. App. July 20, 2021), affirming an order entered on 2 December 2019 by Judge Anna Mills Wagoner in Superior Court, Rowan County. Heard in the Supreme Court on 20 September 2023.

Joshua H. Stein, *Attorney General*, *by Zachary K. Dunn*, *Assistant Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Kathryn L. VandenBerg*, *Assistant Appellate Defender*, *for defendant-appellee.*

BARRINGER, Justice.

In this case, we are tasked with determining whether the Court of Appeals erred in refusing to address whether officers possessed reasonable suspicion to stop defendant's vehicle. We are further tasked with determining whether the Court of Appeals erred in concluding that the traffic checkpoint did not comply with the Fourth Amendment.

For the following reasons, we hold that the officers had independent reasonable suspicion and, therefore, did not violate defendant's Fourth Amendment rights. Since the officers had independent reasonable suspicion, we do not reach the constitutionality of the checkpoint. Thus,

the trial court erred in granting the motion to suppress and the Court of Appeals erred in affirming the trial court's order. We reverse the decision of the Court of Appeals and remand to that court for further remand to the trial court for appropriate proceedings.

I. Background

On 6 June 2018, the Rowan County Sheriff's Office set up a checkpoint at the intersection of Stone and Rainey Roads in Salisbury, North Carolina, from 12:00 a.m. to 2:00 a.m. The checkpoint was in response to a fatal traffic accident in that location.

At approximately 1:45 a.m., defendant came into view of the checkpoint. Deputy Nolan Shue testified, and the trial court found as fact, that defendant's passenger side wheels came off the road and onto the grass before coming to a stop at the checkpoint. Deputy Shue further testified that this observation led him to believe that defendant might be driving while impaired, and that defendant appeared "very nervous and overly talkative," could not stop smiling, and had "glassy eyes."

Based on defendant's driving, demeanor, and appearance, officers initiated a search of defendant's vehicle. During the search, officers discovered cocaine, buprenorphine, marijuana, and drug paraphernalia, for which defendant was later indicted for possessing. Defendant moved to suppress the evidence against him on grounds that it was collected at an unconstitutional checkpoint.

The trial court concluded that the State failed to provide a valid primary programmatic purpose for the checkpoint. Therefore, the State violated the Fourth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Accordingly, the trial court granted defendant's motion and suppressed all evidence collected at the checkpoint. The trial court did not address whether the officers had independent reasonable suspicion to stop defendant, despite having heard arguments on independent reasonable suspicion.

The Court of Appeals affirmed the trial court's order, holding that the checkpoint was unconstitutional because the State failed to establish "a valid primary programmatic purpose" for its implementation. *State v. Alvarez*, No. COA20-611, slip op. at 2 (N.C. Ct. App. July 20, 2021) (unpublished). In a brief concurrence, Judges Dietz and Murphy opined that the Court of Appeals should have addressed whether officers had independent reasonable suspicion. *Id.* at 18. However, the Court of Appeals reasoned, "it is unnecessary to address whether officers possessed independent reasonable articulable suspicion." *Id.* at 16. We disagree.

II. Standard of Review

In reviewing a motion to suppress evidence, this Court examines whether the trial court's findings of fact are supported by competent evidence and whether those findings support the conclusions of law. *State v. Cooke*, 306 N.C. 132, 134 (1982). Conclusions of law are reviewed de novo. *State v. Biber*, 365 N.C. 162, 168 (2011).

III. Analysis

"When an officer observes conduct which leads him reasonably to believe that criminal conduct may be afoot, he may stop the suspicious person to make reasonable inquiries." *State v. Pearson*, 348 N.C. 272, 275 (1998). The officer "must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *State v. Thompson*, 296 N.C. 703, 706 (1979) (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). Reasonable suspicion is an issue independent of the constitutionality of the checkpoint. *State v. Griffin*, 366 N.C. 473, 477 (2013).

Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

> Only some minimal level of objective justification is required. This Court has determined that the reasonable suspicion standard requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.

State v. Barnard, 362 N.C. 244, 247 (2008) (cleaned up).

Here, officers had reasonable suspicion to stop defendant. Deputy Shue articulated in his testimony that defendant's failure to maintain lane control made him "believe that there might be possibly some impaired driving," in violation of N.C.G.S. § 20-138.1. Further, consistent with the trial court's finding of fact, three officers testified that they observed defendant's vehicle veer out of its lane and "basically run off the road." Thus, officers had reasonable suspicion that defendant's actions constituted a traffic violation under N.C.G.S. § 20-146(d)(1), which requires drivers to remain "within a single lane" and not depart from that lane unless it can be departed safely. *See* N.C.G.S. § 20-146(d)(1) (2021).

Although the trial court found that "[t]he location of the checkpoint played a role in the vehicle's alleged 'failure to maintain lane control,' " this finding appears to be based on Deputy Shue's testimony on the hypothetical use of checkpoints as speed enforcement. Neither Deputy Shue's testimony, nor that of any other witness, supports the inference that placement of the checkpoint contributed to defendant's failure to maintain lane control. Moreover, in closing argument, defendant's counsel conceded that "[w]e have no testimony as to whether or not the checking station might have caused him to look down or something as he was approaching and run off the road."

Officers' observation of defendant as he approached the checkpoint gave them reasonable suspicion based on defendant's failure to maintain lane control and possible impaired driving. The officers had reasonable suspicion to justify stopping defendant. Thus, the officers did not violate defendant's Fourth Amendment rights.

Since we hold that the officers had independent reasonable suspicion to stop defendant, we decline to address whether the traffic checkpoint was constitutional. We disavow the Court of Appeals' broad statements on traffic stop constitutionality.

IV. Conclusion

The officers had reasonable suspicion to stop defendant independent of the traffic checkpoint. Thus, stopping defendant did not violate the Fourth Amendment. Accordingly, the trial court erred in granting the motion to suppress and the Court of Appeals erred in affirming the trial court. We reverse the decision of the Court of Appeals and remand to that court for further remand to the trial court for appropriate proceedings.

REVERSED AND REMANDED.

Justice DIETZ did not participate in the consideration or decision of this case.

STATE v. BECK

[385 N.C. 435 (2023)]

STATE OF NORTH CAROLINA
v.
ISAIAH SCOTT BECK

No. 264A21

Filed 15 December 2023

Conspiracy—multiple conspiracies—sufficiency of evidence—separate and distinct agreements

In a criminal prosecution in which defendant was charged with two different conspiracies—to commit robbery with a dangerous weapon and to commit felonious breaking and entering—based on one sequence of events where the victim was threatened at gunpoint in her apartment, the trial court's denial of defendant's motion to dismiss one of the conspiracy charges was proper because the State presented sufficient evidence from which a jury could conclude that defendant formed multiple conspiracies, based on separate agreements with his co-conspirators to, first, rob the victim and, subsequently, to break and enter the victim's apartment. Therefore, the decision of the Court of Appeals vacating defendant's conviction for conspiracy to commit robbery with a dangerous weapon was reversed and the matter remanded with instructions to reinstate defendant's conviction for that offense.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 255 (2021), vacating in part and finding no error in part in a judgment entered on 31 October 2019 by Judge Susan E. Bray, in Superior Court, Watauga County. On 14 December 2021, the Supreme Court allowed defendant's petition for discretionary review of an additional issue. Heard in the Supreme Court on 13 September 2023.

Joshua H. Stein, Attorney General, by Robert C. Ennis, Assistant Attorney General, for the State-appellant/appellee.

Glenn Gerding, Appellate Defender, by Sterling Rozear, Assistant Appellate Defender, for defendant-appellant/appellee.

BARRINGER, Justice.

Here, we consider whether the Court of Appeals erred by vacating defendant's conviction for conspiracy to commit robbery with a dangerous weapon. Upon careful review, we hold that the trial court did not err. Therefore, we reverse the Court of Appeals and direct the Court of Appeals to reinstate defendant's conviction for conspiracy to commit robbery with a dangerous weapon.

I. Factual Background

In April of 2017, Daniel Silva, Javier Holloway, and defendant Isaiah Scott Beck lived in Lexington, North Carolina. The three also knew Cameron Baker who, at that time, lived in Boone, North Carolina. Baker knew Mackenzie Beshears, a drug dealer selling marijuana and Xanax in Boone.

At defendant's trial, the evidence tended to show as follows. Defendant, Silva, and Holloway made plans to rob a drug dealer in Boone. Initially, the three did not have a plan as to whom, specifically, they would rob. On 18 April 2017, Silva texted Holloway, "Send me a pic with me and the gun [ ] so I can show my [a]migo." Later that day, Holloway texted Silva, "[hit me up as soon as possible] got a lick," referring to a robbery. On 24 April 2017, Holloway texted Silva saying, "Aye bro I need that AR asap." On 26 April 2017, Holloway texted Silva asking whether he was "try[ing to get in] on this lick in the [a.m.]." When Silva texted back asking, "Where?", Holloway replied, "Boone, certified we gone come up bro we just need a ride." Silva responded to Holloway, "I got you" and "Be ready at 9." Silva clarified by asking, "me you and [defendant]?", to which Holloway replied, "Yeah."

While defendant, Silva, and Holloway were en route to Boone on 27 April 2017, defendant contacted Baker and asked him if he knew where defendant "could buy some drugs and stuff." Baker then coordinated a meeting between Beshears and defendant, Holloway, and Silva, to take place that day. Defendant then informed Baker he was going to "take all the money [Beshears] got too . . . ."

At trial, Beshears testified that Baker had contacted her on 27 April 2017, asking if she had any marijuana or Xanax for sale. Baker told Beshears that he and a friend would be coming over to purchase the drugs. Baker later told Beshears that only his friend Silva would meet her instead. On the afternoon of 27 April 2017, Beshears and her boyfriend, Devon Trivette, saw Silva pull into the empty parking lot at her apartment. Beshears spoke with Silva on the phone, identifying which

apartment was hers. Then Silva drove away unexpectedly. Beshears texted Silva, who replied that he had become "sketched . . . out [when he saw] somebody peaking [sic] round the corner . . . ." Silva explained that he understood from Baker that Beshears was going to come to the parking lot to transact the sale. Beshears replied "I'll come down if ya want!" Roughly twenty-four minutes later, Silva returned to Beshears' apartment complex, parked his vehicle, and went inside Beshears' apartment.

Upon entering Beshears' apartment, Silva sat down on her couch. Then defendant and Holloway, wearing all black clothing and face coverings, broke in the door of the apartment. Defendant pointed the barrel of an AR-15 at Beshears' head while instructing Holloway to "grab everything." A struggle ensued. Beshears and Trivette were able to push defendant and Holloway out of the apartment, while their roommate called police. Silva helped hold the door closed as Beshears and Trivette pushed defendant and Holloway outside. Beshears testified that during the struggle, Silva stated that he did not know the break-in was going to happen.

II. Procedural Background

Defendant was indicted on four charges: conspiracy to commit robbery with a dangerous weapon, robbery with a dangerous weapon, conspiracy to commit felonious breaking or entering, and felonious breaking or entering. At the close of the State's evidence, defendant moved to dismiss all charges. Pertinent to this appeal, defendant contended that the State failed to present sufficient evidence of multiple conspiracies. The trial court denied defendant's motions to dismiss. A jury found defendant guilty of all four charges.

On appeal, the Court of Appeals held that the trial court erred by denying defendant's motion to dismiss one of the two conspiracy charges, and vacated defendant's conviction for conspiracy to commit robbery with a dangerous weapon. *State v. Beck*, 278 N.C. App. 255, 261–62 (2021).[1] The Court of Appeals reasoned that the State's evidence established one single conspiracy that continued from on or around 18 April 2017 through the date of the breaking or entering and armed robbery on 27 April 2017. *Id.* Judge Tyson issued an opinion, dissenting in

1. We also note that the Court of Appeals erred in determining the charge of conspiracy to commit breaking or entering would be the conspiracy charge to remain if there had been sufficient evidence of only one conspiracy. During oral argument, defendant conceded that the conspiracy to commit robbery with a dangerous weapon would be the conspiracy charge to remain, if only one conspiracy charge would stand. *See* Oral Argument at 53:34, *State v. Beck* (No. 264A21) (Sept. 13, 2023).

part, in which he opined that the State presented sufficient evidence to deny defendant's motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon. *Id.* at 264–65. The State appealed that issue to this Court, in accordance with N.C.G.S. § 7A-30(2). Defendant also filed a petition for discretionary review of an additional issue pursuant to N.C.G.S. § 7A-31, which this Court allowed.[2]

III. Standard of Review

Whether the State presented substantial evidence of conspiracy to commit robbery with a dangerous weapon is a question of law. Therefore, we review the denial of defendant's motion to dismiss de novo. *E.g.*, *State v. Golder*, 374 N.C. 238, 250 (2020). Substantial evidence is the "amount . . . necessary to persuade a rational juror to accept a conclusion." *Id.* at 249 (quoting *State v. Winkler*, 368 N.C. 572, 574 (2015)). Substantial evidence means "more than a scintilla of evidence." *State v. Powell*, 299 N.C. 95, 99 (1980). In our review of the sufficiency of evidence, we consider the evidence in the light most favorable to the State. *E.g.*, *Golder*, 374 N.C. at 250. The State is entitled to "every reasonable intendment and every reasonable inference to be drawn" from the evidence presented. *Id.* (cleaned up). If the record reveals that substantial evidence of the charged offenses has been presented, "the case is for the jury and the motion to dismiss should be denied." *Id.* (cleaned up).

IV. Analysis

The crime of conspiracy is committed when two or more persons agree to perform an unlawful act. *State v. Cox*, 375 N.C. 165, 169 (2020). A single conspiracy can encompass multiple crimes. *See State v. McLamb*, 313 N.C. 572, 578 (1985).

However, in the course of completing the target crime of an original conspiracy, a defendant may enter into an additional and separate conspiracy to commit a different crime not conspired to originally. *State v. Gibbs*, 335 N.C. 1, 48–49 (1993) (defendant first conspired to commit murder with two co-conspirators, then formed a second conspiracy when, in the course of committing the murders, he and one of the original co-conspirators formed a separate agreement to commit burglary in order to accomplish the murders), *cert. denied*, 512 U.S. 1246 (1994). "[W]hether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury." *State v. Tirado*, 358

2. The issue presented in the petition for discretionary review was whether the Court of Appeals erred when it failed to remand for resentencing after vacating one of two convictions that had been consolidated for judgment.

N.C. 551, 577 (2004), *cert. denied*, 544 U.S. 909 (2005) (identifying a non-exhaustive list of factors that *may be considered* by the *Tirado* jury). Evidence of an express agreement is not required. *State v. Winkler*, 368 N.C. 572, 575 (2015). Rather, "evidence tending to show a mutual, implied understanding will suffice." *Id.* (quoting *State v. Morgan*, 329 N.C. 654, 658 (1991)).

The issue before us is whether the State presented substantial evidence of multiple conspiracies, or just one conspiracy. As related to the conspiracies, the State had the burden of presenting substantial evidence tending to show that defendant and at least one other person formed the original conspiracy by agreeing to commit robbery with a dangerous weapon. The State also had the burden of presenting substantial evidence tending to show that defendant and at least one other person formed an additional and separate conspiracy by agreeing to commit the crime of felonious breaking or entering. *See Cox*, 375 N.C. at 169. The elements of robbery with a dangerous weapon are: (1) the unlawful taking or attempt to take personal property from another; (2) having in possession or with the use or threatened use of any firearms or other dangerous weapon; (3) whereby the life of a person is endangered or threatened. *Id.*; N.C.G.S. § 14-87(a) (2021). The elements of felony breaking or entering are: (1) the breaking or entering; (2) of any building; (3) with the intent to commit any felony or larceny therein. *Cox*, 375 N.C. at 172; N.C.G.S. § 14-54 (2021).

Here, the State presented evidence that on 18 April 2017, Silva texted Holloway asking for "a pic with [Silva] and the gun [ ] so [he] can show [his] [a]migo." Holloway then texted Silva later that same day, "[hit me up as soon as possible] got a lick," referring to a robbery. On 24 April 2017, Holloway texted Silva, saying, "Aye bro I need that AR asap." On 26 April 2017, Holloway texted Silva asking whether he was "try[ing to get in] on this lick in the [a.m.]?" When Silva texted back asking, "Where?", Holloway replied, "Boone, certified we gone come up bro we just need a ride." Silva texted Holloway, "I got you" and "Be ready at 9." Silva clarified by asking "me you and [defendant]?" to which Holloway replied "Yeah." While en route to Boone, defendant contacted Baker and asked where he "could buy some drugs and stuff." Baker then coordinated a meeting between Beshears and Silva to take place on 27 April 2017.

When viewed in the light most favorable to the State, the State presented more than a scintilla of evidence from which a rational juror could conclude that defendant conspired with Silva and Holloway to commit robbery with a dangerous weapon against Beshears. Further, that juror could reasonably conclude that the original crime of conspiracy—to

commit robbery with a dangerous weapon—was complete no later than the morning of 27 April 2017.

Importantly, no evidence was produced that the *original* plan included breaking or entering the apartment. Instead, the evidence presented indicates that defendant, Silva, and Holloway *originally* wanted to rob Beshears somewhere other than inside her apartment. Baker testified that "they weren't trying to necessarily go to [Beshears'] house to get the [drugs] . . . . They wanted to meet somewhere else." Silva went to Beshears' apartment complex, thinking they would meet in the parking lot.

Upon arrival at the apartment complex, Silva became "sketched . . . out" and drove away. Silva then texted Beshears, communicating that he understood that Beshears was going to leave her apartment and come to the parking lot. Beshears replied, offering to come to the parking lot. Roughly twenty-four minutes later, Silva texted Beshears that he was returning to the apartment complex. No evidence was presented regarding what communication may or may not have transpired amongst defendant, Silva, and Holloway in those twenty-four minutes. Silva then went inside Beshears' apartment and sat down. Shortly thereafter, defendant and Holloway, wearing all black clothing and face coverings, broke in the door of Beshears' apartment. Beshears testified that during the ensuing struggle, Silva stated that he did not know the break-in was going to happen. Silva helped hold the front door closed as Beshears and Trivette pushed defendant and Holloway outside. This testimony creates a question of fact for jury consideration.

When viewed in the light most favorable to the State, a rational juror could conclude that the original plan was to rob Beshears in the parking lot. When viewed in the light most favorable to the State, a rational juror could also conclude that, in those twenty-four minutes between Silva's first and second appearances at the apartment complex, defendant and at least one other person formed an additional and separate conspiracy—a new plan. *Gibbs*, 335 N.C. at 48 ("[T]he defendant committed the offense of conspiracy to commit murder when he, Doris, and Yvette agreed to kill Ann's family. . . . [O]n the night of the murder, a separate agreement was made between the defendant and Yvette . . . to commit first-degree burglary."); *Tirado*, 358 N.C. at 578 ("a rational juror, considering [facts specific to *Tirado*, could find] the evidence established multiple separate conspiracies, rather than one single conspiracy") In the new plan, Silva would enter Beshears' apartment for the meeting, and defendant and Holloway would feloniously break into the apartment.

V. Conclusion

A rational juror could find, based on the State's evidence presented at trial, that defendant entered into multiple conspiracies—namely, conspiracy to commit robbery with a dangerous weapon and conspiracy to commit felonious breaking or entering. Accordingly, we conclude that, when the evidence is viewed in the light most favorable to the State, sufficient evidence supports the trial court's decision to deny defendant's motion to dismiss the charges against him, including the charge of conspiracy to commit robbery with a dangerous weapon. Thus, we hold that the trial court did not err in denying defendant's motion to dismiss that charge. Therefore, we reverse the Court of Appeals and direct the Court of Appeals to reinstate the defendant's conviction for conspiracy to commit robbery with a dangerous weapon.

Because we reverse the decision of the Court of Appeals as to the issue on direct appeal and have thus ordered reinstatement of the trial court's judgment upon defendant's conviction for conspiracy to commit robbery with a dangerous weapon, we do not reach the sentencing issue on which defendant seeks discretionary review. Therefore, we conclude that the petition for discretionary review as to an additional issue was improvidently allowed.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice RIGGS dissenting.

The majority reverses the Court of Appeals because, in its view, the State submitted sufficient evidence to permit a rational juror to find the existence of two separate conspiracies. Its rationale rests largely on the fact that the evidence did not show the conspiracy to rob Ms. Beshears originally included an agreement to break and enter into her apartment. But our precedents are clear that a multifactor analysis applies to the factual question of whether multiple conspiracies existed: "The nature of the agreement or agreements, the objectives of the conspiracies, the time interval between them, the number of participants, and the number of meetings are all factors that may be considered." *State v. Tirado*, 358 N.C. 551, 577 (2004). So, too, is the time at which the purported separate conspiracies were complete. *Id.* at 577–78. Because I believe a full consideration of these several factors shows that the agreement to break and enter was part and parcel of the conspiracy to rob Ms. Beshears, I would affirm the Court of Appeals' vacatur of the conspiracy to commit felonious breaking or entering. And, because I

believe that improper conviction may have led the trial court to impose a harsher consolidated sentence than if only one conspiracy conviction was returned, I would also remand for resentencing based on a single conspiracy to commit robbery with a dangerous weapon.

I. Single or Multiple Conspiracies as a Constitutional Concern

I do not disagree with the majority's recitation of the applicable scope of review on appeal and the evidentiary burden placed on the State in attempting to send multiple conspiracy counts to the jury. I do, however, think it appropriate to reiterate the evidentiary standard's constitutional underpinnings. That this evidentiary standard—and any test adopted by this Court to distinguish between single and multiple conspiracies—seeks to protect the constitutional right against double jeopardy cannot be overlooked.

The Fifth Amendment's Double Jeopardy Clause establishes that "[n]o person shall be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Similarly, "[t]he Law of the Land Clause incorporates similar protections under the North Carolina Constitution," *State v. Oliver*, 343 N.C. 202, 205 (1996) (citing N.C. Const. art. I, § 19), and "[d]ouble jeopardy has long been a fundamental prohibition of our common law and is deeply imbedded in our jurisprudence," *State v. Hill*, 287 N.C. 207, 214 (1975) (citations omitted). This constitutional protection bears directly on the ability of the State to bring multiple conspiracy charges in connection with related activities,[1] as "[t]he double jeopardy clause clearly prohibits the division of a single criminal conspiracy into multiple violations of a conspiracy statute." *United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986) (citations omitted) (citing *Braverman v. United States*, 317 U.S. 49, 52–53 (1942)).

Courts have struggled with how to cleanly and clearly distinguish between single and multiple conspiracies in vindication of this constitutional right. *See, e.g.*, *State v. Rozier*, 69 N.C. App. 38, 52 (1984) ("Defining the scope of a conspiracy or conspiracies remains a thorny problem for the courts."). Most have recognized that a consideration of the full factual circumstances surrounding the criminal enterprise is the appropriate course. *See, e.g.*, *United States v. Leavis*, 853 F.2d 215, 218 (4th Cir. 1988) ("Whether there is a single conspiracy or multiple

1. As the majority recognizes, the law is clear that plans to commit multiple different crimes may nonetheless constitute a single conspiracy. *E.g.*, *State v. McLamb*, 313 N.C. 572, 578–79 (1985).

conspiracies depends upon the overlap of key actors, methods, and goals." (citations omitted)). Our Court of Appeals—which, by simple dint of volume, has had more occasion than this Court to consider the issue—has recognized the same. *See, e.g.*, *Rozier*, 69 N.C. App. at 52 ("There is no simple test for determining whether single or multiple conspiracies are involved: . . . factors such as time intervals, participants, objectives, and number of meetings all must be considered."). Central to the evaluation of these factors is "the nature of the agreement." *Id.* (citing *Braverman*, 317 U.S. 49).

II. The *Tirado* Factors Applied

Recognizing the wisdom of our Court of Appeals' decisions in cases involving multiple conspiracies, this Court explicitly adopted a multifactor analysis in *Tirado*. 358 N.C. at 577. Our holding in that case tasks us with considering, *inter alia*, "[t]he nature of the agreement or agreements, the objectives of the conspiracies, the time interval between them, the number of participants, and the number of meetings." *Id.* (citing *State v. Dalton*, 122 N.C. App. 666, 672–73 (1996)). Also relevant is the timing of when each purportedly separate conspiracy ended. *Id.* at 577–78.

Viewing the evidence in the light most favorable to the State, I believe the nature and objectives of the agreements in this case weigh against multiple conspiracies. There is no evidence suggesting, for example, that breaking and entering into Ms. Beshears' apartment was considered an end in and of itself; in other words, the breaking and entering was not agreed to and accomplished for its own sake. Nor does the breaking and entering appear to have been undertaken for any purpose *other than* to rob Ms. Beshears. To the contrary, all the evidence demonstrates that Mr. Silva, Mr. Holloway, and Mr. Beck agreed to break and enter for the single and sole purpose of stealing from Ms. Beshears; no other motivation is suggested by the evidence. The nature and object of the agreements are thus functionally indistinguishable and militate against submitting separate conspiracy counts to the jury.

The time interval, number of participants, and number of meetings likewise weigh against multiple conspiracies, even considered in the light most favorable to the State. As the majority notes, the State's evidence shows the agreement to rob Ms. Beshears was complete amongst Mr. Silva, Mr. Holloway, and Mr. Beck on the morning of 27 April 2017.[2]

2. Assuming the text messages between Mr. Silva and Mr. Holloway suggest some prior agreement by Mr. Beck to participate in a robbery of Ms. Beshears, the first mention of his involvement occurred on the night of 26 April 2017. I do not find this difference of less than twenty-four hours to be significant.

That afternoon, and a mere twenty-four minutes after the original plan was frustrated by Ms. Beshears' absence, Mr. Silva, Mr. Holloway, and Mr. Beck agreed to break and enter into her apartment to accomplish the previously planned robbery. A few hours difference in plans amongst the same three participants, spread between a few text messages and a single physical meeting, does not suggest the existence of multiple conspiracies.

That both conspiracies terminated at the same time also suggests the existence of a single conspiracy. While it is true that the *offense* of conspiracy is complete "[a]s soon as the union of wills for the unlawful purpose is perfected," *State v. Knotts*, 168 N.C. 173, 188 (1914), the crime itself "ends with the attainment of its criminal objectives," *Tirado*, 358 N.C. at 577 (cleaned up). I therefore believe the majority's narrow focus and emphasis on which crimes were contemplated when the offense of conspiracy to commit armed robbery was completed misses the mark, as the evidence shows the conspiracy was still continuing when the plan to break and enter was formed. Indeed, to hold otherwise renders that consideration dispositive—a result plainly not contemplated, let alone suggested, by the multifactor test enunciated in *Tirado*.[3]

In sum, the evidence in the light most favorable to the State shows three men conspired to rob Ms. Beshears. Less than twenty-four hours later, and before the robbery was accomplished, those same three men agreed to breaking and entering in order to accomplish the planned robbery.[4] Consideration of these facts consistent with the multifactor test in *Tirado* leads me to conclude that the evidence establishes the existence of a single overarching conspiracy, consisting of multiple planned crimes, to rob Ms. Beshears. Because our caselaw recognizes only a single chargeable offense arises in these circumstances, *McLamb*, 313 N.C. at 578–79, and with concern for constitutional double jeopardy protections, I respectfully disagree with the majority's holding that the trial court properly submitted two separate conspiracy counts to the jury.

III. Resentencing

My resolution of the above issues necessarily leads me to dissent from the majority's decision to dismiss Mr. Beck's petition for

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3. The majority suggests that a full consideration of all relevant factors is not required by *Tirado*. I do not believe that is consistent with the analysis actually conducted in that case, which reached its ultimate decision only after "considering the series of meetings, the variety of locations and participants, their different objectives, and the statements of conspirators." *Id.* at 578.

4. Mr. Baker, for his part, set up both the initial robbery and Mr. Silva's return to the apartment complex after the initial buy fell through.

discretionary review as improvidently allowed. Turning to the arguments raised in that petition on the merits, I would hold that the Court of Appeals erred in declining to remand this matter for resentencing after vacating one of the conspiracies consolidated at Mr. Beck's initial sentencing.

In *State v. Wortham*, this Court identified the influence of multiple convictions in consolidated discretionary sentencing, and concluded that remand for resentencing is appropriate when at least one of the consolidated convictions was in error:

> Since it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.

318 N.C. 669, 674 (1987). While *Wortham* was decided in the context of the discretion afforded to judges under the repealed Fair Sentencing Act rather than under the now-controlling Structured Sentencing Act, trial court judges nonetheless retain discretion under current law to sentence a defendant "within the range specified for the class of offense and prior record level." N.C.G.S. § 15A-1340.13(b) (2023). *See also State v. Parker*, 143 N.C. App. 680, 685–86 (2001) ("The Structured Sentencing Act clearly provides for judicial discretion in allowing the trial court to choose a minimum sentence within a specified range."). I would thus continue to apply the practice adopted in *Wortham* and remand for resentencing.[5] *See, e.g.*, *State v. Dew*, 379 N.C. 64, 74–75 (2021) (remanding for resentencing when one of the convictions incorporated in the consolidated sentence was in error).

IV. Conclusion

The majority's analysis omits substantive engagement with *Tirado*'s recitation of a multifactor test for determining whether the State has introduced sufficient evidence of multiple conspiracies. The majority's elision of that precedent flattens the relevant analysis to a single question—namely, whether commission of the later agreed-upon crime was originally envisioned when the conspiracy was first formed. My reading

5. Notably, Mr. Beck received the maximum sentence allowed within the presumptive range for each offense.

of *Tirado*—and my concern for the double jeopardy protection undergirding the rule against improper prosecution for multiple conspiracies—would lead me to affirm the vacatur of Mr. Beck's conviction for conspiracy to commit breaking and entering. I also would remand for resentencing on the remaining conspiracy conviction. I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
LARRY FRITSCHE

No. 344PA21

Filed 15 December 2023

Sexual Offenders—registration—early termination—ten-year registration requirement—prior out-of-state registration

The trial court did not err by denying defendant's petition pursuant to N.C.G.S. § 14-208.12A for early termination of his requirement to register as a sex offender where defendant did not meet the statutory requirement of maintaining registration in a North Carolina county for at least ten years. Although he filed his petition almost thirteen years after initially registering in another state, the "initial county registration" in section 14-208.12A refers to initial registration in a North Carolina county, not initial registration in a county in any state.

Justice BARRINGER concurring.

Justice DIETZ joins in this concurring opinion.

Justice EARLS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 283 N.C. App. 411, 872 S.E.2d 838 (2022), affirming an order entered on 7 May 2021 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court on 20 September 2023.

Joshua H. Stein, Attorney General, by Bryan G. Nichols, Special Deputy Attorney General, for the State-appellee.

CarnesWarwick, by Amy Lynne Schmitz and Jonathan A. Carnes, for defendant-appellant.

NEWBY, Chief Justice.

In this case we determine whether N.C.G.S. § 14-208.12A permits removal of a registered sex offender from the North Carolina Sex Offender Registry (North Carolina registry) ten years after he initially registers in another state. The Court of Appeals has previously held that section 14-208.12A only permits removal of a sex offender from the North Carolina registry ten years after he initially registers in North Carolina. *See In re Borden*, 216 N.C. App. 579, 718 S.E.2d 683 (2011). Because the application of *In re Borden* is consistent with both this Court's duty to give effect to the meaning of N.C.G.S. § 14-208.12A and the purposes of the sex offender registry, we adopt the reasoning of *In re Borden* and affirm the Court of Appeals.

On 17 November 2000, defendant pled guilty to sexual exploitation of a child in Colorado pursuant to Colo. Rev. Stat. § 18-6-403 (1999). The trial court suspended defendant's sentence and placed him on probation. Defendant subsequently violated the terms of his probation. Accordingly, the trial court revoked defendant's probation and activated his sentence. Defendant served eight years in prison in Colorado. Upon his release, defendant registered with the Colorado Sex Offender Registry on 26 August 2008 as required by Colorado law. *See* Colo. Rev. Stat. § 16-22-103(1)(c) (West, Westlaw through 2023 Legis. Sess.).

In February 2020, defendant moved from Colorado to Florida, where he registered with the Florida Sex Offender Registry as required by Florida law. *See* Fla. Stat. § 943.0435 (2019). In October 2020, defendant moved to North Carolina. On 28 October 2020, defendant petitioned the trial court under N.C.G.S. § 14-208.12B requesting a judicial determination as to whether he must register in North Carolina as a sex offender. On 9 April 2021, the trial court issued an order requiring defendant to register as a sex offender in North Carolina. He did so on 12 April 2021.

On 14 April 2021, defendant filed a petition pursuant to N.C.G.S. § 14-208.12A seeking termination of his requirement to register as a sex offender in North Carolina. *See* N.C.G.S. § 14-208.12A(a) (allowing sex offenders to petition for early removal from the North Carolina

registry "[t]en years from the date of initial county registration" if several qualifications are met). Defendant filed this petition almost thirteen years after initially registering in Colorado. At the hearing on the petition, defendant argued that because ten years had passed since his initial registration in Colorado, he qualified for early termination in North Carolina. On 7 May 2021, the trial court denied defendant's petition. Relying on the Court of Appeals' decision in *In re Borden*, the trial court concluded that because defendant had not been registered as a sex offender in North Carolina for at least ten years, defendant did not meet the requirements for early termination. Defendant appealed.

On appeal, the Court of Appeals affirmed the trial court's denial of defendant's petition for early termination of registration. *State v. Fritsche*, 283 N.C. App. 411, 418, 872 S.E.2d 838, 844 (2022). Like the trial court, the Court of Appeals relied on *In re Borden* in reaching its determination. *See id.* at 413–15, 872 S.E.2d at 841–42. In *In re Borden*, the defendant similarly sought early termination of registration on the North Carolina registry pursuant to section 14-208.12A. *In re Borden*, 216 N.C. App. at 580, 718 S.E.2d at 684. The defendant argued that he was eligible for early termination because more than ten years had elapsed since his initial registration as a sex offender in Kentucky. *Id.* The Court of Appeals held that the plain meaning and purpose of N.C.G.S. § 14-208.12A requires that an offender be registered for at least ten years in North Carolina before being eligible for early termination and, therefore, the Court of Appeals denied the defendant's petition. *Id.* at 583, 718 S.E.2d at 686–87. Accordingly, in the present case, the Court of Appeals concluded that defendant did not satisfy the required period of registration in North Carolina for early termination. *Fritsche*, 283 N.C. App. at 414–15, 872 S.E.2d at 841–42.[1]

On 3 June 2022, defendant filed a petition for discretionary review with this Court. This Court allowed defendant's petition for discretionary review only as to the issue discussed below.[2]

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1. Defendant also argued that requiring him to remain on the North Carolina registry for ten years before being eligible for early termination violates the Equal Protection Clauses of the North Carolina Constitution and the Constitution of the United States. The Court of Appeals disagreed, concluding that the requirement is rationally related to the State's legitimate interest in maintaining public safety and protection. *Fritsche*, 283 N.C. App. at 418, 872 S.E.2d at 844.

2. Defendant also filed a notice of appeal based upon a constitutional question. This Court, however, allowed the State's motion to dismiss the appeal based upon a constitutional question. Defendant raised the same constitutional question as an issue in his petition for discretionary review. This Court denied review of that issue. We therefore do not consider the constitutional issue.

Here we consider whether the trial court erred in denying defendant's petition for early termination of registration on the North Carolina registry. Accordingly, we must determine whether the trial court erroneously interpreted the language of N.C.G.S. § 14-208.12A. Conclusions of law, such as issues of statutory interpretation, are reviewed de novo by this Court and are subject to full review. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

This Court neatly summarized the framework for analyzing matters of statutory construction in *In re R.L.C.*:

> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of the statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

361 N.C. 287, 292, 643 S.E.2d 920, 923 (2007). In cases of ambiguous statutory language, we examine the language of the statute itself, the context, and what the legislation seeks to accomplish as the best indicators of the legislature's intent. *State v. Abshire*, 363 N.C. 322, 330, 677 S.E.2d 444, 450 (2009).

A sex offender who commits certain "reportable convictions" as defined in N.C.G.S. § 14-208.6(4) is "required to maintain registration with the sheriff of the county where the person resides." N.C.G.S. § 14-208.7(a) (2021). The registration requirement generally lasts "for a period of at least 30 years following the date of initial county registration." *Id.* Section 14-208.12A provides an exception to the thirty-year registration requirement and allows an offender to petition for early termination of registration "[t]en years from the date of initial county registration . . . ." N.C.G.S. § 14-208.12A.

The precise question we must answer is whether the word "county" in the relevant statutes refers to a county of any state or only one in North Carolina. Because the term "county" is subject to different interpretations, we look to the statutory language, its context, and legislative purpose.

The General Assembly passed section 14-208.12A as part of Article 27A: Sex Offender and Public Protection Registration Programs. Under Article 27A, "[c]ounty registry" is defined as "[t]he information compiled by the *sheriff of a county* in compliance with this Article." N.C.G.S. § 14-208.6(1b) (2021) (emphasis added). Additionally, "[s]heriff" is

defined as "[t]he sheriff of a county *in this State*." N.C.G.S. § 14-208.6(7) (2021) (emphasis added).

Because the definitions under Article 27A refer specifically to counties in North Carolina, "initial county registration" in section 14-208.12A must mean the first registration compiled by a sheriff of a county in the state of North Carolina. Moreover, the purpose of Article 27A aligns with this interpretation of "initial county registration." Article 27A states the purpose of the Sex Offender and Public Protection Registration Programs:

> The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest . . . . Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses . . . to register with law enforcement agencies . . . .

N.C.G.S. § 14-208.5 (2021); *see also State v. Bryant*, 359 N.C. 554, 560, 614 S.E.2d 479, 483 (2005) (explicitly recognizing the purposes of Article 27A as public safety and protection).

The legislature's purposes in protecting the public and ensuring public safety are not served if sex offenders can avoid registering or maintaining registry in North Carolina as a result of time spent on another state's sex offender registry. It is an offender's registration in North Carolina—not in other jurisdictions—that protects North Carolina citizens. *See In re Borden*, 216 N.C. App. at 583, 718 S.E.2d at 686 ("Allowing registered sex offenders to be removed from the sex offender registry without being on the registry for at least ten years in North Carolina contradicts the intent of the statutes to protect the public, maintain public safety, and assist law enforcement agencies and the public in knowing the whereabouts of sex offenders."). North Carolinians ought not be deprived of Article 27A's protections because the same protections were previously afforded to the citizens of another state.

Interpreting "initial county registration" in section 14-208.12A as requiring ten years of registration in North Carolina is further supported by the General Assembly's silence since the Court of Appeals decided *In re Borden* in 2011. Over the past twelve years, the General Assembly has made no attempts to clarify or amend section 14-208.12A in a manner contradictory to the Court of Appeals' reading. This silence from the legislature leaves us to conclude that the General Assembly takes no

issue with the Court of Appeals' interpretation of section 14-208.12A in *In re Borden* and lends further credence to our adoption of that interpretation today.

In sum, the trial court correctly applied *In re Borden* in interpreting "initial county registration" in section 14-208.12A as initial registration in North Carolina. As a result, the trial court properly denied defendant's petition for early termination of registration on the North Carolina registry. *In re Borden* provides an apt examination of section 14-208.12A, relying on sound principles of statutory construction in reaching its holding. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice BARRINGER concurring.

I join in my colleagues' opinion but write separately to note that I would not adopt legislative acquiescence. In my view, legislative intent cannot be gleaned from the General Assembly's silence following a court decision. Instead, it can only be gleaned from the legislature's affirmative acts. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 82–83 (2012) ("When government-adopted texts are given a new meaning, the law is changed; and changing written law, like adopting written law in the first place, is the function of . . . elected legislators and . . . elected executive officials and their delegates."). My concern is that legislative acquiescence vests lawmaking power in the judicial branch, rather than the legislative branch. *See id.*

Furthermore, legislative acquiescence "is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current [legislature] desires, rather than by what the law as enacted meant." *Johnson v. Transp. Agency*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting).

> But even accepting the flawed premise that the intent of the current [legislature], with respect to the provision in isolation, is determinative, one must ignore rudimentary principles of political science to draw any conclusions regarding that intent from the *failure* to enact legislation. The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of

> assurance that [legislative] failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.

Id. at 671–72.

As I would not adopt legislative acquiescence, I respectfully concur.

Justice DIETZ joins in this concurring opinion.

Justice EARLS dissenting.

On 17 November 2000, Mr. Fritsche pled guilty in Colorado to Sexual Exploitation of a Child based on conduct that occurred when he was seventeen years old. Mr. Fritsche was initially released pending trial; however, he violated his pretrial release conditions when he picked up his younger brother from middle school and thus served eight years in prison. Since his release, Mr. Fritsche has become the father of two boys, who were ages nine and eleven at the time he filed his termination petition. Mr. Fritsche now asks this Court to reverse the trial court's and Court of Appeals' decisions requiring him to remain on the sex offender registry, in part so that he can participate in his children's lives without the restraints of the registry's requirements. Mr. Fritsche contends that the "most devastating" of these requirements prohibits him from attending many of his sons' school and sporting events.

This case requires the Court to determine what the words "initial county registration" mean under N.C.G.S. § 14-208.12A(a). *See* N.C.G.S. § 14-208.12A(a) (2021). Namely, whether those words mean "initial county" in North Carolina or if those words mean exactly what they say: the first county a person registers in. Because I believe that N.C.G.S. § 14-208.12A(a) allows a person to petition the superior court to be removed from the sex offender registry "[t]en years from the date of initial county registration," *see id.*, whether that initial county is in North Carolina or elsewhere, I dissent.

I. N.C.G.S. § 14-208.12A

At the outset, it is important to note that Mr. Fritsche has met all the requirements listed in N.C.G.S. § 14-208.12A(a1)(1), (2), and (3), and the only thing keeping him on the sex offender registry is this Court's interpretation of the words "initial county registration."

Subsection 14-208.12A(a) states that:

> Ten years from the date of *initial county registration*, a person required to register under this Part may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article.

N.C.G.S. § 14-208.12A(a) (emphasis added). In addition, Subsection (a1) of the statute provides three requirements that must be met before a court may grant an individual's petition to be removed from the sex offender registry. N.C.G.S. § 14-208.12A(a1) (2021). First, the petitioner must "demonstrate[ ] . . . that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence." N.C.G.S. § 14-208.12A(a1)(1). Second, the statute requires that the "requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable . . . or required to be met as a condition for the receipt of federal funds by the State." N.C.G.S. § 14-208.12A(a1)(2). Lastly, the court must be "satisfied that the petitioner is not a current or potential threat to public safety." N.C.G.S. § 14-208.12A(a1)(3).

When interpreting legislative provisions, this Court looks first to the plain meaning of the words. *State v. Fletcher*, 370 N.C. 313, 326 (2017). If "the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. *In re R.L.C.*, 361 N.C. 287, 292 (2007) (quoting *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387 (2006)). Under the relevant statute or elsewhere in Article 27A, which sets forth the Sex Offender and Public Protection Registration Programs, neither "initial" nor "county" are defined. *See* N.C.G.S. ch. 14, art. 27A; N.C.G.S. § 14-208.6 (2021); N.C.G.S. § 14-208.12A. However, these words are not ambiguous, and thus under our precedent, they must be given their plain meaning.

In *In re Borden*, the Court of Appeals interpreted the words "initial county registration" to mean "initial county registration in North Carolina." 216 N.C. App. 579, 583 (2011). But in doing so, the Court of Appeals deviated from the correct method of statutory interpretation, which required that the words "initial" and "county" be construed in accordance with their ordinary meaning. *See Fletcher*, 370 N.C. at 326. Instead, the Court of Appeals looked to N.C.G.S. § 14-208.12A's purpose, stating that the term "initial county" must refer to the initial county of

registration in North Carolina due to the statute's public safety goals. *In re Borden*, 216 N.C. App. at 583. However, the correct method of statutory interpretation required the Court of Appeals to interpret the term "initial" based on its ordinary meaning of "first," *Initial*, American Heritage Dictionary of the English Language (5th ed. 2011), and to interpret "county" based on its ordinary meaning as "[t]he largest territorial division for local government within a state," *County*, *Black's Law Dictionary* (11th ed. 2019); *see also Initial*, Merriam-Webster Dictionary (11th ed. 2019) (defining "initial" as "of or relating to the beginning . . . being at the beginning"). Thus, taking both terms together, "initial county" refers to the first territorial division of registration, regardless of whether that county is in North Carolina or another state. *See* N.C.G.S. § 14-208.12A(a). This reading of N.C.G.S. § 14-208.12A(a) is also in line with the laws of the rest of the country, as there is only one state, Louisiana, that requires the registration's duration requirement to begin running from the time of initial registration in that state. *See* La. Rev. Stat. Ann. § 15:544.

Moreover, even assuming arguendo that the statute was ambiguous and required the use of statutory construction, the Court of Appeals' analysis collapses the statute's ten-year requirement with subsection (a1)(3) of the statute, which states that in order to grant a termination petition, the court must be "otherwise satisfied that the petitioner is not a current or potential threat to public safety." N.C.G.S. § 14-208.12A(a1)(3). Specifically, the Court of Appeals noted that

> [a]llowing registered offenders to be removed from the sex offender registry without being on the registry for at least ten years in North Carolina contradicts the intent of the statutes to protect the public, maintain public safety, and assist law enforcement agencies and the public in knowing the whereabouts of sex offenders.

In re Borden, 216 N.C. App. at 583. While there is no doubt that the purpose of North Carolina's Sex Offender and Public Protection Registration Programs is to protect public safety and that this is an important governmental interest, *see* N.C.G.S. § 14-208.5 (2021), our rules of statutory construction state that a statute "may not be interpreted in a manner which would render any of its words superfluous," *State v. Geter*, 383 N.C. 484, 491 (2022) (quoting *State v. Morgan*, 372 N.C. 609, 614 (2019)). Yet, by determining that subsection (a) and subsection (a1)(3) of N.C.G.S. § 14-208.12A mean the same thing and serve the same purpose, the Court of Appeals' analysis imposes a redundant

requirement that a registrant show twice that they are not a threat to public safety. *See id.* Accordingly, this interpretation renders subsection (a1)(3)'s text superfluous. Thus, even if the Court of Appeals had been correct to proceed with statutory construction, its analysis is incorrect under our precedent and should be disregarded. *See id.*

The Court of Appeals in *In re Borden* also determined that interpreting "initial county registration" to mean "initial county registration in North Carolina" was consistent with the definitions provided in Article 27A. *In re Borden*, 216 N.C. App. at 583. In doing so, the court noted that under N.C.G.S. § 14-208.6, "county registry" is defined as "information compiled by the sheriff of a county in compliance with this Article," while "sheriff" is defined as "sheriff of a county in this State." *Id.*; *see* N.C.G.S. § 14-208.6(1b), (7) (2021). However, these definitions do not actually refer to or reference the words "initial county registration." *See* N.C.G.S. § 14-208.12A(a). Furthermore, other portions of Article 27A specifically include the modifier "North Carolina" or "this State," supporting that if the General Assembly had intended to insert "in North Carolina" after the words "initial county registration" it would have done so. *See*, *e.g.*, N.C.G.S. § 14-208.9(b) (2021) (using the modifier "this State"); N.C.G.S. § 14-208.12A(a) (referencing a conviction "that occurred in North Carolina").

II. The Adam Walsh Act

Additionally, to the extent that statutory construction of the General Assembly's intent was necessary, the proper course was to look directly to the text of the statute at issue which expressly states the General Assembly's intent to comply with the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), 34 U.S.C. § 20901.[1] *See* N.C.G.S. § 14-208.12A(a1)(2); *see also C Invs. 2, LLC v. Auger*, 383 N.C. 1, 8 (2022) (stating that "[l]egislative will must be found from the legislative language of the act" (cleaned up)). This is evident in its passing of N.C.G.S. § 14-208.12A and, more specifically, in determining the provisions a registrant must meet to be removed from the registry. Under subsection (a1)(2), a petition to terminate registration may be granted when

1. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Jacob Wetterling Act), which set minimum standards for state sex offender programs and conditions federal law enforcement funding on a state's adoption of sex offender registration laws. *Smith v. Doe*, 538 U.S. 84, 89–90 (2003). In 2006, Congress repealed the Jacob Wetterling Act and replaced it with the Adam Walsh Act, which is now codified at 34 U.S.C. § 20901.

> [t]he requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State.

N.C.G.S. § 14-208.12A(a1)(2). The Court of Appeals interpreted subsection (a1)(2) in *In re McClain* and determined that the section's purpose was to "bring [North Carolina's] program in line with the external federal standards" to receive federal funding. 226 N.C. App. 465, 468 (2013). Thus, any reading of N.C.G.S. § 14-208.12A that is inconsistent with the Adam Walsh Act is also inconsistent with the General Assembly's intent in passing the same.

The Adam Walsh Act was established "in response to the vicious attacks [against children] by violent predators" and to "protect the public from sex offenders and offenders against children" more generally. *Id.* In pertinent part, the Adam Walsh Act contains two registration requirements which provide context for the term "initial." The first is termed a "general" requirement, which describes what is required of a registrant to keep their registration current. This section provides:

> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. *For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.*

34 U.S.C. § 20913(a) (emphasis added). Next, the statute addresses a registrant's "initial registration" and discusses when an offender's first or initial registration must occur. 34 U.S.C. § 20913(b). Namely, the section provides that "initial registration" should occur (1) "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement;" or (2) "not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." *Id.* Both factors support that the term "initial" refers to the very first time an offender registers, regardless of what state that initial registration occurs in. Moreover, any interpretation that limits a person's initial registration to a particular state would be unreasoned because people are convicted of sex offenses in all jurisdictions.

A registrant's first registration is likely to occur in the same jurisdiction in which their offense took place as there is a short time frame for when initial registration must occur. *See id.*

Regarding the duration of a registration requirement, the Adam Walsh Act states that a tier I[2] sex offender's registration period may be reduced from fifteen years to ten years if they maintain a clean record.[3] 34 U.S.C. § 20915(a), (b)(1)–(3). North Carolina's statute, N.C.G.S. § 14-208.12A, is consistent with this—as it allows a court to terminate "the thirty-year registration requirement" "after ten years from the date of initial county registration"—if "[t]he petitioner demonstrates . . . that [they have] not been arrested for any crime that would require registration" under the statute. N.C.G.S. § 14-208.12A(a), (a1)(1).

Moreover, while the Adam Walsh Act requires a registrant to register, "[f]or initial registration purposes only, . . . in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence," 34 U.S.C. § 20913(a), it does not require a registrant to restart the minimum ten-year registration period each time they move, *see id.* Also, as evidenced by 34 U.S.C. § 20913(c), federal law seems to view the registration requirement as a single ongoing requirement that is not dependent on what state the registrant lives in. 34 U.S.C. § 20913(c). Namely, 34 U.S.C. § 20913 requires an offender to keep their registration current by maintaining registration in at least one jurisdiction. *Id.* This jurisdiction is one where the offender resides, is an employee, or is a student. 34 U.S.C. § 20913(a). However, this provision does not differentiate between the several states, and rather it suggests that under federal law, a registrant's registration is current so long as they are registered in a jurisdiction where they live, work, or study, regardless of the state. 34 U.S.C. § 20913(a)–(c).

> Our General Statutes also contemplate that an initial registration requirement could occur either in North Carolina or in another state. In pertinent part, N.C.G.S. § 14-208.12A(a) provides:
>
> If the reportable conviction is for an offense that occurred in North Carolina, the petition shall be filed

2. It was uncontested at the time of the termination of registration hearing that Mr. Fritsche was considered a tier I sex offender pursuant to federal law.

3. The now-repealed Jacob Wetterling Act also had a similar ten-year registration requirement. *See* 42 U.S.C. § 14071(b)(6)(A) (repealed 2006).

> in the district where the person was convicted of the offense.
>
> If the reportable conviction is for an offense that occurred in another state, the petition shall be filed in the district where the person resides.

N.C.G.S. § 14-208.12A(a). If the offense occurred out of state, the person must complete additional requirements to petition for termination from the registry. Namely, the person must do two things:

> (i) provide written notice to the sheriff of the county where the person was convicted that the person is petitioning the court to terminate the registration requirement and (ii) include with the petition at the time of its filing, an affidavit, signed by the petitioner, that verifies that the petitioner has notified the sheriff of the county where the person was convicted of the petition and that provides the mailing address and contact information for that sheriff.

Id. Both requirements are designed to inform the initial county of registration of the offender's intent to terminate the registration requirement. This raises an important question, if N.C.G.S. § 14-208.12A(a) only refers to the initial county of registration in North Carolina, why would the General Assembly include language referencing an initial registration that occurred outside of North Carolina? Instead, it is more logical that "initial county registration" refers to the first county a person registered in, regardless of what state that county was in. *See id.*

III. Conclusion

Mr. Fritsche's presence on the registry is accompanied by a variety of legal restrictions. Since moving to North Carolina, these restrictions have impacted his life, particularly his ability to parent his two sons. By requiring that Mr. Fritsche be registered with North Carolina's sex offender registry for ten years, despite having already served over ten combined years on the Colorado and Florida registries, Mr. Fritsche will have spent twenty-three years on a sex offender registry before he is eligible to petition a North Carolina court for termination. By that time, his sons will be nineteen and twenty-one years old, and he will have missed many, if not all, of their school and sporting events.

A twenty-three year registration period before being eligible for termination of the requirement is not what the North Carolina General Assembly intended. Instead, through the text of N.C.G.S. § 14-208.12A,

the legislature made clear that those who have been on the registry for ten years in any jurisdiction and meet the other requirements for removal from the registry should have their petitions granted. Because Mr. Fritsche (1) has now served fifteen years on the registry since his initial registration in 2008, *see* N.C.G.S § 14-208.12A(a); (2) has not committed another crime that would require registration, *see* N.C.G.S. § 14-208.12A(a1)(1); (3) "[t]he requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended," *see* N.C.G.S. § 14-208.12A(a1)(2); and (4) the trial court determined that Mr. Fritsche is not a current or potential threat to public safety, I would reverse the decision of the Court of Appeals.

STATE OF NORTH CAROLINA
v.
DARREN O'BRIEN LANCASTER

No. 240A22

Filed 15 December 2023

Indictment and Information—sufficiency—going armed to the terror of the public—act committed on a public highway—not an essential element

Defendant's indictment for the common law offense of going armed to the terror of the public was sufficient to confer jurisdiction upon the trial court, where the indictment alleged that defendant waved a firearm around in the parking lots of two different locations, including a private apartment complex. After overruling a prior case saying otherwise, the Supreme Court clarified that the crime of going armed to the terror of the public does not include as an essential element that the act occur on a public highway. Therefore, defendant's indictment was not fatally defective where the locations it mentioned did not constitute public highways.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 284 N.C. App. 465 (2022), finding no error in part and vacating in part judgments entered on 14 September 2020 by Judge Joshua W. Willey Jr. in Superior Court, Craven County, and remanding the case for resentencing. Heard in the Supreme Court on 21 September 2023.

Joshua H. Stein, Attorney General, by Zachary K. Dunn, Assistant Attorney General, for the State-appellant.

Craig M. Cooley for defendant-appellee.

BERGER, Justice.

Upon conducting an *Anders* review, the Court of Appeals determined that the indictment charging defendant with going armed to the terror of the public was deficient. According to the Court of Appeals, the State's failure to allege in the indictment that the crime occurred on a public highway deprived the trial court of jurisdiction. We reverse.

I. Factual and Procedural Background

On 30 September 2019, officers with the Havelock Police Department responded to a call of an individual "waving a gun and firing rounds off kind of aimlessly in the parking lot" of an apartment complex located behind a local high school. The officers soon received another call that the same individual was at a separate nearby location "with a firearm and was yelling at a female." Upon their arrival at the second location, the officers located and detained defendant. The officers discovered a Hi-Point 9mm handgun in a nearby vehicle, and the vehicle's owner testified at trial that the gun belonged to defendant.

Defendant was indicted for multiple offenses, including two counts of going armed to the terror of the public. As is relevant to our consideration, the indictments alleged that he "unlawfully, willfully and feloniously did go armed to the terror of the public by causing a disturbance and waving a firearm around in the parking lot[s]" of the two locations.

Defendant's matter came on for trial on 14 September 2020, and after defendant waived his right to a jury trial, he was found guilty of possession of a firearm by a felon, injury to personal property, resisting a public officer, and one count of going armed to the terror of the public. The charges were consolidated and the trial court sentenced defendant to a minimum of fifteen months and a maximum of twenty-seven months in prison. Defendant appealed.[1]

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1. The Court of Appeals noted that it was "not apparent from the record that [d]efendant properly noticed his appeal," but that court nevertheless issued a writ of certiorari to remedy any jurisdictional question. *State v. Lancaster*, 284 N.C. App. 465, 466 n.1 (2022). Although the State has not argued that the Court of Appeals abused its discretion

At the Court of Appeals, defendant's counsel was unable to identify any errors in defendant's trial and instead submitted an *Anders* brief requesting that the Court of Appeals examine the record for any meritorious issues. *See Anders v. California*, 386 U.S. 738 (1967). The Court of Appeals examined the record and identified what it contended was a meritorious issue related to the validity of the indictment charging defendant with going armed to the terror of the public.[2] Relying on its previous decision in *State v. Staten*, 32 N.C. App. 495 (1977), the Court of Appeals' majority concluded that the indictment was fatally defective and failed to confer jurisdiction upon the trial court because it "failed to allege" an essential element of the common law crime of going armed to the terror of the public, specifically, "that [d]efendant committed his act on a 'public highway.' " *State v. Lancaster*, 284 N.C. App. 465, 466 (2022). Accordingly, the Court of Appeals vacated the judgment convicting defendant of going armed to the terror of the public and remanded the matter for resentencing. *Id.*

In a separate opinion, Judge Griffin agreed the panel was bound by the Court of Appeals' previous decision in *Staten* but reasoned that the indictment's allegation "that the act was committed in the parking lot of an apartment complex" was sufficient. *Id.* at 471–72 (Griffin, J., concurring in part and dissenting in part). Accordingly, he concluded there was no error in the trial court's judgments. *Id.*

II. Analysis

The State appealed based upon the dissent, arguing that the indictment was sufficient because the common law crime of going armed to the terror of the public does not contain an element that the conduct occur about a public highway, and that even if such element exists, an apartment parking lot is connected to and therefore "about" a public highway. Defendant argues that the indictment was fatally defective because it failed to allege that (1) defendant's actions occurred about a

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in issuing this writ, "a writ of certiorari 'is not intended as a substitute for a notice of appeal.' " *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 573 (2023) (quoting *State v. Ricks*, 378 N.C. 737, 741 (2021)). This is so because "[i]f courts issued writs of certiorari solely on the showing of some error below, it would 'render meaningless the rules governing the time and manner of noticing appeals.' " *Id.* (quoting *Ricks*, 378 N.C. at 741).

2. It appears that neither defendant nor the State was given an opportunity to brief the issue identified by the Court of Appeals following its *Anders* review. Even where the argument and reasoning of the Court of Appeals may be sound, the better practice is to order supplemental briefing on the issue so identified. Such action permits full vetting of the issue and avoids potential prejudice to either party on appeal.

public highway, (2) defendant armed himself with an unusual and dangerous weapon, and (3) defendant acted with the purpose of terrorizing the people. We must, therefore, determine whether the indictment is fatally defective in light of our precedent that "[q]uashing of indictments and warrants is not favored." *State v. Abernathy*, 265 N.C. 724, 726 (1965).

"The sufficiency of an indictment is a question of law reviewed de novo." *State v. White*, 372 N.C. 248, 250 (2019).

"Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. I, § 22. An "indictment is a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses." N.C.G.S. § 15A-641(a) (2021).

"An indictment need not conform to any technical rules of pleading but instead must satisfy both statutory strictures and the constitutional purposes which indictments are designed to satisfy, i.e., notice sufficient to prepare a defense and to protect against double jeopardy." *In re J.U.*, 384 N.C. 618, 623 (2023) (cleaned up) (quoting *State v. Oldroyd*, 380 N.C. 613, 617 (2022)); *see also State v. Sturdivant*, 304 N.C. 293, 311 (1981) (stating that an indictment's "purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime").

Although earlier common law principles certainly conveyed that defective indictments implicated jurisdictional concerns, the General Assembly's adoption of the Criminal Procedure Act represented a sharp departure from the demands of technical pleading. *See Oldroyd*, 380 N.C. at 619 ("[T]he Criminal Procedure Act of 1975 . . . statutorily modernize[d] the requirements of a valid indictment."); *see also United States v. Cotton*, 535 U.S. 625, 630 (2002) (overruling the common law principle that a defective indictment deprives a court of jurisdiction and noting that the common law's "elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.*, 'the courts' statutory or constitutional *power* to adjudicate the case' " (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998))).

Since adoption of the Act, "[t]his Court has been consistent in retreating from the highly technical, archaic common law pleading requirements which promoted form over substance." *In re J.U.*, 384 N.C. at 622. "Instead, contemporary criminal pleading requirements

have been designed to remove from our law unnecessary technicalities which tend to obstruct justice." *Id.* at 623 (cleaned up) (quoting *State v. Williams*, 368 N.C. 620, 623 (2016)). After all, "it would not favor justice to allow [a] defendant to escape merited punishment upon a minor matter of form." *Sturdivant*, 304 N.C. at 311.

Thus, indictments and other criminal pleadings are

> sufficient in form for all intents and purposes if [they] express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality of refinement, if in the bill of proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C.G.S. § 15-153 (2021). Indictments simply must contain, as is relevant here, "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5) (2021).

As for the indictment at issue here, defendant first contends that the crime of going armed to the terror of the public includes an element that the criminal conduct occur on a public highway, and that the State's failure to allege this element deprived the trial court of jurisdiction. We disagree.

The General Assembly has provided that:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

N.C.G.S. § 4-1 (2021). In other words, "the common law [which] has not been abrogated or repealed by statute or become obsolete is in full force and effect in this state." *State v. Vance*, 328 N.C. 613, 617 (1991). "The 'common law' referred to in N.C.G.S. § 4-1 is the common law of England

as of the date of the signing of the Declaration of Independence." *Id.* (citing *State v. Buckom*, 328 N.C. 313 (1991); *Hall v. Post*, 323 N.C. 259 (1988); *Steelman v. City of New Bern*, 279 N.C. 589 (1971)).

To determine whether the indictment in this case adequately charged defendant with going armed to the terror of the public, we must first identify the elements of the crime. Unlike crimes codified in our criminal statutes—the elements of which may be readily ascertained by a reading of the statutory text—the elements of common law crimes must be discerned through a reading of English common law and our precedent interpreting such. *See id.*

This Court's review of the common law crime of going armed to the terror of the public began nearly two centuries ago in *State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843) (per curiam).[3] In *Huntly*, the defendant was charged with the offense of "riding or going about armed with unusual and dangerous weapons, to the terror of the people." *Id.* at 420. The defendant argued that because this crime was created by the statute of Northampton, a 1328 English statute, and because English statutes were no longer in effect in North Carolina, the allegations in his indictment—including riding on a public highway with said weapons to the terror of the people—constituted no crime at all. *Id.*

The statute of Northampton relied on by the defendant provided in relevant part that:

> [N]o man great nor small, of what condition soever he be, except the King's servants in his presence, and his ministers in executing the King's precepts, or of their office, and such as be in their company assisting them, . . . [shall] with force and arms, . . . go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure.

Statute of Northampton, 2 Edw. 3, ch. 3 (1328).

In rejecting the defendant's argument that this statute abrogated the common law crime of going armed to the terror of the public, this Court relied on *Sir John Knight's Case*, a 1686 English case in which the Chief Justice "declared . . . that the statute of Northampton was made

3. Citations and quotations to *State v. Huntly* herein reference the original James Iredell Reports, Volume III, published in 1843.

in affirmance of the common law." *Huntly*, 25 N.C. (3 Ired.) at 421; *see also Sir John Knight's Case*, 87 Eng. Rep. 75 (K.B. 1686). This Court thus determined that the statute of Northampton "did not *create* this offence, but provided only special penalties and modes of proceeding for its more effectual suppression." *Huntly*, 25 N.C. (3 Ired.) at 420. In so reasoning, this Court consulted Blackstone's Commentaries on the Laws of England:

> Blackstone states that "the offence of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is *particularly* prohibited by the statute of Northampton, upon pain of forfeiture of the arms, and imprisonment during the King's pleasure."

Id. at 420–21 (citation omitted) (quoting 4 William Blackstone, Commentaries *149). Having thus determined that this English common law crime remained in force despite the statute of Northampton, this Court then considered the argument that the crime diminished citizens' right to carry firearms, and it concluded with a succinct description of the crime itself:

> But although a gun is an "unusual weapon," it is to be remembered that the carrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. It is the wicked purpose—and the mischievous result—which *essentially* constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.

Id. at 422–23 (second emphasis added).

Over one hundred years after *Huntly*, this Court again addressed the crime of going armed to the terror of the public in *State v. Dawson*, 272 N.C. 535 (1968). In *Dawson*, four codefendants were charged with crimes stemming from their alleged conduct of firing gunshots into various homes, breaking and entering into homes, and defacing a home by painting "KKK" onto said property. *Id.* at 538–40. Among other offenses, the appealing defendant was charged with and convicted of "the common-law misdemeanor known as going armed with unusual and dangerous weapons to the terror of the people." *Id.* at 541.

In finding no error in the trial court's denial of defendant's motion to quash the indictment charging this crime, this Court recognized that *Huntly* "is still the law of North Carolina[,]" *id.* at 544, and stated that:

> The indictment . . . , although not as detailed and specific as the charge in *State v. Huntley* [sic], . . . is nevertheless sufficient. It charges all the essential elements of the crime, that is, that defendant (1) armed himself with unusual and dangerous weapons, to wit, pistols and rifles (2) for the unlawful purpose of terrorizing the people of Alamance County, and, (3) thus armed, he went about the public highways of the county (4) in a manner to cause terror to the people. While it would have been proper (as in *Huntley* [sic], *supra*) to enumerate acts or threats of violence committed by defendant while thus going armed, such specific averments are not required. Evidence of such acts, of course, was admissible as tending to prove the commission of the offense charged.

Id. at 549 (citations omitted).

Defendant contends that this language sets forth the elements of going armed to the terror of the public. However, the Court in *Dawson* was describing the specific evidentiary allegations contained in the defendant's indictment, not the general elements of the offense. The Court clearly stated earlier in the opinion that an individual is not allowed "to arm himself in order to prowl the highways *or other public places* to the terror of the people." *Id.* (emphasis added). As the Court noted without limiting the offense to public highways, the crime of going armed to the terror of the public has broad application:

> In this day of social upheaval one can perceive only dimly the tragic consequences to the people if either night riders or daytime demonstrators, fanatically convinced of the righteousness of their cause, could legally arm themselves, mass, go abroad, and display their weapons for the purpose of imposing their will upon the people by terror. Such weapons—unconcealed and "ready to be used on every outbreak of ungovernable passion"—would endanger the whole community.

Id.

Defendant's reading of *Dawson* would not only require that the crime occur about a public highway, but also that the only weapons

which would qualify to establish the crime are "pistols and rifles." Revolvers, shotguns, crossbows, flamethrowers, grenades, and other weapons would not qualify. In addition, such a reading would lead to an even more absurd result, that the crime could only occur in Alamance County. Just as one can commit the crime of going armed to the terror of the public while armed with unusual and dangerous weapons other than pistols and rifles, or in counties other than Alamance County, one can commit the crime in public locations other than highways. *See Dawson*, 272 N.C. at 549; *see also State v. Rambert*, 341 N.C. 173 (1995) (upholding conviction for going armed to the terror of the public and remanding for resentencing where crime occurred in a Piggly Wiggly parking lot).

The evidentiary allegations in the *Dawson* indictment led the Court of Appeals in another case to incorrectly state that *Dawson* had

> Enumerated the four essential elements to charge the common law offense of intentionally going about armed with an unusual and dangerous weapon to the terror of the people, namely: (1) armed with unusual and dangerous weapons, (2) for the unlawful purpose of terrorizing the people of the named county, (3) by going about the public highways of the county, (4) in a manner to cause terror to the people.

State v. Staten, 32 N.C. App. 495, 496–97 (1977).

The Court of Appeals' majority below recognized that this Court in *Huntly* described the crime "without any reference that the defendant *must* have acted while on a 'public highway' to be subject to criminal liability." *Lancaster*, 284 N.C. App. at 468 (quoting *Huntly*, 25 N.C. (3 Ired.) at 421–22). In fact, the majority expressly recognized that "it has long been understood that" the crime of going armed to the terror of the public, like the similar common law crime of affray, "can occur in locations other than along a public highway." *Id.* at 469. Despite this, the majority understood that because this Court has never addressed the Court of Appeals' decision in *Staten*, the panel was bound to follow that decision. *Id.* at 470; *see also In re Civ. Penalty*, 324 N.C. 373, 384 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

We now take this opportunity to overrule *Staten* and clarify the elements of the common law crime of going armed to the terror of the public. Although the Court of Appeals interpreted our decision in *Dawson* as imposing an "about a public highway" element, *see Staten*, 32 N.C.

App. at 496–97, this interpretation conflates this Court's recitation of the particular evidentiary facts set forth in the *Dawson* indictment with a recitation of the elements of the crime in general.

The Court of Appeals' erroneous statement in *Staten*, and defendant's argument in reliance thereof, is not just a misreading of *Dawson*—it is contrary to both the English history of this common law crime and our decision in *Huntly* interpreting such. The statute of Northampton did not restrict punishment for the offense of going armed to the terror of the public to only those offenses committed "about a public highway." To the contrary, the statute specifically provided that punishment was applicable to those who were armed "in fairs, markets," and any other public location. Statute of Northampton, 2 Edw. 3, ch. 3.

It is therefore no surprise that Blackstone's Commentaries on the Laws of England also fails to mention any requirement that this crime be committed "about a public highway." *See* 4 William Blackstone, Commentaries *149–50 ("The offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land . . . ." (emphasis omitted)).[4] As we stated in *Huntly*, "[i]t is the wicked purpose—and the mischievous result—which essentially constitute the crime." *Huntly*, 25 N.C. (3 Ired.) at 422–23.

Both the contemporary English history and our decision in *Huntly* confirm that the crime of going armed to the terror of the public does not require that the offensive conduct occur about a public highway. *See id.* at 423 ("[Defendant] shall not carry about this [gun] or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people."). Thus, the elements of the common law crime of going armed to the terror of the public are that the accused (1) went about armed with an unusual and dangerous weapon, (2) in a public place, (3) for the purpose of terrifying and alarming the peaceful people, and (4) in a manner which would naturally terrify and alarm the peaceful people.

With a proper understanding of the elements, we turn to defendant's arguments that the indictment charging him with going armed to

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4. The fourth volume of Blackstone's Commentaries was published in 1769. *See* Wilfrid Prest, William Blackstone: Law and Letters in the Eighteenth Century 246 (2008). As there is no indication that the common law altered this crime between 1769 and 1776, Blackstone's description of the crime reflects "the common law of England as of the date of the signing of the Declaration of Independence." *Vance*, 328 N.C. at 617.

the terror of the public was fatally deficient because it failed to allege the "unusual weapon" and "purpose" elements. Here, the indictment charged that on 30 September 2019, defendant "unlawfully, willfully and feloniously did go armed to the terror of the public by causing a disturbance and waving a firearm around in the parking lot of 326 McCotter Blvd Apartments, Havelock, North Carolina."

First, defendant contends that although "a firearm is a dangerous weapon, . . . there's nothing 'unusual' about a run-of-the-mill firearm." This argument is foreclosed by our precedent.

> It has been remarked, that a double-barrelled gun, or any other gun, cannot in this country come under the description of "unusual weapons," for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an "unusual weapon," wherewith to be armed and clad. . . . But although a gun is an "unusual weapon," it is to be remembered that the carrying of a gun per se constitutes no offence.

Huntly, 25 N.C. (3 Ired.) at 422–23. Thus, defendant's argument that a firearm does not constitute an unusual weapon is without merit.

Defendant next contends that the indictment was insufficient because it failed to allege that he "possessed the firearm for the 'purpose of terrorizing' the people of the named county." According to defendant, "simply possessing or waving a firearm doesn't automatically mean the specific 'purpose' of said possession or waving is to 'terrorize' the people of the named county."

However, "all that is required" for a sufficient indictment are "factual allegations *supporting* the elements of the crime charged," not "magic words" or a rote recitation of elements. *In re J.U.*, 384 N.C. at 624 (emphasis added). Here, both the element that defendant's conduct was done with the purpose of terrifying and alarming people, and the element that such conduct was done in a manner which would naturally terrify and alarm people, are "clearly inferable" from the allegations in the indictment that defendant caused a disturbance and waved a firearm around in the parking lot of an apartment complex. *See id.*

Defendant's attempt to compare these circumstances to a situation in which an individual lawfully exercises their constitutional right by "simply possessing" a firearm is inapposite. *See Huntly*, 25 N.C.

(3 Ired.) at 422–23. Defendant's argument on this point goes to proof at trial. Further, although one may be able to imagine circumstances under which "simply" waving a firearm is done without the purpose of terrorizing people, an indictment need only contain factual allegations which *support* the elements of the charged crime, not evidentiary allegations which conclusively establish the elements regarding an accused's mental state. *See* N.C.G.S. § 15A-924(a)(5) ("[Indictments must contain a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element . . . ."). Defendant's argument that the indictment was fatally deficient due to an omission of the "purpose" element is therefore without merit.

The indictment here adequately alleged facts supporting each element of the crime of going armed to the terror of the public. The indictment clearly appraised defendant of the conduct which was the subject of the accusation, *see* N.C.G.S. § 15A-924(a)(5), and provided "notice sufficient to prepare a defense and to protect against double jeopardy." *In re J.U.*, 384 N.C. at 623. Accordingly, there is no error in the indictment charging defendant with going armed to the terror of the public, and the decision of the Court of Appeals is reversed.

REVERSED.

Justice DIETZ did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA
v.
RUSSELL WILLIAM TUCKER

No. 113A96-4

Filed 15 December 2023

Jury—selection—Batson challenge—prima facie case not established—newly discovered evidence—procedural bar

Defendant's motion for appropriate relief (MAR), in which defendant raised a *Batson* claim that the State exhibited purposeful discrimination during jury selection in his trial for first-degree murder, was procedurally barred pursuant to N.C.G.S. § 15A-1419 because defendant was in a position to adequately raise his claim on direct appeal and in prior post-conviction proceedings but failed to do so, and he failed to establish either good cause and actual prejudice or a fundamental miscarriage of justice to overcome the procedural bar. In particular, although defendant based his MAR on "newly discovered evidence" in the form of a continuing legal education handout listing permissible reasons to strike jurors and a statistical analysis of juror selection in North Carolina capital cases, the content of both items could have been discovered previously through reasonable diligence. The Supreme Court noted that any arguments related to pretext (step three of the *Batson* inquiry) had no place in the review of defendant's MAR since the trial court's determination during jury selection that defendant failed to establish a prima facie case of discrimination (step one of the *Batson* inquiry) rendered analysis of the State's reasons for its strikes (erroneously solicited by the trial court) unnecessary.

Justice EARLS dissenting.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 24 August 2020 by Judge R. Stuart Albright in Superior Court, Forsyth County, denying defendant's motions for appropriate relief. Heard in the Supreme Court 8 February 2023.

Joshua H. Stein, Attorney General, by Danielle Marquis Elder, Senior Deputy Attorney General, and Jonathan P. Babb, Special Deputy Attorney General, for the State-appellee.

Elizabeth Hambourger, for defendant-appellant.

Ian A. Mance, Quintin D. Byrd, and Irving Joyner for North Carolina Association of Black Lawyers and North Carolina State Conference of the NAACP, amici curiae.

BERGER, Justice.

Through a series of post-conviction motions, defendant asserts that his conviction for first-degree murder and sentence of death should be set aside. Defendant argues that despite the trial court's finding that he failed to establish a prima facie case of purposeful discrimination in jury selection, he is nevertheless entitled to a new trial because newly discovered evidence, consisting of a continuing legal education handout and a statistical study, supports his claim pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). However, defendant failed to raise a *Batson* claim or otherwise argue purposeful discrimination on direct appeal from his original trial or in previous post-conviction proceedings. Thus, the question before this Court is whether review of defendant's *Batson* claim is procedurally barred pursuant to N.C.G.S. § 15A-1419. For the reasons set forth herein, we conclude that defendant's claim is barred and affirm the judgment of the Superior Court denying defendant's motion for appropriate relief.

I. Factual and Procedural Background

It is undisputed that defendant killed K-Mart security guard Travis Williams and shot two Winston-Salem police officers on December 8, 1994.[1] Defendant was indicted for first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury. A Forsyth County jury found defendant guilty of first-degree murder, and defendant was sentenced to death upon the jury's recommendation. The State dismissed the assault charges.

Forsyth County Assistant District Attorneys Robert Lang and David Spence prosecuted the case for the State. During jury selection, which was conducted by Mr. Lang, defendant lodged *Batson* objections to the State's peremptory strikes against black prospective jurors Debra Banner, Thomas Smalls, and Wayne Mills. The voir dire transcript reveals

1. A more detailed account of the underlying facts of this case can be found in this Court's opinion at *State v. Tucker*, 347 N.C. 235, 239–40 (1997).

the following relevant exchanges between these prospective jurors, the trial court, and the State.

A. Voir Dire of Ms. Banner

Following inquiry by the trial court, Ms. Banner stated that she worked at Forsyth Medical Center and had not acquired sufficient leave time, which she referred to as PTO, to receive compensation when she missed work. Ms. Banner worked eight-hour shifts that ended at 11:00 p.m., and "nine o'clock [a.m. wa]s not [her] time" because she was not a morning person.[2] Ms. Banner further stated that she "prefer[red] not to be on [the jury]." The trial court clarified her response:

> THE COURT: Prefer not to serve I take it. Do you think that situation will prevent you or substantially impair you in performing your duties as a juror in this?
>
> MS. BANNER: Yes.
>
> THE COURT: Will it prevent you or substantially impair you from giving your full attention to this case?
>
> MS. BANNER: Yes, sir.
>
> THE COURT: The State want to make inquiry of this juror then?

The State chose not to challenge Ms. Banner for cause and made no further inquiry at that time. The Court then resumed its questioning of other prospective jurors.

The next interaction with Ms. Banner took place during the State's voir dire when Ms. Banner had fallen asleep in the jury box while other prospective jurors were being questioned.

> [THE STATE]: Come down to you, Ms. Banner. Wake up.
>
> MS. BANNER: I told you I didn't do well early.
>
> [THE STATE]: But you'd be at work now, wouldn't you?
>
> MS. BANNER: Yeah.

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2. The transcript of jury selection reveals that along with Ms. Banner, jurors Wayne Robinson and Katherine Shook also worked at Forsyth Medical Center. Similar to Ms. Banner, Mr. Robinson expressed concern about missing work to attend court due to a lack of paid time off. Mr. Robinson was excused for cause. Ms. Shook was excused using a peremptory challenge at the same time as Ms. Banner.

Neither the trial court nor defense counsel interjected to suggest Ms. Banner had not fallen asleep.

Thereafter, Ms. Banner acknowledged that she had no personal or moral objections to the death penalty, but her work and lack of paid time off would likely affect her ability to listen to the evidence and follow the trial court's instructions. In addition, it was revealed in questions directed to all the jurors that Ms. Banner did not own the residence in which she lived.

B. Voir Dire of Mr. Smalls

As with Ms. Banner, the transcript indicates that Mr. Smalls "nodded off" and "went to sleep" during jury selection. His responses to the initial questions from the trial court were unremarkable, but during questioning by the State, the following exchange occurred:

> [THE STATE]: It's vitally important that everybody know the State is very concerned about whether everybody can consider the death penalty and the defendant is concerned about whether everybody will automatically impose the death penalty and won't consider the option of life without parole so I'm sorry it gets lengthy but it has got to be done.
>
> Mr. Smalls, can you please tell me about your feelings about the death penalty.
>
> MR. SMALLS: I cannot give an answer to that.
>
> [THE STATE]: Let me ask you do you feel like it's a necessary part of the law?
>
> MR. SMALLS: I think it's a part of the law.
>
> [THE STATE]: Do you think it's a necessary part of the law?
>
> MR. SMALLS: I don't know.
>
> [THE STATE]: Do you have any personal, moral or religious or philosophical beliefs against the death penalty or capital punishment?
>
> MR. SMALLS: I believe in capital punishment.
>
> [THE STATE]: You do?
>
> MR. SMALLS: Yes.

[THE STATE]: Do you think that under some appropriate circumstances, and the judge will tell you what those circumstances are, that the death penalty is an appropriate punishment in some cases?

MR. SMALLS: I guess so. I don't know.

[THE STATE]: Do you belong to any churches or any organizations that oppose the death penalty?

MR. SMALLS: Yes, I'm a Christian.

[THE STATE]: There is a wide broad views in the church. Some churches oppose the death penalty, others feel it's appropriate and have taken a stand. Has your church taken a stand against the death penalty?

MR. SMALLS: I don't know. I can't speak for all of my church. I can only speak for myself.

[THE STATE]: Well that's what is most important. Do you feel that if the circumstances were appropriate that you could vote to impose the death penalty?

MR. SMALLS: I still don't know.

[THE STATE]: You'd have to wait to hear all the evidence?

MR. SMALLS: Yes, sir.

[THE STATE]: Let me ask you, Mr. Smalls, if the State—at the guilt/innocence phase—satisfies its burden to prove the defendant's guilt beyond a reasonable doubt based on one or both of the theories of first degree murder that I've talked about—premeditation and deliberation or felony murder— could you find the defendant guilty?

MR. SMALLS: I guess so.

[THE STATE]: If the law—if the State satisfied its burden and the judge instructed you and gave you the law with regards to the various elements of premeditation and deliberation and felony murder and the State proved those to you beyond a reasonable doubt, would you be able to find the defendant guilty?

MR. SMALLS: I guess so.

[THE STATE]: Having made that decision at the guilt/innocence if the jury determined unanimously that the defendant was guilty of first degree murder and we move on to the second stage and you were satisfied beyond a reasonable doubt that the death penalty was the appropriate punishment after going through the detailed instructions the Court will give you at that second stage, would you be able to vote to impose the death penalty?

MR. SMALLS: I'll have to wait. I'll have to wait until that time comes.

[THE STATE]: Do you feel—well, let me ask you are there some circumstances you feel where the death penalty is appropriate?

MR. SMALLS: Sometimes. Sometimes I think so.

[THE STATE]: Do you feel like you could be part of a jury that comes back and makes a recommendation of the death penalty to the Court in this case?

MR. SMALLS: I guess so.

[THE STATE]: When you say you guess so, does that mean—

MR. SMALLS: —If I have to.

[THE STATE]: If you have to?

MR. SMALLS: Yes. If there is no way out.

[THE STATE]: If there is no way out?

MR. SMALLS: Yes.

C. Voir Dire of Mr. Mills

When Mr. Mills was seated as a prospective alternate juror, the trial court questioned him on whether he had heard or seen anything about the case in the newspaper or from another source. Although Mr. Mills had not read about the case in the newspaper, he stated that he had "heard about it . . . [in] talk around the street." When the trial court asked Mr. Mills whether he had formed or expressed an opinion on the guilt or innocence of defendant based on what he heard, Mr. Mills responded

that he "didn't comment on it." When asked to clarify what he meant, Mr. Mills responded, "I didn't comment on it. When I heard it, I didn't comment on it." The trial court moved on to questions about the death penalty and life without parole and asked if Mr. Mills had any reservations about the death penalty, and Mr. Mills responded that he was not against it.

Mr. Mills responded to several of the State's questions with "yes" and "no" answers with no elaboration. Mr. Mills was specifically asked if he had been convicted of any criminal offense other than traffic offenses, and he replied, "No." Contrary to Mr. Mills' representation, the State had discovered in its pretrial research that he had been convicted of solicitation of prostitution.

D. Defendant's Objections

The State struck each of these prospective jurors using peremptory challenges, and defendant objected to each strike pursuant to *Batson*.

In attempting to establish a prima facie case of racial discrimination, defendant contended that Ms. Banner showed unwavering support for the death penalty, noting that "right down the line Ms. Banner answered yes, yes, yes, yes just like everybody else on that jury and even more so." Defendant argued that other jurors passed by the State were not as strong on the death penalty as Ms. Banner, because their responses only suggested that they "could consider" the death penalty or that "it was appropriate in some cases." Defendant further contended that even though Ms. Banner raised the issue of her lack of paid time off, in the end, Ms. Banner "was very clear that [she] understood her duty [as a juror] overrode [her work responsibilities]." Moreover, defendant argued that Ms. Banner "very candidly said she wouldn't hold [issues concerning her work schedule] against either party and she could be fair to both sides." Defendant stated that "no race[-]neutral reason" justified the use of the peremptory challenge against Ms. Banner.

Concerning Mr. Smalls, defendant contended even though Mr. Smalls "was a little more hesitant" on the death penalty questions than Ms. Banner, Mr. Smalls conveyed that he believed in capital punishment if it was appropriate under the circumstances. Defendant stated that there was "no race[-]neutral basis" for the State's peremptory strike on Mr. Smalls.

Before ruling on defendant's *Batson* objections to the State's peremptory strikes of Ms. Banner and Mr. Smalls, the State and defendant stipulated that defendant and the victim, Mr. Williams, were both black.

The parties also stipulated that of the two officers involved in the case, one was black and the other was white. The trial court further noted, and both defendant and the State agreed, that race was not an issue in the case.

The trial court determined that defendant had not established a prima facie case of purposeful discrimination. However, the trial court stated that it would "give the State the opportunity . . . to address the issue of whether or not the challenge . . . has been done on a race[-]neutral basis" in order to make a record for appeal. The State indicated that it would respond with its race-neutral explanations if ordered to by the trial court because such an order would not waive defendant's burden of establishing a prima facie case. The trial court stated that "I think this Court's ruling is correct. I don't think there is a prima facie case," but nonetheless asked the State to articulate its race-neutral reasons.

As to the peremptory strike for Ms. Banner, the State noted that Ms. Banner was sleeping during jury selection, which "fit in" with her prior comment that she "doesn't do well in the morning hours" due to her work schedule. The State also explained that Ms. Banner had stated that she preferred not to serve, that she had concerns about paid time off, and that her work schedule would make it difficult to work most of the night and then have to be in court. The State explained that because the case involved "a lot of important evidence, . . . we need a juror who is awake and aware and not worried about work."

In addition, the State considered Ms. Banner's work as a nurse problematic for her jury service because, in the State's opinion, "those who save lives are often hesitant to make a recommendation for death." The State also expressed concern that Ms. Banner showed a "lack of stake in the community," pointing to the fact that she was not a homeowner and was not registered to vote.

Regarding Mr. Smalls, the State explained that he "nodded off and went to sleep one time [and the State] saw him startle and wake up during the selection of the other jurors." This statement was not disputed by defendant or the trial court.[3] The State expressed concern regarding Mr. Smalls' body language and asserted that his responses were

3. Our dissenting colleague's reliance on *Snyder v. Louisiana*, 552 U.S. 472 (2008) is misplaced for two reasons. First, contrary to our colleague's indication that deference is *only* warranted when a trial court makes findings regarding a juror's demeanor, *Snyder* states more broadly that "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike." *Id.* at 479 (emphasis added). Second, unlike in *Snyder*, and as discussed in more detail herein, step

inappropriate because they were "middle of the road responses," and as a result, the State "didn't feel he was very strong on the death penalty." Specifically, the State recounted that Mr. Smalls said he did not know what he felt about the death penalty, then "put his head down and began talking to the floor," and "did not ever make eye contact" with prosecutors during the death penalty questions. Further, the State noted that Mr. Smalls "was often looking up" and was "mumbling and talking to himself." The State explained that Mr. Smalls' statement that he could consider the death penalty "if he had to" was inappropriate.

After the State's proffered reasons for exercising peremptory challenges for both Mr. Smalls and Ms. Banner, the trial court announced its finding that there were thirty-nine prospective jurors in the entire jury venire and that seven were black. Of the four black jurors that had been called by the clerk as potential jurors for the trial, two were excused using peremptory challenges and two were excused for cause.[4] Of the four peremptory strikes exercised by the State at that time, two were for white prospective jurors and two were for black prospective jurors. At the time the peremptory challenges were made, eleven jurors had been seated—nine were white and two were black.

The trial court found that "the questions and statements of the prosecuting attorney during jury selection do not tend to support an inference of discrimination," and that "each juror was examined substantially in the same format." The trial court found that there had not been "a

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one of *Batson* is not moot in this case. *See State v. Snyder*, 750 So.2d 832, 841 (La. 1999) (noting that the State offered race-neutral reasons before the trial court made a "finding as to whether defendant had made a prima facie showing of purposeful racial discrimination."). However, even though the trial court was not required to make findings regarding pretext because step one was not moot, the trial court stated that "the district attorney observed that [Mr. Smalls] nodded off to sleep at one time . . . ." Defendant did not object or otherwise argue to the contrary.

We also note that, despite the trial court's statement, our colleague implies that the prosecutor's observation that Mr. Smalls "nodded off" was untruthful. The fact that a juror "nodded off" seems highly relevant to his or her ability to serve, regardless of skin color. But according to our colleague, "it is more likely that [the prosecutor]'s choice of words evince [the prosecutor]'s reliance on the [CLE handout] by echoing the handout's language of 'obvious boredom [which] may show anti-prosecution tendencies.' " It is a remarkable feat indeed to extract this reading from the record as it exists in this case.

4. The trial court detailed on the record that two prospective black jurors, Mr. Leroy Robinson and Ms. Dorothy Nash, were excused for cause. Ms. Nash was removed for cause after she expressed unwavering opposition to the death penalty, and Mr. Robinson stated that he had prior knowledge of the case from media reports and had formed an opinion as to defendant's guilt or innocence. For clarity, we note that there are two jurors with the last name Robinson in the transcript: Wayne Robinson and Leroy Robinson; Mr. Leroy Robinson was identified as a black juror in the trial court's *Batson* findings.

repeated use of peremptory challenges" against black jurors such that a pattern of strikes against black jurors had arisen. Finally, the trial court found that there had "not been a disproportionate number of peremptory challenges" exercised to strike black jurors.

As such, the trial court found that "defendant ha[d] failed to raise an inference that the prosecuting attorney ha[d] . . . used the peremptory challenges to exclude [individuals] from the jury on account of race." The trial court did not characterize its findings as a full *Batson* hearing, and defendant did not raise the issue of pretext, nor was it ever discussed by the trial court.

As to Mr. Mills, the prospective alternate juror, defendant argued that Mr. Mills was the eighth black potential juror to enter the juror box and that there appeared to be no race-neutral reason to strike Mr. Mills. Defendant explained that Mr. Mills believed in the death penalty and stated that he could follow the law. Defendant also noted that the jury was all white.

The trial court concluded again that race was not an issue in this case and that "the demeanor of the questions and statements of the prosecuting attorney during jury selection did not tend to support an inference of discrimination in the use of [the] peremptory challenge." The trial court also found that the format for questions was "typically the same for each juror without regard to race" and that "there ha[d] not been a disproportionate number of peremptory challenges to strike black jurors in this case."

The trial court made additional findings that of the thirty-nine jurors initially called on 6 February 1996, seven were black. Of the seven black jurors, three were excused for cause and four were excused by the State's peremptory challenges. Of the forty-eight jurors called on 8 February 1996, eight were black, and one black juror was excused by consent for pretrial knowledge and contact.

At close of court on 12 February 1996, no additional black jurors had been called and twelve jurors had been seated for the trial. At that point, the State had exercised eleven peremptory challenges against prospective jurors—four were used against black jurors and seven were used against white jurors.

The trial court also addressed strikes used against prospective alternate jurors. The first alternate prospective juror called was white and was excused for cause. Mr. Mills was the second alternate prospective juror called. The trial court determined that defendant had not

established a prima facie case of discrimination in striking Mr. Mills, but again requested that the State provide its reasons for the challenge.

The State, pursuant to the trial court's request, explained that Mr. Mills had been untruthful about his criminal record. Even though the State had accepted other jurors with criminal convictions, the concern with Mr. Mills was "his failure to acknowledge the criminal court convictions" and "the untruthful answers given." In addition, Mr. Mills hesitated on the death penalty questions; gave answers which were mostly "monosyllabic;" appeared to be "smiling inappropriately on a number of occasions;" and seemed confused during questioning.

After the State provided its race-neutral reasons, the trial court reiterated that defendant had failed to establish a prima facie case of discrimination. With each of the three prospective jurors at issue, the trial court never characterized the proceeding as a full *Batson* hearing, nor was pretext argued or ruled upon.

E. Trial and Post Conviction Proceedings

A Forsyth County jury convicted defendant of first-degree murder based on a theory of premeditation and deliberation and under the felony murder rule. *Tucker*, 347 N.C. at 239. Upon completion of the sentencing phase, the jury recommended that defendant be sentenced to death. *Id.* at 239. Consistent with that recommendation, the trial court sentenced defendant to death. *Id.* at 239.

Defendant appealed, and this Court determined that "defendant received a fair trial and capital sentencing proceeding, free from prejudicial error." *Id.* at 247.[5] Defendant did not raise a *Batson* issue on direct appeal.

In addition, defendant did not raise a *Batson* issue in his initial motion for appropriate relief (MAR) or subsequent amendments thereto. Defendant filed an MAR on October 6, 1998, and filed an amendment to that MAR on January 13, 2000. Defendant's motions were denied on May 11, 2000. Later, defendant received newly appointed counsel who filed an MAR in 2001 styled as a Second Amended Motion for Appropriate Relief. After evidentiary hearings in 2004 and 2006, defendant's MAR was denied and this Court denied certiorari in *State v. Tucker*, 361 N.C. 575 (2007) (mem.).

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5. The Supreme Court of the United States denied certiorari in *Tucker v. North Carolina*, 523 U.S. 1061 (1998) (mem.).

In 2010, defendant filed an MAR in Forsyth County Superior Court pursuant to the Racial Justice Act (RJA). In 2008, defendant filed a petition for writ of habeas corpus in federal district court, and defendant amended this petition in 2016 and 2017. The federal court held defendant's federal habeas corpus proceedings in abeyance in 2010 while defendant's RJA claims were resolved.

In 2017, defendant filed another MAR and a second amendment to his RJA MAR. The State filed an answer in 2018, defendant replied in 2018, and defendant filed an amendment to his MAR in 2019. Then, in 2020, defendant, for the second time, amended his MAR.

In his 2017, 2019, and 2020 MARs, which are presently before the Court, defendant for the first time raised the *Batson* issue under a theory of newly discovered evidence. The alleged newly discovered evidence which provides the basis for defendant's most recent post-conviction filings are a continuing legal education (CLE) handout and a statistical study on jury selection in North Carolina assembled by law professors from Michigan State University, along with a corresponding affidavit submitted by the authors of the study. Defendant asked the MAR court to vacate his conviction and death sentence and order a new trial, asserting that newly discovered evidence allows him to overcome any procedural bar found in N.C.G.S. § 15A-1419. Defendant further asserted that his claims were not barred under this Court's decision in *State v. Burke*, 374 N.C. 617 (2020).

The CLE handout is a one-page handout entitled "BATSON Justifications: Articulating Juror Negatives." The CLE handout lists ten legally acceptable justifications for the use of peremptory challenges: (1) inappropriate dress; (2) physical appearance; (3) age; (4) attitude; (5) body language; (6) rehabilitated jurors or those who vacillate in answering the State's questions; (7) inappropriate, non-responsive, evasive, or monosyllabic responses; (8) communication difficulties, be it language barriers or difficulty understanding questions and the process; (9) unrevealed criminal history; and (10) any other signs of defiance, sympathy with the defendant, or antagonism to the State.

The statistical study was conducted by Catherine Grosso and Barbara O'Brien, two law professors at Michigan State University College of Law. *See* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012) [hereinafter Grosso & O'Brien, *A Stubborn Legacy*]. The professors reviewed data concerning jury selection in North Carolina capital

cases between 1990 and 2010. Pursuant to an affidavit from the professors proffered at the hearing on defendant's motion for appropriate relief, the study took less than one year to create as they "began data collection for the study in the fall of 2009 and completed it in the spring of 2010."[6]

Defendant advances two primary arguments in his most recent MAR and amendments. First, defendant contends that not only was the CLE handout newly discovered evidence, but that Mr. Lang used language from the handout as his race-neutral justification for striking Ms. Banner, Mr. Smalls, and Mr. Mills. Second, defendant argued that the MSU study and the authoring professors' affidavit established a pattern of race-based strikes by both prosecutors in this case. Defendant asserts that the purported history of discrimination in Forsyth County, allegedly established not by court rulings but by statistical evidence, shows a pattern of discrimination which must be present in this case also.

On 24 August 2020, the MAR court entered an order denying defendant's MARs. That order is the subject of our review here. The MAR court expressly stated the scope of the order was limited to the 2017 MAR, 2019 MAR, and 2020 MAR filed by defendant "based on alleged newly discovered evidence." The RJA MARs were assigned to a separate judge and were not considered by the MAR court.

The MAR court's comprehensive order makes several pertinent findings of fact before ultimately denying defendant's claims because defendant "failed to show good cause, actual prejudice, or a fundamental miscarriage of justice" sufficient to overcome the procedural bar of N.C.G.S. § 15A-1419. Specifically, the MAR court found that defendant failed to raise a *Batson* issue on direct appeal despite the fact that "the trial court identified the *Batson* issue as a possible issue on appeal and said so in the presence of the parties."[7]

In addition and contrary to defendant's argument, the MAR court held that *State v. Burke* cannot be read to prevent operation of the procedural bar in this case because *Burke* applied specifically to RJA MARs and "all of [d]efendant's RJA MARs are still pending and are beyond the scope of this [o]rder."

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6. Defendant also asserted that a similar study on juror data constituted newly discovered evidence. *See* Ronald F. Wright, et al., *The Jury Sunshine Project: Jury Selection as a Political Issue*, 2018 Ill. L. Rev. 1407 (2018). Our "good cause" analysis of the MSU study under N.C.G.S. § 15A-1419(c) applies equally to this study.

7. Defendant conceded that his counsel was not ineffective for failing to raise the *Batson* issue on direct appeal or in his initial post-conviction filings.

Defendant petitioned this Court for a writ of certiorari to review the order of the MAR court. This Court allowed review pursuant to N.C.G.S. § 7A-32(b) on three issues: (1) whether the CLE handout and the MSU study constitute newly discovered evidence of purposeful discrimination in jury selection under *Batson v. Kentucky*, (2) whether defendant was in an adequate position to raise his *Batson* claim before he had access to the CLE handout and the MSU study, and (3) whether this Court's decision in *State v. Burke* forecloses acceptance of the State's procedural bar argument.

II. Standard of Review

This Court reviews a lower court's order on motions for appropriate relief to determine "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720 (1982)). We review issues of law de novo. *State v. Biber*, 365 N.C. 162, 168 (2011).

III. Analysis

A. Procedural Bar

Section 15A-1419 of the North Carolina General Statutes provides a mandatory procedural bar for issues a party seeks to litigate in post-conviction proceedings. The procedural bar applies when any of the following circumstances are present:

> (1) Upon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. . . .
>
> (2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.
>
> (3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

> (4) The defendant failed to file a timely motion for appropriate relief as required by G.S. 15A-1415(a).

N.C.G.S. § 15A-1419(a) (2021). If any of these circumstances are present, "the court shall deny the motion . . . unless the defendant can demonstrate" that an exception applies. N.C.G.S. § 15A-1419(b) (2021); *see also State v. Murrell*, 362 N.C. 375, 402 (2008).

An exception to the procedural bar applies only if the defendant can demonstrate: (1) "[g]ood cause for excusing the ground for denial listed in subsection (a) of this section and . . . actual prejudice resulting from the defendant's claim," or (2) "[t]hat failure to consider the defendant's claim will result in a fundamental miscarriage of justice." N.C.G.S. § 15A-1419(b).

"[G]ood cause" exists under this section only if the defendant demonstrates "by a preponderance of the evidence that his failure to raise the claim or file a timely motion" was:

> (1) The result of State action in violation of the United States Constitution or the North Carolina Constitution including ineffective assistance of trial or appellate counsel;
>
> (2) The result of the recognition of a new federal or State right which is retroactively applicable; or
>
> (3) Based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review.

N.C.G.S. § 15A-1419(c) (2021).

"[A]ctual prejudice," within the meaning of subsection (b), exists only "if the defendant establishes by a preponderance of the evidence that an error during the trial or sentencing" raises a "reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error." N.C.G.S. § 15A-1419(d) (2021).

"[A] fundamental miscarriage of justice," occurs only where:

> (1) The defendant establishes that more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense; or

(2) The defendant establishes by clear and convincing evidence that, but for the error, no reasonable fact finder would have found the defendant eligible for the death penalty.

N.C.G.S. § 15A-1419(e) (2021).

The post-conviction procedure set forth above serves a critical role in our criminal justice system. Not only does it provide for review and potential relief to defendants convicted of crime, but the process also promotes finality. *See* N.C.G.S. § 15A-1415, Official Commentary (2021) ("[A]dditional finality has been added in G.S. 15A-1419 by making it clear that there is but one chance to raise available matters after the case is over, and if there has been a previous assertion of the error, or opportunity to assert the error, by motion or appeal, a later motion may be denied on that basis."); *see also* N.C.G.S. § 15A-1419, Official Commentary (2021) ("[O]nce . . . there has been opportunity to litigate a matter, there will not be a right to seek relief by additional motions at a later date. . . . [I]f there has been an opportunity to have the matter considered on a previous motion for appropriate relief or appeal the court may deny the motion for appropriate relief.").

It is imperative, not only for the parties, but also for federal habeas review, that we strictly and regularly follow our post-conviction procedural requirements. *See Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *see also Cnty. Ct. of Ulster Cnty., N.Y. v. Allen*, 442 U.S. 140, 148 (1979) (determining whether an independent and adequate state procedural ground was utilized by the state court which would bar the federal courts from addressing the issue on habeas corpus); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) ("We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review.").

1. Batson

We first address defendant's argument that the procedural bar of subsection 15A-1419(a) does not apply to his *Batson* claim because at the time of his direct appeal and initial MAR proceedings, he did not have access to the CLE handout or the MSU study and was therefore not "in a position to adequately raise the . . . issue." N.C.G.S. § 15A-1419(a). To do so, we begin with the essential tenets of *Batson* and the MAR court's application of those tenets to defendant's claim.

The "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisian*a, 552 U.S. 472, 478

(2008) (quoting *United States v. Vasquez–Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)). "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

The North Carolina Constitution states that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. Const. art. I, § 26. Thus, the North Carolina Constitution specifically "bars race-based peremptory challenges." *State v. Nicholson*, 355 N.C. 1, 21 (2002) (citing *State v. Fletcher*, 348 N.C. 292, 312 (1998), *cert. denied*, 525 U.S. 1180 (1999)). "[O]ur courts have adopted the *Batson* test for reviewing the validity of peremptory challenges under the North Carolina Constitution." *State v. Campbell*, 384 N.C. 126, 133 (2023) (quoting *Nicholson*, 355 N.C. at 21).

"When a defendant raises a *Batson* objection, the trial court must engage in a three-step inquiry to evaluate the merits of the objection." *Id.* First, a defendant must "establish a *prima facie* case that the peremptory challenge was exercised on the basis of race." *State v. Cummings*, 346 N.C. 291, 307–08 (1997). "A defendant meets his or her burden at step one 'by showing that the totality of the relevant facts gives rise to [an] inference of discriminatory purpose.' " *Campbell*, 384 N.C. at 134 (quoting *Batson*, 476 U.S. at 94). A "prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson*, 476 U.S. at 97.

"Where the trial court rules that a defendant has failed to make a prima facie showing [at step one], our review is limited to whether the trial court erred in finding that the defendant failed to make a prima facie showing, even if the State offers reasons for its exercise of the peremptory challenges." *State v. Locklear*, 349 N.C. 118, 137 (1998) (first citing *State v. Hoffman*, 348 N.C. 548, 554 (1998); and then citing *State v. Williams*, 343 N.C. 345, 359 (1996), *cert. denied*, 519 U.S. 1061 (1997)). "[W]e do not consider at step one the State's *post facto* reply to the trial court's request for a step two response." *Campbell*, 384 N.C. at 136. Further, "[w]here 'the trial court clearly rule[s] there ha[s] been no prima facie showing' . . . this Court does 'not consider whether the State offered proper, race-neutral reasons for its peremptory challenge.' " *Id.* (quoting *State v. Hoffman*, 348 N.C. 548, 552 (1998)). Thus, a *Batson* inquiry concludes "when the trial court . . . determine[s] that defendant failed to make a prima facie showing." *Id.*

Although a step one showing by defendant may be mooted "when the trial court does not explicitly rule on whether the defendant made a *prima facie* case, and . . . the State [voluntarily] proceeds to the second prong of *Batson* by articulating its explanation for the challenge," *State v. Golphin*, 352 N.C. 364, 426 (2000), our precedent is clear that a prima facie showing by defendant is an important step in a *Batson* analysis. Thus, step one will not be rendered moot, and will therefore remain subject to review, when the trial court determines that the "*defendant failed to make a* prima facie *showing before the prosecutor articulated his reasons for the peremptory challenges*." *State v. Hoffman*, 348 N.C. 548, 551–52 (1998) (quoting *State v. Williams*, 343 N.C. 345, 359 (1996), *cert. denied*, 519 U.S. 1061 (1997)). In fact, we have expressly stated that it is error for a trial court to require a step two explanation in the absence of a prima facie showing by defendant. *See Campbell*, 384 N.C. at 136 ("Whatever the reason, the *Batson* inquiry should have concluded when the trial court first determined that defendant failed to make a prima facie showing.").

Only when the trial court determines that a defendant successfully established prima facie showing will the *Batson* inquiry proceeds to the second step. *Id.* at 134. There, "the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question." *Hernandez v. New York*, 500 U.S. 352, 358–59 (1991) (citing *Batson*, 476 U.S. at 97–98). "*Batson*'s requirement of a race-neutral explanation means an explanation other than race." *Id.* at 374 (O'Connor, J., concurring). "[E]ven if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three." *Johnson v. California*, 545 U.S. 162, 171 (2005).

In the third and final step of the *Batson* inquiry, "the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez*, 500 U.S. at 359 (citing *Batson*, 476 U.S. at 98). "No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause *unless it is based on race*." *Id.* at 375 (O'Connor, J., concurring) (emphasis added). At this step, the trial court must "determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019). "The ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent." *Id.* at 2244 (cleaned up).

"[T]he job of enforcing *Batson* rests first and foremost with trial judges." *Id.* at 2243. Thus, "when a trial court rules that a defendant has

failed to demonstrate a prima facie case of discrimination, '[t]he trial court's ruling is accorded deference on review and will not be disturbed unless it is clearly erroneous.' " *Campbell*, 384 N.C. at 131–32 (alteration in original) (quoting *State v. Augustine*, 359 N.C. 709, 715 (2005)); *see also State v. Hobbs*, 374 N.C. 345, 349 (2020); *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Hernandez*, 500 U.S. at 364. "The ability of the trial judge to observe firsthand the reactions, hesitations, emotions, candor, and honesty of the lawyers and veniremen during voir dire questioning is crucial to the ultimate determination" of whether a prosecutor is acting with discriminatory purpose. *State v. Smith*, 328 N.C. 99, 127 (1991).

"Trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Campbell*, 384 N.C. at 131 (quoting *Batson*, 476 U.S. at 97). Just as judges may consider questions and statements of prosecutors when determining whether a prima facie case has been established by defendant at step one, judges may also consider plainly observable prospective juror conduct—such as falling asleep—which would justify the use of a peremptory strike. The law does not require that trial judges disregard evidence of such conduct in considering whether a prima facie case of discrimination has been established. "An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *Id.* at 138 (quoting *State v. Alston*, 307 N.C. 321, 341 (1983)).

2. MAR Court Order

a. Mootness

The MAR court reviewed defendant's *Batson* argument in a thorough thirty-six-page order, making extensive findings of fact and conclusions of law. In accordance with our precedent, the MAR court first determined that because the trial court ruled that defendant failed to establish a prima facie case of purposeful discrimination *prior* to the trial court's request that the State articulate its race-neutral reasoning for striking Ms. Banner, Mr. Smalls, and Mr. Mills, step one of *Batson* was not moot. Relying on *Locklear*, the MAR court properly limited its review to step one. The MAR court further found that the hearing in the trial court was not a "full hearing" on defendant's *Batson* claim because pretext in the third step was never discussed by defendant at trial, nor did the trial court rule on any third-step issue of pretext.

In contrast with the finding of the MAR court, defendant argues, and the State concedes, that step one of the *Batson* inquiry is moot, citing

this Court's decision in *Hobbs*, 374 N.C. at 354. However, that understanding between the parties is immaterial as a stipulation to an issue of law is not binding upon the Court. *See Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 56 (1975) ("[T]heir misapprehension is immaterial for the stipulation was one of law and therefore not binding upon the court."); *Moore v. State*, 200 N.C. 300, 301 (1931) ("[W]hile the parties to an action or proceeding may admit or agree upon facts[,] they cannot make admissions of law which will be binding upon the courts."); *see also Rawlings v. Neal*, 122 N.C. 173 (1898); *Binford v. Alston*, 15 N.C. (4 Dev.) 351, 354 (1833). Thus, parties may not by agreement bind or otherwise compel this Court to adhere to an application of the law that is inconsistent with an interpretation articulated by this Court. After all, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The present case is readily distinguishable from those in which this Court has found step one of the *Batson* inquiry moot. In *Hobbs*, this Court relied on our decision in *State v. Robinson*, 330 N.C. 1, 17 (1991), where we held that it was "unnecessary to address the trial court's conclusion that defendant failed to make a prima facie case of discrimination because . . . the State *voluntarily* proffered explanations for each peremptory challenge." (Emphasis added.) Further, *Hobbs* expressly required us to review what had been characterized as "a full hearing on the defendant's *Batson* claim." 374 N.C. at 348. That is not the situation here.

Here, the *Batson* inquiry included a clear ruling that defendant had failed to establish a prima facie case of purposeful discrimination at step one. Unlike *Robinson*, the State did not thereafter "voluntarily" proceed to step two. Instead, the State was directed by the trial court to proffer its race-neutral reasons for striking the jurors to bolster the appellate record in the event that an appellate court overruled the trial court's step one determination. Moreover, the inquiry never proceeded to step three, and the trial court never characterized the inquiry as a "full hearing." Accordingly, this case is readily distinguishable from both *Hobbs* and *Robinson*.

We note that defendant relies on a 2020 report by the North Carolina Task Force for Racial Equity in Criminal Justice to argue that this Court should radically alter our *Batson* jurisprudence. The task force, chaired at the time of the report by Attorney General Joshua Stein and a member of this Court, Justice Earls, recommended that this Court enact several "administrative" rule changes, including elimination of the requirement for a prima facie showing in *Batson* altogether, "disallowing

strikes where race could be a factor, reconsidering commonly accepted 'race[-]neutral' justifications for strikes, and disallowing demeanor-based strikes."[8] N.C. Task Force for Racial Equity in Criminal Justice, Report 2020, at 102 (2020), *available at* https://ncdoj.gov/wp-content/uploads/2021/02/TRECReportFinal_02262021.pdf.

As is most relevant here, the task force's recommendation to abolish a defendant's burden at step one of *Batson* states openly what a member of that task force has thus far implied vis-à-vis an analytical framework that would see most step one determinations rendered moot on appeal. *See Campbell*, 384 N.C. at 139–43 (Earls, J., dissenting). We once again reject the notion that a trial court's clear determination that no prima facie case has been made should be swept aside on appellate review merely due to a trial court judge's erroneous attempt to preserve judicial resources by bolstering the appellate record.

When, as here, the trial court determines that a defendant has "failed to make a prima facie showing" of purposeful discrimination on the basis of race, the *Batson* inquiry concludes. *Campbell*, 384 N.C. at 135–36. For each of the potential jurors at issue here, the trial court clearly ruled that no prima facie showing of purposeful discrimination had been established. The *Batson* inquiry should have ended at that point, and it was error for the trial court to direct the State to place its race-neutral reasons on the record. *Id*. at 136. Therefore, the MAR court's findings of fact that the trial court ruled on step one prior to requesting the State's race-neutral reasons and that no full *Batson* hearing occurred support its conclusion of law that step one is not moot, and the MAR court properly limited its review of the trial court's *Batson* inquiry to step one.

b. Position to Adequately Raise

As noted above, defendant's *Batson* claim is barred if, upon a previous appeal or previous motion for appropriate relief, he was "in a position to adequately raise the . . . issue . . . but did not do so," and no exception to the bar applies. N.C.G.S. § 15A-1419(a)–(b). Subsection

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8. This Court does not question that racial discrimination has been and, in portions of society, continues to be a pervasive evil that deprives citizens of every race of their constitutional right to equal protection of the laws. Interestingly, however, the task force's recommendations would effectively eliminate the ability to peremptorily challenge any juror because an argument could be made that any challenge would qualify as a strike "where race could be a factor" – even when a juror falls asleep during jury selection. We reaffirm that, subject only to the commands of the Equal Protection Clauses of the United States Constitution and the North Carolina Constitution, "peremptory strikes . . . may be used to remove any potential juror for any reason—no questions asked." *Flowers*, 139 S. Ct. at 2238.

15A-1419(a)(3) " 'is not a general rule that *any* claim not brought on direct appeal is forfeited on state collateral review' [but rather] requires the reviewing court, instead, 'to determine whether the particular claim at issue *could* have been brought on direct review.' " *State v. Hyman*, 371 N.C. 363, 383 (2018) (emphasis added) (quoting *State v. Fair*, 354 N.C. 131, 166 (2001)). The MAR court found that: (1) "the trial court identified the *Batson* issue as a possible issue on appeal and said so in the presence of the parties;" (2) "[d]efendant was on actual notice that a *Batson* claim could be an appellate issue;" and (3) "despite being on actual notice that a *Batson* claim could be an appellate issue, [d]efendant failed to assert any *Batson* claim on direct appeal or in his 1998 MAR, 2000 MAR or 2001 MAR." Accordingly, the MAR court found "there was nothing that prevented [d]efendant from asserting a *Batson* claim on direct appeal or in one of his prior MARs."

The trial transcript shows that defendant promptly objected on *Batson* grounds to the State's peremptory challenges of both Mr. Smalls and Ms. Banner first and then Mr. Mills. The trial court ruled that defendant failed to establish a prima facie case of purposeful discrimination on the basis of race.

Defendant does not contest that he failed to raise a *Batson* claim in his direct appeal to this Court despite having raised a *Batson* objection at trial, receiving a ruling from the judge, and having the trial court note on the record that the issue may be the subject of review on appeal. *See Tucker*, 347 N.C. 235 (1997). Defendant was in an adequate position to raise a *Batson* claim on direct appeal but failed to do so. N.C.G.S. § 15A-1419(a)(3).

In addition, the same circumstances which would have allowed defendant to raise his *Batson* claim on direct appeal would have allowed defendant to raise a *Batson* claim in one of his prior MARs. Therefore, defendant was in an adequate position to raise, and in fact could have raised, his *Batson* claim on a previous MAR but failed to do so. N.C.G.S. § 15A-1419(a)(1). The MAR court's findings of fact support its conclusion that defendant was in a position to adequately raise the *Batson* issue previously but failed to do so. Thus, defendant's *Batson* claim is barred unless defendant can demonstrate an exception to this mandatory bar.

B. Exception to the Procedural Bar

Defendant argues the "good cause" exception found in subsection 15A-1419(b)(1) applies because the CLE handout and the MSU study at issue here were not available at his trial, and he was therefore prevented

from raising the claim on direct appeal. However, the bulk of defendant's argument ignores step one of the *Batson* inquiry and focuses on pretext at step three, which is not the pertinent issue as set forth above.

Because defendant offers the CLE handout and the MSU study as "newly discovered evidence" of purposeful discrimination and pretextual reasons proffered by the State in striking Ms. Banner, Mr. Smalls, and Mr. Mills, defendant's purported "newly discovered" evidence does not address his failure to establish a prima facie case at step one. The proper inquiry is whether this "evidence" constitutes "a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review," N.C.G.S. § 15A-1419(c)(3), and, if so, whether defendant can then demonstrate that the absence of this evidence caused "actual prejudice," i.e., "a reasonable probability" of a different step one outcome. N.C.G.S. § 15A-1419(b)(1), (d).

1. Good Cause

As noted,

> good cause may only be shown if the defendant establishes by a preponderance of the evidence that his failure to raise the claim or file a timely motion was:
>
> (1) The result of State action in violation of the United States Constitution or the North Carolina Constitution including ineffective assistance of trial or appellate counsel;
>
> (2) The result of the recognition of a new federal or State right which is retroactively applicable; or
>
> (3) Based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review.

N.C.G.S. § 15A-1419(c).

However, the legislature specifically exempted from the definition of good cause "[a] trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a claim." *Id.* "[A] deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a State's legitimate rules for the fair and orderly disposition of its criminal cases." *Smith v. Murray*, 477 U.S. 527, 534 (1986).

When determining whether good cause exists to overcome a procedural bar, the question is whether, at the time of the procedural default, the claim was available at all. *Id.* at 537. Accordingly, for cause sufficient to overcome the procedural bar, it must exist beyond the control of counsel—it must not be subject to counsel's manipulation, but rather, truly unavailable.

a. CLE Handout

As an initial matter, we note that because review of the *Batson* issue here is limited to step one, the CLE handout listing various race-neutral reasons for peremptory challenges at step two is irrelevant. We can discern no possible scenario in which, had defendant possessed this CLE handout, it would have assisted defendant in carrying his burden at step one.[9] At most, this handout is "evidence" that a prosecuting attorney attended a CLE class on jury selection. Any argument related to a prosecutor's step two explanation at step one would be purely conjecture and speculation because mere possession of a CLE handout from a State Bar sanctioned CLE class does not raise an inference that a peremptory challenge was based on race. Nevertheless, we address whether defendant's acquisition of this CLE handout constitutes good cause, and whether his failure to previously acquire it resulted in actual prejudice.

> The MAR court found that the [CLE] handout could not be "newly discovered" because the information contained therein followed and was supported by established caselaw and defendant "by the exercise of reasonable diligence[ ] could have conducted legal research . . . to determine that the reasons contained in the [CLE] handout referenced established case law." The MAR court reviewed cases in which "race-neutral reasons or explanations" to exercise a peremptory challenge had been analyzed in prior court decisions. The trial court noted that the cases it had reviewed were similar "in form and substance to the list of reasons or explanations set forth on the [CLE] handout." The list of cases and the acceptable reason for striking a potential juror the MAR court provided is as follows:[10]
>
> > Knowledge of the case. *State v. Thomas*, 329 N.C. 423, 430–33 (1991); *State v. Thomas*, 350 N.C. 315, 333–35 (1999).

9. To the extent defendant raises an argument regarding pretext, such argument is properly considered at step three of *Batson* and is irrelevant to the trial court's determination at step one—which is why defendant did not make such an argument at trial.

10. To improve readability, this list has been slightly reformatted from the original MAR court's order.

Belief that criminal justice system operates unfairly before facts presented. *State v. Porter*, 326 N.C. 489, 499–502 (1990).

Inappropriate dress. *State v. Headen*, 206 N.C. App. 109, 116–17, *rev. denied*, 364 N.C. 607 (2010).

Reservations or doubts about the death penalty. *State v. Basden*, 339 N.C. 288, 297–98 (1994); *State v. Locklear*, 349 N.C. 118, 139–140 (1998); *State v. Rogers*, 355 N.C. 420, 444–46 (2002).

Physical appearance. *Purkett v. Elem*, 514 U.S. 765, 769 (1995); *State v. Barnes*, 345 N.C. 184, 210–13 (1997); *State v. Headen*, 206 N.C. App. 109, 116–17, *rev. denied*, 364 N.C. 607 (2010).

Age being too young or close to defendant's age, or a relative's age close to defendant's age. *State v. Jackson*, 322 N.C. 251, 255–57 (1988); *State v. Smith*, 328 N.C. 99, 125–27 (1990); *State v. Thomas*, 329 N.C. 423, 430–33 (1991); *State v. Barnes*, 345 N.C. 184, 210–13 (1997).

Attitude. *State v. Jackson*, 322 N.C. 251, 255–57 (1988) (including, among other reasons, citation of another case where lack of eye contact was a race-neutral reason); *State v. Sanders*, 95 N.C. App. 494, 501–03, *rev. denied*, 325 N.C. 712 (1989); *State v. Porter*, 326 N.C. 489, 499–502 (1990) (including, among other reasons, excessive eye contact with defense counsel and failure to make eye contact with the prosecutor); *State v. Barnes*, 345 N.C. 184, 210–13 (1997) (including, among other reasons, failure to maintain eye contact with the prosecutor); *State v. Locklear*, 349 N.C. 118, 139–40 (1998); *State v. Rogers*, 355 N.C. 420, 444–46 (2002).

Body language. *State v. Jackson*, 322 N.C. 251, 255–57 (1988); *State v. Barnes*, 345 N.C. 184, 210–11 (1997).

History of unemployment or unsteady employment. *State v. Sanders*, 95 N.C. App. 494, 501–03, *rev. denied*, 325 N.C. 712 (1989); *State v. Porter*, 326 N.C. 489, 499–502 (1990); *State v. Barnes*, 345 N.C. 184, 210–13 (1997).

> Rehabilitated jurors and those that vacillate in answering questions. *State v. Robinson*, 330 N.C. 1, 17–20 (1991).
>
> Unstable/lack of a stake in the community. *State v. Sanders*, 95 N.C. App. 494, 501–03, *rev. denied*, 325 N.C. 712 (1989); *State v. Thomas*, 329 N.C. 423, 430–33 (1991); *State v. Barnes*, 345 N.C. 184, 210–13 (1997); *State v. Thoma*s, 350 N.C. 315, 333–35 (1999).
>
> Inappropriate or inconsistent juror responses. *State v. Smith*, 328 N.C. 99, 125–27 (1990); *State v. Peterson*, 344 N.C. 172, 176–77 (1996).
>
> Communication difficulties/lack of attention. *State v. Jackson*, 322 N.C. 251, 255–57 (1988); *State v. Robinson*, 330 N.C. 1, 17–20 (1991); *Hernandez v. New York*, 500 U.S. 352, 356–72 (1991) (plurality opinion); *State v. Caporasso*, 128 N.C. App. 236, 243–44, *appeal dismissed*, 347 N.C. 674 (1998).
>
> Criminal history or relative's criminal history. *State v. Sanders*, 95 N.C. App. 494, 501–03, *rev. denied*, 325 N.C. 712 (1989); *State v. Porter*, 326 N.C. 489, 499–502 (1990); *State v. Robinson*, 330 N.C. 1, 17–20 (1991); *State v. Burge*, 100 N.C. App. 671, 674 (1990), *rev. denied*, 328 N.C. 272 (1991); *State v. Peterson*, 344 N.C. 172, 176–77 (1996); *State v. Locklear*, 349 N.C. 118, 139–140 (1998); *State v. Rogers*, 355 N.C. 420, 444–46 (2002).
>
> Antagonism to the State or sympathy with defendant. *State v. Jackson*, 322 N.C. 251, 255–57 (1988); *State v. Porter*, 326 N.C. 489, 499–502 (1990); *State v. Burge*, 100 N.C. App. 671, 674 (1990), *rev. denied*, 328 N.C. 272 (1991); *State v. Thomas*, 329 N.C. 423, 430–33 (1991); *State v. Barnes*, 345 N.C. 184, 210–13 (1997); *State v. Rogers*, 355 N.C. 420, 444–46 (2002).

The MAR court also determined that the CLE handout provided

> accurate and correct statements of law of both the United States Supreme Court and the North Carolina appellate courts concerning appropriate race-neutral and constitutionally permissible reasons to exercise a peremptory challenge when such facts arise in a

> particular case, as well as handwriting[11] that identifies when it would be improper to exercise a peremptory challenge. There is nothing inherently wrong . . . with a handout containing accurate statements of the law regarding permissible and impermissible reasons to exercise a peremptory challenge. Moreover, such a handout containing accurate statements of the law should be expected when attending a CLE class on jury selection.

A review of the cases cited by the MAR court reveals that the MAR court correctly found that the CLE handout does little more than restate, in a list format, the established caselaw reviewing legally permissible reasons to exercise a peremptory challenge of a potential juror. In reaching its conclusion that the CLE handout was not evidence of racial discrimination, the MAR court reasoned that

> when any attorney or judge attends a CLE o[r] CJE on a particular legal subject, it is expected that accurate and correct statements of the law on a particular subject will be given to the attendee. Similarly, any handout on a particular legal subject should contain accurate and correct statements of the law.

Additionally, the MAR court explained that "[t]here is nothing wrong or improper with knowing legally permissible and impermissible reasons to exercise peremptory challenges," noting that trial preparation requires that attorneys understand "legally permissible and impermissible reasons to exercise peremptory challenges," and that a lawyer or judge who fails to obtain the requisite number of CLE or CJE hours each year could be subject to disciplinary action by the State Bar. In fact, the MAR court noted that the Capital Case Law Handbook, published by the UNC School of Government, "includes a list of cases that identify appropriate race-neutral reasons to exercise peremptory challenges," and that a UNC School of Government handout from a 2017 CJE seminar entitled Capital Case Management for Superior Court Judges "contains a list of race-neutral reasons for exercising peremptory challenges as well as accurate and correct statements of law on this subject." We agree with the MAR court that "when any attorney or judge attends a CLE or CJE seminar on a particular legal subject, it is expected that accurate and

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11. The handwriting referenced appears on the CLE handout provided in Defendant's Appendix. It reads "[d]on't use gender/race reasons in NC." It also states "may be expanded to othe[r] 'cognizable Equ[al] Prot[ection] Clause protected class.' "

correct statements of the law on a particular subject will be given to the attendee," and that mere knowledge of the state of the law under *Batson* does not raise any inference of discriminatory intent.

Further, acknowledging defendant's admission that "there are good reasons to strike almost anyone from jury service," the MAR court determined that "the [CLE] handout sets forth reasons that are race-neutral and are therefore 'good reasons' to exercise peremptory challenges . . . in a particular case."

The MAR court further concluded that "by an exercise of reasonable diligence," defendant could have obtained the CLE handout through a public records request to the entity that provided the continuing legal education, the North Carolina Conference of District Attorneys. Accordingly, the MAR court concluded that the CLE handout was "not newly discovered, and [d]efendant's claim to the contrary is meritless."

As the MAR court correctly observed, trial preparation requires that attorneys understand a host of legal issues, including reasons why an attorney may and may not strike a juror. The CLE handout simply displayed legally permissible reasons for exercising peremptory challenges. It defies logic and common sense that an educational tool from a CLE sanctioned by the State Bar would be sufficient to establish a prima facie showing of purposeful discrimination at step one when the material merely contains an accurate rendering of the law.

Taking defendant's argument to its logical conclusion, a prima facie showing of purposeful discrimination could be shown simply by alleging that an attorney researched the law on *Batson*, or that he or she had a section in a trial notebook on defenses to *Batson* objections. Defendant's assertion that the CLE handout is evidence of racial animus on behalf of the State is meritless at best.

Defendant further argues that because he presented evidence that "his prosecutors used the [CLE] handout not only in his case, but in at least two others," *State v. Lyons*, 343 N.C. 1 (1996) and *State v. White*, 131 N.C. App. 734 (1998), the CLE handout constitutes newly discovered evidence of a pattern of racial discrimination. This argument fails not only for the reasons set forth above, but also because our appellate courts have held that the trial courts in those cases properly denied the defendants' *Batson* challenges. *See Lyons*, 343 N.C. at 14; *White*, 131 N.C. App. at 741. "[O]nce an appellate court has ruled on a question, that decision becomes the law of the case and governs both in subsequent proceedings in a trial court and on subsequent appeal." *Weston*

v. Carolina Medicorp, Inc., 113 N.C. App. 415, 417 (1994) (citing *Transp., Inc. v. Strick Corp.*, 286 N.C. 235 (1974)).

Defendant essentially asked the MAR court to overrule both the trial courts involved in these cases and the appellate courts that affirmed *Batson* denials. Correctly noting that no Superior Court judge has the authority to overrule either the trial courts which denied those defendants' *Batson* challenges or the appellate courts that affirmed those denials, the MAR court properly rejected this request.

The MAR court's findings of fact are supported by competent evidence and further support the conclusion of law that defendant cannot show good cause based on the CLE handout. Because defendant could have conducted legal research and arrived at a proper understanding of the legally recognized justifications set forth in the CLE handout on his own "through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review," we hold that defendant has failed to demonstrate good cause pursuant to subsection 15A-1419(b)(1). Defendant's meritless argument regarding the CLE handout does not provide relief from the mandatory procedural bar.

It is worth noting here that the CLE handout is readily distinguishable from the discriminatory manual at issue in *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005). In that case, the Supreme Court of the United States addressed, among other issues associated with the claims, a "specific policy of systematically excluding blacks from juries." 545 U.S. at 263. The district attorney's office there had adopted a manual entitled "Jury Selection in a Criminal Case" which detailed "the reasoning for excluding minorities from jury service" and which placed explicit "emphasis on race." *Id.* at 264, 266. Specifically, the manual advised prosecutors that minorities frequently empathize with defendants. *See id.* at 306 (Thomas, J., dissenting). The Court ultimately determined that "when the evidence on the issues raised is viewed *cumulatively* its direction is too powerful to conclude anything but discrimination." *Miller-El II*, 545 U.S. at 265 (emphasis added).

In reaching its conclusion, the Court considered the surrounding circumstances, which included the following: (1) the strikes of 10 of 11 black prospective jurors—one of whom was "ideal;" (2) the fact that prosecutors marked the race of each juror on their juror cards; (3) the explanations given by prosecutors, which did not hold up and were at odds with the evidence; (4) the jury shuffles of the State; (5) the disparate questioning of black and white jurors; and (6) the use of the manual which sought to exclude minorities from the jury. *Id.* at 265–66.

Here, the CLE handout does not include or establish evidence of an intent to exclude minorities from juries. The CLE handout merely contained accurate statements of legally permissible reasons to exercise peremptory challenges, not a prosecutorial training manual advocating race-based strikes. The CLE handout here is not only not newly discovered evidence under subsection 15A-1419(c); it is not "evidence" that raises an inference of impermissible race-based peremptory challenges at step one. We therefore agree with the MAR court that defendant "suffered no prejudice from failing to have" the CLE handout because "even if [d]efendant had the [CLE] handout . . . there would not have been a different result" at step one.

b. Jury Selection Study

Defendant contends that the MSU study was previously unavailable evidence that shows the prosecutor violated *Batson*. Again, however, the lack of a full *Batson* hearing in the trial court has narrowed the scope of our review, and the issue is whether this study constitutes newly discovered evidence that provides a "reasonable probability" of a different result at step one. As previously noted, to qualify as newly discovered evidence sufficient to overcome the mandatory procedural bar, the MSU study must contain "a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review." N.C.G.S. § 15A-1419(c)(3).

As an initial matter, the MAR court "reviewed and considered" the MSU study and found that it "was created for [d]efendant in preparation to file a previous MAR, specifically [d]efendant's 2010 RJA MAR." The authors' admission that the purpose of the study was to "evaluate the potential for statistical evidence to support claims under . . . the RJA," Grosso & O'Brien, *A Stubborn Legacy* at 1533, and defendant's statement in his reply brief in support of his 2018 MAR that the study "was conducted in preparation for filings under the Racial Justice Act," support the MAR court's finding that the MSU study was created to assist capital defendants, including this defendant, preparing to file under the RJA.

The MAR court noted that the study took less than one year to create, which is borne out by the affidavit of Professors Catherine Gross and Barbara O'Brien who noted that "[w]e began data collection for the study in the fall of 2009 and completed it in the spring of 2010." The MAR court found that "nothing prevented [d]efendant from preparing a substantially similar study or analysis to use on direct appeal or in one

of his prior MARs covering the years immediately preceding his direct appeal or prior MARs." Further, the MAR court correctly concluded that the study was "not newly discovered" but "newly created."

We agree with the MAR court that allowing defendant to label such a study as "newly discovered evidence" sufficient to overcome a procedural bar would effectively allow defendant to "manufacture[ ] a mechanism to file an infinite number of MARs." Indeed, historical information concerning juror strikes in other cases, to the extent it may be relevant at step one, was readily obtainable by defendant.[12] Mere review of relevant files or transcripts of capital proceedings in preparation for trial could have yielded for defendant the same or similar data utilized in the MSU study. Put another way, defendant's attorney, investigator, or someone acting at their direction could have reviewed the Clerk of Court's files from capital murder trials in Forsyth County and compiled the information defendant now contends is newly discovered. That gathering such information may have been difficult or time consuming does not change its character. The data was in existence and could "have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review," N.C.G.S. § 15A-1419(c)(3), and in time to present at trial. Counsel for defendant certainly understood that *Batson* issues might arise in a capital trial—and defendant's various postconviction counsel certainly knew *Batson* objections were made at trial.

Further, defendant argues that peremptory strike data from cases tried subsequent to his conviction may be considered retrospectively as evidence establishing a prima facie case of purposeful discrimination. We reject this argument because such data has no bearing on defendant's *Batson* claim. While a defendant is certainly entitled to bring the trial court's attention to a number of relevant factors when attempting to establish a prima facie case at step one, including historical evidence, *see Hobbs*, 374 N.C. at 350, an appellate court's consideration of facts not yet in existence at the time of the trial court's step one ruling would pervert our well-established standard that such a ruling "is accorded deference on review and will not be disturbed unless it is clearly erroneous." *Campbell*, 384 N.C. at 131–32 (quoting *State v. Augustine*, 359 N.C. 709, 715 (2005)); *see also Alston*, 307 N.C. at 341 ("An appellate court is not required to, and should not, assume error by the trial judge when

12. The State correctly notes that while historical evidence and statistical information may be relevant evidence at step one, the issue here "is not relevance or admissibility, but is solely the question of whether such a study constitutes newly discovered evidence allowing for overcoming the procedural bar."

none appears on the record before the appellate court" (quoting *State v. Williams*, 274 N.C. 328, 333 (1968))). A trial court's lack of precognition cannot render its step one ruling clearly erroneous, and in this context, evidence from future cases which did not exist at the time of a trial court's step one ruling cannot establish actual prejudice.

Further, even if the prospective data in the MSU study could have some bearing on our analysis, and even if the historical data in the MSU study could not have been discovered through the exercise of reasonable diligence, the MAR court correctly concluded that this study could not afford defendant relief because the study was unreliable and fatally flawed. The MAR court reached this determination after it examined each of the Forsyth County cases used in the MSU study and found that the study inaptly imputed racial motives to peremptory strikes for cases in which *Batson* arguments had not been made or *Batson* violations had not been found. In other words, the MSU study assumed racial animus in cases in which defendants did not make any such claim, or in which the trial court or appellate courts did not make or sustain any such findings.

The MAR court discussed the following cases included in the MSU study: (1) *State v. Hooks*;[13] (2) *State v. Larry*;[14] (3) *State v. Little*;[15] (4) *State v. Moore*;[16] (5) *State v. White*;[17] (6) *State v. Moseley*;[18] (7) *State v. Murrell*;[19] (8) *State v. Thibodeaux*;[20] (9) *State v. Frogge*;[21] (10) *State v. Moses*;[22] and (11) *State v. Woods*.[23]

Specifically, regarding *State v. Larry* and *State v. Hooks*, cases in which *Batson* challenges were denied by the trial courts and not raised on appeal, the MAR court found

> the MSU [s]tudy has no authority to overrule the *Hooks* and *Larry* trial courts that specifically found

13. *State v. Hooks*, 353 N.C. 629 (2001).
14. *State v. Larry*, 345 N.C. 497 (1997).
15. This case remained pending at the time of the MAR court's order.
16. *State v. Moore*, 335 N.C. 567 (1994).
17. *State v. White*, 355 N.C. 696 (2002).
18. *State v. Moseley*, 336 N.C. 710 (1994).
19. *State v. Murrell*, 362 N.C. 375 (2008).
20. *State v. Thibodeaux*, 352 N.C. 570 (2000), *cert. denied*, 531 U.S. 1155 (2001).
21. *State v. Frogge*, 345 N.C. 614 (1997).
22. *State v. Moses*, 350 N.C. 741 (1999).
23. *State v. Woods*, 345 N.C. 294 (1997).

> there were no Batson violations. . . . [T]he part of the MSU study that relies on the *Hooks* and *Larry* cases as evidence that race was a significant factor in exercising peremptory challenges and therefore are also evidence of a *Batson* violation in the instant case is materially contradicted by the unambiguous record, unreliable, fatally flawed and meritless . . . .

Next, the MAR Court addressed the examination of *State v. Little* in the MSU study and determined that although that case remains pending, the defendant in *Little* was tried and convicted more than 10 years after defendant in the instant case was tried and convicted—many years after Mr. Lang had left the Forsyth County District Attorney's Office. The MAR court reasoned that

> other than a similar job title, job description and the same employer, the MSU study fails to show any "demonstrable nexus between" the act of the prosecutor allegedly using race as a basis to exercise peremptory challenges in the *Little* case and Rob Lang nor any "causal connection between the conduct [of the other prosecutor's alleged bad act] and the injury [of Rob Lang exercising peremptory challenges in the instant case]" to show that Rob Lang allegedly violated *Batson* in the instant case.

(Alterations in original.)

Ultimately, the MAR court concluded that even though *Little* was a Forsyth County case, "it is so remote in time to the *Tucker* trial that absent said nexus or causal connection, there is no meaningful probative value." In addition, the MAR court determined that defendant could not rely on the *Little* case to show a *Batson* violation in the instant case because "the part of the MSU [s]tudy that relies on *Little* as evidence that race was a significant factor in peremptory challenges . . . is materially contradicted by the unambiguous record, unreliable and fatally flawed."

The remaining cases used in the MSU study—*Moore*, *White*, *Moseley*, *Murrell*, *Thibodeaux*, *Frogge*, *Moses*, and *Woods*—involve defendants *who did not raise a* Batson *issue on appeal*. Thus, the MAR court correctly concluded that the "MSU [s]tudy has no authority to raise a *Batson* claim on behalf of the [r]emaining [d]efendants that failed to do so in their respective cases" and it "has no authority to overrule any of [the] appellate courts ultimately finding no error" in these cases.

The MAR court expressed that the MSU study's reliance on these cases was legally problematic "because [as] trial courts never had the opportunity to make a *Batson* ruling, not only is the three step *Batson* inquiry . . . meaningless, but the standard of review that deference be given to the rulings of the trial courts obviously does not apply"; thus, "by ignoring and effectively bypassing the caselaw" the MSU study essentially "allows [d]efendant to create his own standard of review."

As succinctly put by the MAR court, the use of cases

> (1) where trial courts have already specifically ruled there were no *Batson* violations, which rulings were never appealed to a higher court or otherwise reversed by a higher court, or (2) where no *Batson* claim was ever raised at the trial level to begin with, in a statistical analysis like the MSU [s]tudy as credible evidence of a *Batson* violation in the instant cases is misleading and manipulative.

We agree with the MAR court that the MSU study is fundamentally flawed and lacks relevance because it purports to establish purposeful racial discrimination in jury selection by utilizing cases in which *Batson* arguments were not made, *Batson* violations were not found, and/or appellate courts determined that *Batson* violations did not exist. As such, the study has no probative value. The use of the MSU study as evidence of racial animus where courts have neither weighed in nor found *Batson* violations by the State is at best a manipulation of data, and at worst, an attempt to use misleading statistics to circumvent established rules of appellate review in the courts of this State.

Among its many fatal flaws, the MSU study suffers from a lack of relevance and causation which cannot be ignored. The connection between the data utilized in the MSU study and the prosecutor's voir dire in the instant case is attenuated at best. Defendant cites the MSU study and argues that because black jurors were struck in prior Forsyth County capital trials, "race was the deciding factor" in the treatment of black jurors in defendant's case.

But researchers armed with information have great power and discretion. Interpretation of data may often be more art than science, and conclusions may often prove to be misleading. Biases and preconceptions can distort objective truths, and the maxim that "statistics don't lie, but statisticians do" should run through the mind of every discerning attorney and judge. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2345 (2021) (describing how the "use of statistics" can be "highly

misleading" and how "a distorted picture" can be created by "statistical manipulation"). A healthy skepticism ensures that one is not misled by conclusions that do not reflect reality. The reality here is that the MSU study used data to proclaim racial disparities when *Batson* violations were not alleged or found. As previously noted, the law of a case is the province of the courts and may not be altered by agreement of the parties or academic interpretation of data.

Fundamentally, defendant seeks to use "evidence" of other purported wrongs to show that the prosecutor acted in conformity therewith in the present case. However, it is not the prosecutor's own alleged prior wrongs that defendant seeks to show, but rather the alleged prior wrongs of North Carolina prosecutors at large. At a bare minimum, our law requires some nexus with the alleged wrongful act, and no demonstrable nexus is present here.

The MAR court observed that the MSU study "identifies alleged bad acts during jury selection of prosecutors working in different offices across North Carolina . . . and imputes these bad acts during jury selection to the prosecutor in the instant case." Further, the MAR court emphasized that "[n]o prosecutors are . . . identified by name" in the study. Defendant's argument amounts to a contention that because two professors from Michigan State issued a study asserting that North Carolina prosecutors struck black jurors at higher rates than other jurors in certain cases, race must have been a deciding factor in selecting jurors in these cases—regardless of prior rulings to the contrary. Therefore, according to defendant, because Mr. Lang is a prosecutor in North Carolina, he must have used race as a deciding factor in selecting the jury in defendant's trial here. This attenuated "connection" is wholly insufficient to establish purposeful discrimination in the selection of jurors in defendant's case.

As is of ultimate importance here, the ability to obtain similar data and create a similar study was within the control of defendant or his counsel. Good cause can only be shown when the claim cannot be made due to circumstances outside defendant's control—in other words, what cannot be accomplished "through the exercise of reasonable diligence in time to present the claim." N.C.G.S. § 15A-1419(c). Because obtaining then existing data and creating such a study could have been achieved with reasonable diligence, the MAR court correctly concluded that the MSU study is "newly created" not newly discovered evidence. Thus, defendant cannot overcome the procedural bar of section 15A-1419.

We also share the MAR court's concerns that allowing this "newly created" evidence or clever statistical manipulation to be treated as

"newly discovered" allows a defendant to manufacture all manner of studies to continue to seek review of his conviction. This directly contradicts one of the purposes of our post-conviction review—finality. *See* N.C.G.S. § 15A-1415, Official Commentary (2021).

Defendant contends that this concern is "a fiction" because he is "indigent and incarcerated." However, those factors did not preclude appointed counsel from petitioning courts for necessary funds to assist in his defense and did not inhibit the production of the MSU study here. As defendant notes, the MSU study was "undertaken in order to evaluate the potential for statistical evidence to support claims under . . . the RJA." Grosso & O'Brien, *A Stubborn Legacy* at 1533. Thus, every time an academic takes an interest in the law of our State or the case of a particular defendant, or class of defendants, additional post-conviction studies could be generated.

Moreover, "a deliberate, tactical decision not to pursue a particular claim" until a third-party has interpreted already available evidence in a manner most favorable to the defendant "is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a State's legitimate rules for the fair and orderly disposition of its criminal cases." *Murray*, 477 U.S. at 534. Here, the raw data used to construct the study could have been discovered by defendant's exercise of reasonable diligence. To the extent that the MSU study analyzed and presented previously existing data in a manner that defendant now believes is more persuasive for his claim, it fails to qualify as newly discovered evidence. The "factual predicate" contemplated by section 15A-1419(c) is either available or unavailable to a defendant—it is not a matter of creative packaging.

Finally, we note that this case is not the first instance in which this Court has addressed this study. *See State v. Robinson*, 368 N.C. 596 (2015) (remanding to the trial court to grant the State a continuance to adequately respond to the defendant's submission of the study in support of his RJA MAR); *see also State v. Richardson*, 385 N.C. 101, 192–201 (2023) (affirming the trial court's exclusion of the MSU study as evidence supporting the defendant's burden at step one of *Batson*, after the State objected to its admission and the prosecutor characterized "it as 'one of the most ridiculous studies [he had] seen in [his] entire life' " (alterations in original)). Neither case involved the circumstances here—a defendant submitting the study as "newly discovered evidence" of a *Batson* violation in a non-RJA MRA—and neither case impacts our rejection of the study here.

Defendant's argument is unrelated to actual innocence and would permit review ad infinitum with the only potential limitation being the imagination and ingenuity of clever attorneys. Such an interpretation of our post-conviction statutes runs counter to the express intent of the legislature. We decline to adopt a rule which would encourage contrived means of overcoming a procedural bar which could ultimately bog down our criminal justice system in a cycle of unending post-conviction review.

Accordingly, we agree with the MAR court and hold that because of the many flaws in the MSU study and its lack of relevance to defendant's argument, it cannot establish evidence of purposeful discrimination in the case at bar, and it does not constitute newly discovered evidence sufficient to overcome the procedural bar.

c. Case Law

Good cause may also be established as "[t]he result of the recognition of a new federal or state right which is retroactively applicable." N.C.G.S. § 15A-1419(c). Defendant contends that he was not in an adequate position raise his *Batson* claim earlier "because at the time of his direct appeal and original post-conviction proceedings, North Carolina law imposed an impossibly high bar on *Batson* claimants."

Specifically, defendant argues that until *State v. Waring*, 364 N.C. 443 (2010), North Carolina used the "sole factor" test, requiring *Batson* claimants to prove that racial discrimination in jury selection was the sole factor in a particular strike. In making this argument, defendant points us to *State v. Davis*, 325 N.C. 607 (1989), *State v. Wright*, 189 N.C. App. 346 (2008), and *State v. White*, 131 N.C. App. 734 (1998).

The MAR court addressed defendant's contention that there has been a change in the law of North Carolina regarding *Batson*, specifically, a shift from a requirement that race be a "sole" factor to a requirement that race be only a "substantial" factor. The MAR court determined that "[r]egardless of which standard applies" nothing prevented defendant from making his *Batson* claim on direct appeal or in his prior MARs. In the alternative, the MAR court found that defendant's failure to raise a *Batson* issue on direct appeal constituted error on his part which precludes him from claiming prejudice now. Defendant's argument fails for the reasons stated by the MAR court and because defendant's claim does not bear out in our precedent. *Waring* did not change the law in this State—it merely reaffirmed it.

In *Waring*, the defendant argued that the trial court had applied the wrong legal standard by stating that the "defendant failed to show

that the State's challenge was 'based solely on the fact that she was an African-American female.' " 364 N.C. at 480. This Court declared that the proper test was whether race was a significant factor in a peremptory challenge. *Id.* The trial court had also expressed that the defendant needed to show that the State's challenge of a juror was "*motivated* by discriminatory purposes." *Id.* at 480. The Court went on to hold that "the trial judge applied the correct legal standard," as the trial court's statements demonstrated that it applied the correct standard but misspoke in using the word "solely" at one point. *Id.* at 480–81. In that case, this Court did not announce a new standard; it upheld the same one that had been, and still remains, the law. Therefore, there is no new state right available to defendant which is sufficient to overcome the procedural bar of section 15A-1419.

In *State v. Hobbs*, this Court detailed the *Batson* analysis, citing with approval to this Court's decision in *State v. Quick*, 341 N.C. 141 (1995), while also noting that any suggestion that race be the "sole" reason for striking a juror is incorrect and that the proper inquiry is whether "race was significant in determining who was challenged and who was not." *Hobbs*, 374 N.C. at 352, n.2 (quoting *Waring*, 364 N.C. at 480).

Defendant uses *State v. Davis*, 325 N.C. 607, 617 (1989), as an example demonstrating a prior standard used in *Batson* cases. To do so, defendant amplifies the word "solely," which appears in the opinion exactly one time. *Id.* at 617. That case did not turn on whether race must be the sole or substantial factor in exercising a peremptory challenge to violate *Batson*. Rather, *Davis* was resolved with a straightforward *Batson* analysis where this Court considered whether "[t]he relevant facts and circumstances in the record . . . establish[ed] a prima facie case of racial discrimination against black citizens during jury selection." *Id.* at 620. This Court concluded that a prima facie case of discrimination had not been established. *Id.* While this Court did use the word "sole" in that case, we nevertheless correctly applied the law as it has been and remains to this day under *Batson*—race as a significant factor.

Defendant's reliance on *State v. Wright*, 189 N.C. App. 346 (2008), *writ denied*, *rev. denied*, 667 S.E.2d 280 (2008), suffers from the same defect as his reliance on *Davis*. In *Wright*, the Court of Appeals addressed "whether the trial court erred by finding the State had not engaged in purposeful discrimination when the State did not provide a race-neutral explanation for each African-American whom it had removed from the jury by peremptory challenge." *Id.* at 346–47. This case addressed the State's failure to provide race-neutral reasons for its strikes, and the word "solely" appeared exactly one time in language quoted from the

trial court which the Court of Appeals never substantively addressed. *Id.* at 350. Accordingly, this case does not support defendant's contention that our State courts employed a different *Batson* standard that recently changed with *Waring*.

However, *State v. White*, 131 N.C. App. 734 (1998), lends some support to defendant's argument. In that case, the Court of Appeals undoubtedly applied a "sole" factor analysis to the *Batson* inquiry, finding that "[w]hile race was certainly a factor in the prosecutor's reasons for challenging" the prospective jurors, the challenge was not "solely" based on race and thus did not contravene *Batson*. *Id.* at 740. To the extent *White* departed from this Court's precedent, it is an anomaly that pales in comparison to the overwhelming weight of this Court's *Batson* jurisprudence. Our precedent makes clear that the test is and has been whether race is a significant factor, as we restated in *Waring* and *Hobbs*. Therefore, defendant has failed to show a new state right that is retroactively applicable to him. There has been no new standard announced to conjure up a new right for defendant, and neither the trial court nor the MAR court followed an incorrect standard of requiring that race be the sole reason for the strike.

For the reasons stated herein, defendant has failed to establish good cause, as he has failed to establish the recognition of a new federal or state right which is retroactively applicable, and he has failed to show that he has "newly discovered" evidence that could not have been discovered through the exercise of reasonable diligence in time to present the claim previously. N.C.G.S. § 15A-1419(c).

2. Prejudice

Even if defendant had established good cause, he must also demonstrate actual prejudice to overcome the procedural bar. N.C.G.S. § 15A-1419(b). "[A]ctual prejudice may only be shown if the defendant establishes by a preponderance of the evidence that an error during the trial or sentencing worked to the defendant's actual and substantial disadvantage, raising a reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error." N.C.G.S. § 15A-1419(d). Defendant has failed to carry his burden.

At the outset, we reiterate that there is no error, as we hold that defendant failed to show that either the CLE handout or the MSU study qualify as newly discovered evidence sufficient to overcome a procedural bar, so there cannot be actual prejudice. However, even so, we conclude that defendant cannot show "that a different result would have occurred" with the CLE handout or the MSU study.

Regarding the CLE handout, defendant references the transcripts of jury selection alongside the handout to argue that "[t]he prosecutors' use of the cheat sheet in [defendant]'s trial demonstrates that the State violated *Batson*. Use of this document is evidence of pretext and thus evidence of purposeful discrimination." Here, as we have previously noted, we are concerned with the trial court's determination at step one of the *Batson* inquiry. Defendant's argument, however, goes to steps two and three of a *Batson* inquiry—the prosecutor's reasons justifying the peremptory strikes and whether they show pretext and purposeful discrimination. There is no reasonable probability that the trial court would have reached a different step one determination had defendant possessed the CLE handout at trial.

In addition, defendant cannot show that a different result would have occurred with a comparative analysis across different cases like the MSU study. The Supreme Court of the United States has recognized that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial." *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008). Such is the case here. As stated above, the study is flawed in many respects and lacks relevance to defendant's case such that any attempted comparative use is improper.

While historical evidence of purposeful discrimination in jury selection within a jurisdiction may be relevant, that is not the nature of the evidence proffered by defendant here. Generally, to show discrimination, a defendant may present any of the following:

> • statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
>
> • evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
>
> • side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
>
> • a prosecutor's misrepresentations of the record when defending the strikes during the Batson hearing;
>
> • relevant history of the State's peremptory strikes in past cases; or

> • other relevant circumstances that bear upon the issue of racial discrimination.

Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019) (first citing *Foster v. Chatman*, 136 S. Ct. 1737 (2016); then citing *Snyder*, 552 U.S. 472; then citing *Miller-El II*, 545 U.S. 231; and then citing *Batson*, 476 U.S. 79).

In *Flowers*, the Supreme Court of the United States looked to a history of discriminatory strikes by the prosecutor in Flowers' multiple prior trials. *Id.* at 2245. This involved an analysis of the same prosecutor and same defendant; not an analysis of different cases and different prosecutors as we have here.

There may be instances where discrimination in peremptory strikes in other cases are potentially relevant. *See Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 345 (2003); *Flowers*, 139 S. Ct. at 2243. In *Miller-El I*, the Supreme Court of the United States considered statistics of disparate questioning along racial lines of potential jurors. 537 U.S. at 345. However, in that case, the comparison was based on another case with the "precise line of disparate questioning" by one of "the same prosecutors who tried" the case before the Court, where the Texas Court of Criminal Appeals had found a *Batson* violation. *Id.* The U.S. Supreme Court also considered "historical evidence of racial discrimination by the District Attorney's Office." *Id.* at 346. This evidence included a history where assistant district attorneys "received formal training in excluding minorities from juries." *Id.* at 347.

The present case is readily distinguishable. Here, discrimination was not found by a court in the other cases used in the MSU study, and in many cases *Batson* objections were never raised by the respective defendants. Again, this study seeks to circumvent the authority of the courts to evaluate *Batson* claims and potentially have superior court judges overrule prior determinations by their colleagues. This is plainly impermissible. *See State v. Woolridge*, 357 N.C. 544, 549 (2003) (explaining that "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action" (cleaned up)). Moreover, the superior court does not have the authority to overrule or disregard decisions of this Court or the Court of Appeals.

Further, there has been no indication in the record that the prosecutors in this case or in the State or county were "trained" to exclude minorities or in any way were operating under a policy which sought to

exclude minorities. Defendant's argument amounts to a contention that the MSU study conclusively establishes a prima facie case of purposeful discrimination any time the State uses a peremptory challenge against any prospective black juror. This argument is plainly contrary to law, and there is no reasonable probability that the trial court would have reached a different step one determination if defendant possessed the MSU study at trial.

3. Fundamental Miscarriage of Justice

"A defendant raising a claim of newly discovered evidence of factual innocence or ineligibility for the death penalty . . . may only show a fundamental miscarriage of justice by proving by clear and convincing evidence that, in light of the new evidence, if credible, no reasonable juror would have found the defendant guilty beyond a reasonable doubt or eligible for the death penalty." N.C.G.S. § 15A-1419(e). Under this exception to the procedural bar, a fundamental miscarriage of justice occurs if a defendant shows new, credible evidence demonstrates that he or she would not have been found guilty or eligible for the death penalty. The plain language of the statute requires an assertion of factual innocence by defendant,[24] or an allegation that defendant is ineligible for the death penalty. Defendant here alleges neither.

Thus, the procedural bar of section 15A-1419 applies and defendant has not satisfied an exception to the same. Accordingly, the MAR court properly concluded that defendant's *Batson* claim was procedurally barred.

4. State v. Burke

Defendant also urges this Court to hold that our decision in *State v. Burke*, 374 N.C. 617 (2020), forecloses application of the procedural

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24. Under federal law, the miscarriage of justice exception to a federal procedural bar is interpreted as an "actual innocence" exception. *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) (addressing a federal law procedural bar of federal habeas review and describing the miscarriage of justice exception as an "actual innocence" exception). In discussing the path to successfully allege that a fundamental miscarriage of justice exception applies, the Supreme Court of the United States has opined that where a constitutional violation is alleged, it must reflect on the defendant's innocence of the crime or show an insufficient basis for a death sentence in order to overcome a procedural bar. *Schlup v. Delo*, 513 U.S. 298, 316 (1995) ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.").

bar in the present case. The MAR court held that *Burke* does not prevent a procedural bar in this case because *Burke* applied specifically to RJA MARs, and "all of [d]efendant's RJA MARs are still pending and are beyond the scope of this Order."

In *Burke*, we addressed the defendant's MARs pursuant to the North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1215 (codified at N.C.G.S. § 15A-2012(b) (repealed 2012)). 374 N.C. at 619. Reversing the trial court, we held that "[t]he alleged procedural bars are negated by the language of the RJA" and that "the trial court abused its discretion by summarily denying the claims." *Id.* at 619 (first citing North Carolina Racial Justice Act § 1, 2009 N.C. Sess. Laws at 1215; and then citing *State v. McHone*, 348 N.C. 254, 258 (1998)). Pursuant to the RJA, this Court looked at the evidence presented by the defendant "that race was a significant factor in jury selection, sentencing, and capital charging decisions in the relevant jurisdictions at the time of [the defendant's] trial and sentencing" and determined that "[i]n light of the evidence and arguments presented by defendant, the trial court's denial of his claims without a hearing was an abuse of discretion." *Id.* at 619–20.

To find the entitlement to an evidentiary hearing, this Court looked specifically to the statutory provisions of the Racial Justice Act. *Id.* at 619. The defendant's MARs there were styled as an RJA MAR and an amendment to the RJA MAR, and this Court considered both under the RJA. *Id.* Thus, our holding in *Burke* was plainly limited to the RJA context.

Here, defendant has filed numerous post-conviction motions. The MAR court's order at issue here was expressly limited to the 2017 MAR, the 2019 MAR, and the 2020 MAR based on alleged newly discovered evidence. Defendant's RJA MARs, however, were assigned to another superior court judge. The 2010 RJA MAR and its supplemental filings remain pending in the Superior Court division and were not addressed by the court below. Thus, this Court's review is limited to the MARs addressed by the MAR court. The MAR court correctly concluded that the MARs at issue here are not RJA MARs like those in *Burke*, and the present case is not controlled by this Court's decision in *Burke*. As such, defendant's argument that *Burke* allows him to overcome the procedural bar under section 15A-1419 is without merit.

Further, the RJA specifically addressed the relief available to defendants sentenced to death.

> If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial

> division, or the State at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant *resentenced to life imprisonment without the possibility of parole.*

North Carolina Racial Justice Act § 1, 2009 N.C. Sess. Laws at 1214 (emphasis added).

Resentencing is not the remedy defendant requests here. Instead, defendant seeks to have his conviction vacated and a new trial ordered—the appropriate remedy for a violation of *Batson*. Thus, it is plainly apparent that the claim advanced by defendant and addressed by the MAR court below was not an RJA claim.

IV. Conclusion

Because defendant was in a position to adequately raise his *Batson* claim in his prior appeal and previous post-conviction proceeding and failed to do so, defendant's MAR is procedurally barred under section 15A-1419. Defendant has failed to establish that he qualifies for a statutory exception to the mandatory procedural bar, and his argument that *Burke* is applicable to the present case is unavailing. The order of the MAR court is affirmed.

AFFIRMED.

Justice RIGGS did not participate in the consideration or decision of this case.

Justice EARLS dissenting.

In 1996, Mr. Tucker, who is African American, was tried capitally, convicted of first-degree murder, and sentenced to death by an all-white jury. While the case before us turns on the applicability of N.C.G.S. § 15A-1419(a)(1) and (3)'s procedural bar, this Court's holding ultimately determines whether a trial court may reach the merits of Mr. Tucker's *Batson v. Kentucky* claim and review the serious allegations Mr. Tucker makes regarding the jury selection procedures in his case. *See* 476 U.S. 79 (1986). Namely that prosecutors Lang and Spence relied on a *Batson* "cheat sheet" to provide pretextual race-neutral reasons for the peremptory strikes that removed all qualified African American venire

members from Mr. Tucker's jury. Because I believe that Mr. Tucker's motion for appropriate relief (MAR) is not barred pursuant to N.C.G.S. § 15A-1419(a)(1) and (3) and thus, should go forward, I dissent.

The MAR at issue was filed on 31 October 2017 and amended twice, once in 2019 and again in 2020. To make his *Batson* claim, Mr. Tucker relied on two new pieces of evidence: (1) a handout included in Mr. Tucker's prosecutorial file titled "Batson Justifications: Articulating Juror Negatives" (Batson Justifications Handout); and (2) a statistical study conducted by Michigan State University College of Law (MSU Study), which analyzed juror strike patterns in North Carolina from 1990 to 2010. Neither piece of evidence was available to Mr. Tucker during his direct appeal or a previous MAR filing. In the 2019 amendment to his MAR, Mr. Tucker also raised the change to our State's *Batson* standard as a reason for his newly filed *Batson* claim. This new standard was adopted in *State v. Waring*, which was decided in 2010. 364 N.C. 443 (2010). Accordingly, this development in our *Batson* caselaw was not available to Mr. Tucker at the time of his direct appeal or a prior MAR filing.

While it is true that N.C.G.S. § 15A-1419(a)(1) and (3) bar a claim that could have been raised on direct appeal or during an earlier MAR but was not, this statute only applies to claims where the defendant was in a "position to adequately raise" the claim in those previous filings. Because Mr. Tucker did not have access to the Batson Justifications Handout or the MSU Study and because the change to North Carolina's *Batson* standard had not occurred at the time of his direct appeal or prior MAR filing, he was not in a "position to adequately raise" his *Batson* claim on direct appeal or in an earlier MAR. Thus, I do not believe his *Batson* claim is subject to section 15A-1419(a)(1) and (3)'s procedural bar.

I. *Batson v. Kentucky* and Race-Based Discrimination in Jury Selection

Both the North Carolina and United States Constitutions prohibit the use of race-based peremptory strikes. *Batson*, 476 U.S. 79; *State v. Locklear*, 349 N.C. 118, 136 (1998). While *Batson* is the seminal case regarding the use of racially-discriminatory peremptory challenges, prior to that decision, the United States Supreme Court had been attempting to eradicate race-based discrimination in jury selection for over a hundred years. In 1879, the United States Supreme Court invalidated statutes that excluded African Americans from serving as jurors because those statutes violated the Equal Protection Clause. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). Despite this effort, racial discrimination in jury selection continued through the use of laws that appeared

racially neutral on their face but as applied, barred African Americans from serving on juries. For example, North Carolina instituted "laws requiring that jurors: (1) had paid taxes the preceding year; (2) were of good moral character; and (3) possessed sufficient intelligence." *State v. Robinson*, 375 N.C. 173, 177 (2020) (citing *State v. Peoples*, 131 N.C. 784, 788 (1902)).

Moreover, while *Batson* articulated a standard by which to determine race-based jury selection, it did not put an end to this type of discrimination, and following *Batson*, some prosecutors were trained on ways to circumvent *Batson*'s requirements. For example, in Pennsylvania, these methods were taught via a recorded training session by a Philadelphia assistant district attorney, *see* Brief for Digenova et al. as Amicus Curiae Supporting Petitioner at 6, *Foster v. Chatman*, 136 S. Ct. 1737 (2016) (No. 14-8349), while in Dallas, Texas, these tactics were taught through the use of a training manual. *See Miller-El v. Cockrell*, 537 U.S. 322, 334 (2003) (discussing a training manual, which evidenced a "formal policy to exclude minorities from jury service"). Ultimately, these training tools, like the Batson Justifications Handout at issue in Mr. Tucker's case were used by prosecutors to "deceive judges" as to the prosecution's "true motivations" for striking a juror. Brief for Digenova et al. as Amicus Curiae Supporting Petitioner at 8, *Foster*, 136 S. Ct. 1737 (No. 14-8349).

In *Batson*, the United States Supreme Court laid out a three-step process for evaluating whether a prosecutor's use of peremptory challenges violated the Equal Protection Clause. 476 U.S. at 96–98.

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 500 U.S. 352, 358–59 (1991) (citing *Batson*, 476 U.S. at 96–98). *Batson*'s first step is satisfied if the defendant submits "evidence sufficient to permit the trial judge to draw an inference that discrimination occurred." *State v. Hobbs*, 374 N.C. 345, 350 (2020) (quoting *Johnson v. California*, 545 U.S. 162, 170 (2005)). The prima facie showing at step one "is not intended to be a high hurdle," *id.* (quoting *Waring*, 364 N.C. at 478), and so long "as a defendant provides evidence from which the court can infer a discriminatory purpose" a defendant will have met the prima facie standard, *id.* Importantly, and as this Court

stated in *Hobbs*, at this step "the burden on the defendant . . . is one of production, not of persuasion," and "the defendant is not required to persuade the court conclusively that discrimination has occurred." *Id.* at 351.

To make this showing, "a defendant may rely on all relevant circumstances," *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (cleaned up), including historical evidence of discrimination in a jurisdiction. *See*, *e.g.*, *Miller-El*, 537 U.S. at 346; *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). In addition, our caselaw has identified a non-exhaustive list of factors that must also be considered at step 1, those are:

> the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

Hobbs, 374 N.C. at 350 (quoting *State v. Quick*, 341 N.C. 141, 145 (1995)).

If the required prima facie showing is met, then "the analysis proceeds to the second step where the State is required to provide race-neutral reasons for its use of a peremptory challenge." *Id.* at 352 (citing *Flowers*, 139 S. Ct. at 2243). If the reasons provided are race-neutral on their face, then the Court proceeds to *Batson*'s third and final step. *Id.* at 353. At this step, the defendant is required to show purposeful discrimination. *Waring*, 364 N.C. at 475. Here, the trial court "must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Flowers*, 139 S. Ct. at 2244. This inquiry requires the court to determine whether the State's peremptory strikes were "motivated in substantial part by discriminatory intent." *Id.* (quoting *Foster*, 136 S. Ct. at 1754).

II. Batson Justifications Handout and the MSU Study

A. Mr. Tucker's Trial

Mr. Tucker was tried for capital murder in Forsyth County in 1996. Robert Lang and David Spence, both of whom were Forsyth County Assistant District Attorneys, prosecuted his case. Jury selection began

on 6 February 1996. In 1995, a few months prior to the beginning of jury selection, prosecutor Lang attended a training session for capital prosecutors known as "Top Gun II." Those in attendance were provided with a handout titled "Batson Justifications: Articulating Juror Negatives," which provided prosecutors with a list of reasons to use when defending peremptory strikes of African American jurors pursuant to a *Batson* challenge. The following list of reasons were included in the handout:

1. Inappropriate Dress - attire may show lack of respect for the system, immaturity, or rebelliousness

2. Physical Appearance - tattoos, hair style, disheveled appearance may mean resistance to authority.

3. Age - Young people may lack the experience to avoid being misled or confused by the defense.

4. Attitude - air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.

5. Body Language - arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.

6. Rehabilitated Jurors, or those who vacillated in answering D.A.'s questions.

7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.

8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.

9. Unrevealed Criminal History re: voir dire on "previous criminal justice experience."

10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

This handout was placed in the prosecution's trial notebook behind a tab titled "jury selection." The bottom of the handout also contains a handwritten note stating "Don't use gender/race reasons in NC may be expanded to othe[r] cognizable Equ. Prot. Clause protected class."

Lang conducted voir dire in Mr. Tucker's case and used peremptory strikes to remove all five qualified African American venire members. Defense counsel objected to all five strikes under *Batson*. After hearing Lang's justifications for each strike, the trial court found there was no purposeful discrimination. However, a comparison of the justifications Lang provided, and the Batson Justifications Handout, suggests that Lang read from the handout when defending his use of peremptory strikes. For example, Lang used the word "inappropriately" on more than one occasion. He also described one prospective juror as "confused" and stated the juror exhibited "monosyllabic" responses. Lang also referred to that same juror as being "very difficult" and having "absolutely horrible [body language]." Lang defended his strikes against one venire member by stating they "did not ever make eye contact with me" and another by stating he "was untruthful about his criminal record." Based on this information, even the State concedes that "the prosecutors in [Mr. Tucker's] case articulated some justifications similar to the 'Top Gun' training document as part of their rationale for particular juror strikes."

Accordingly, in his most recent MAR, Mr. Tucker argued that the reasons Lang gave for striking prospective jurors were pretextual, for if they had not been, Lang would not have needed to resort to those reasons listed in the handout. *See Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) (stating that when the prosecution's proffer is pretextual, it "gives rise to an inference of discriminatory intent").

B. Discovery of the Batson Justifications Handout

After Mr. Tucker's initial trial and prior to the beginning of his post-conviction proceedings, North Carolina passed a law requiring post-conviction discovery in capital cases to include "the complete files of law enforcement and prosecutorial agencies involved in the investigation of the crimes or the prosecution of the defendant." N.C.G.S. § 15A-1415(f) (1997). However, Mr. Tucker's post-conviction counsel stated they never received the Batson Justifications Handout that was part of the prosecution's file. To support this assertion, Mr. Tucker has provided signed affidavits to this effect. Accordingly, no *Batson* claim was raised on direct appeal, in Mr. Tucker's initial MAR, or in any subsequent amendments to that MAR.

On 2 September 2010, Mr. Tucker filed a MAR pursuant to the North Carolina Racial Justice Act (RJA). *See* North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214. While no further litigation has taken place in state court on Mr. Tucker's RJA claim, litigation did proceed on another Forsyth County defendant's case, Errol Duke

Moses. The discovery granted in Mr. Moses's case included the prosecution's files in many Forsyth County cases, including Mr. Tucker's. On 14 December 2015, Mr. Tucker's current counsel was appointed. Shortly thereafter, counsel for Mr. Moses provided Mr. Tucker's attorneys with portions of Mr. Tucker's prosecution files, which were obtained as part of the discovery process in Mr. Moses's case. This was the first time that Mr. Tucker's attorneys were provided with the prosecution's Batson Justifications Handout. Because this evidence was not discovered until 2015, it was not available to Mr. Tucker during his direct appeal or prior MAR filing.

C. Completion of the MSU Study

The results of the MSU Study demonstrated a pattern of discriminatory peremptory strikes in Forsyth County. Namely, the data showed that African American venire members were struck at a rate 2.25 times higher than other venire members. The MSU Study also reviewed four of prosecutor Spence's Forsyth County cases, and based on those findings, Mr. Tucker alleges that in the aggregate, Spence had struck 62% of African American prospective jurors but only 20% of white prospective jurors. This constituted a strike ratio of 3 to 1, which was significantly higher than the average for Forsyth County or North Carolina state capital cases. The data also showed that only one of Spence's trials had more than one African American juror, and two of his cases, including Mr. Tucker's had all-white juries.

This study did not begin until 2009, and data collection was not completed until 2010. Furthermore, the research article detailing the study's findings was not published until 2012. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012) (hereinafter "Race in Jury Selection"). Accordingly, Mr. Tucker did not have access to this evidence at the time of his direct appeal or at the time he filed a prior MAR.

III. MAR Court's Order

In June 2020, Judge R. Stuart Albright denied Mr. Tucker's *Batson* claim, stating that the Batson Justifications Handout and the MSU Study could not be used to support a *Batson* claim because they were not evidence of racial discrimination. Moreover, Judge Albright concluded that Mr. Tucker's claim was procedurally barred pursuant to N.C.G.S. § 15A-1419 because Mr. Tucker had been in a "position to adequately raise" his *Batson* claim on direct appeal or in a prior MAR but did not. *See* N.C.G.S. § 15A-1419(a)(1), (3) (2021).

A. Mootness of *Batson*'s Prima Facie Case Requirement

In its order denying Mr. Tucker's MAR, the MAR court determined that the prima facie case requirement pursuant to *Batson* had not been met and thus the court's analysis was limited to *Batson*'s first step. This was legal error.

In *Hernandez v. New York*, the United States Supreme Court relied on principles used in the employment discrimination context and explained that "where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." 500 U.S. at 359 (cleaned up). In doing so, the Court unambiguously noted that this "same principle applies under *Batson*." *Id.* Thus, once a prosecutor has provided the trial court with a race-neutral explanation "for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Id.*

Our Court has affirmed this principle on numerous occasions, beginning in 1991 with *State v. Thomas*, 329 N.C. 423 (1991). *See also Waring*, 364 N.C. at 478; *State v. Bell*, 359 N.C. 1, 12 (2004); *State v. Williams*, 355 N.C. 501, 550–51 (2002); *Hobbs*, 374 N.C. at 354; *State v. Robinson*, 330 N.C. 1, 17 (1991). And there is good reason for this. "Imagine, for example, that when ordered to provide . . . race-neutral reasons for [their] peremptory challenges, [a] prosecutor . . . [states] . . . that [they] struck one of the jurors because of [their] race." *State v. Campbell*, 384 N.C. 126, 141 (2023) (Earls, J., dissenting). It would be absurd, "in light of this blatant racial discrimination," to say that a trial court is not obligated to review this statement for purposeful discrimination pursuant to *Batson*'s third step simply because the defendant failed to make a prima facie showing of racial discrimination. *Id.* Thus, when a prosecutor provides what they purport to be race-neutral reasons for the use of a peremptory challenge, a trial court must be required to consider whether those statements establish purposeful discrimination.

While the majority attempts to distinguish two of the cases which reaffirm this long-standing principle, there are two problems with this approach. First, in matters pertaining to the United States Constitution, our Court may not grant North Carolinians fewer protections than the federal Constitution provides. *Arizona v. Evans*, 514 U.S. 1, 8 (1995). By determining that a prima facie showing is not moot, despite the prosecution having offered race-neutral reasons for the use of peremptory strikes and the trial court having ruled on the use of those strikes, this

Court has effectively removed a portion of a criminal defendant's protections arising under the federal Equal Protection Clause. *See Hernandez*, 500 U.S. at 358–59. Moreover, a closer look at both *Robinson* and *Hobbs* exposes the inadequacies of the majority's argument. Namely, that Mr. Tucker's case is more similar to *Robinson* and *Hobbs* than it is different.

In *Robinson*, the defendant objected to peremptory challenges used to remove a black juror, and each time the State voluntarily provided a reason for each of its challenges. 330 N.C. at 16. On appeal, our Court determined that because the State had voluntarily provided explanations for each peremptory challenge, there was no need for this Court to determine whether the prima facie standard had been met. *Id.* at 17. Instead, we "proceed[ed] . . . as if the prima facie case had been established." *Id.* In Mr. Tucker's case, the MAR court's order reflects the voluntary nature of the prosecution's proffered reasons for each peremptory strike. At no time was the prosecution ordered to provide reasons for its peremptory strikes, instead the court "g[ave] counsel for the State the *opportunity* to be heard." (Emphasis added.)

Furthermore, in *Hobbs*, our Court noted that "[w]here the State has provided reasons for its peremptory challenges, thus moving to *Batson*'s second step, and the trial court has ruled [on these reasons], completing *Batson*'s third step, the question of whether a defendant has initially established a prima facie case of discrimination becomes moot." 374 N.C. at 354. Thus, while the majority attempts to distinguish *Hobbs* from Mr. Tucker's case based on the presence of a "full hearing," *Hobbs* does not stand for the proposition that mootness only occurs when a full hearing is present. Instead, *Hobbs* stands for exactly what it says: in cases where the State has provided reasons for the use of its peremptory strikes and the trial court has ruled on these reasons, the reviewing court should proceed as if a prima facie case has already been established. *Id.* Accordingly, because the prosecution in Mr. Tucker's case provided reasons for the use of their peremptory challenges and the trial court ruled on these reasons, this Court should proceed as if a prima facie case has been established. *See Robinson*, 330 N.C. at 17.

The majority's discussion of a 2020 report by the North Carolina Task Force for Racial Equity in Criminal Justice is irrelevant when considered in light of our precedent in *Robinson* and *Hobbs*. *See Robinson*, 330 N.C. at 17; *Hobbs*, 374 N.C. at 354. Moreover, this case does not turn on whether *Batson*'s first step is moot. The question of mootness only speaks to whether a reviewing court can proceed to step three of *Batson* and determine whether purposeful discrimination is present. *See Hernandez*, 500 U.S. at 358–59 (citing *Batson*, 476 U.S. at 96–98); *see*

also Hobbs, 374 N.C. at 354. Importantly, the question of mootness does not render evidence of racial discrimination irrelevant or cause it to disappear. Instead, if a prima facie case is not moot, the reviewing court is required to determine whether *Batson*'s first step has been met, and if so, it must remand to the trial court for further consideration.

As noted above, *Batson*'s prima facie case requirement mandates that a defendant provide "relevant circumstances [that] raise an inference that the prosecutor used" their peremptory challenges to exclude jurors on "account of their race." *Batson*, 476 U.S. at 96. A prima facie showing is not a high bar, *Hobbs*, 374 N.C. at 350, and as will be discussed in more detail below, the Batson Justifications Handout, along with the MSU Study, "raise an inference" that the prosecution's peremptory challenges were based on race, *see Batson*, 476 U.S. at 96. This is especially true when these new pieces of evidence are reviewed alongside the prosecution's strike pattern in Mr. Tucker's case, which resulted in all five qualified African American venire members being removed from the jury. *See Flowers*, 139 S. Ct. at 2243 (stating that "statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case" can be used to support a claim of racial discrimination).

B. Batson Justifications Handout and the MSU Study as Evidence of Racial Discrimination

1. The Batson Justifications Handout

The MAR court equated the Batson Justifications Handout to "accurate and correct" statements of law. This finding came even though the handout does not contain any reference to case names or case citations. However, the MAR court's benign characterization of the Batson Justifications Handout ignores the controlling legal standard under *Batson*, America's history of race-based discrimination in jury selection, and the focus of Mr. Tucker's *Batson* claim.

Mr. Tucker does not argue that the reasons provided for striking black jurors in his case could not have been permissible in other cases. Instead, he only argues they were not permissible in his case. Under *Batson*, what matters is whether the reasons given by the prosecutor are the true reasons for the strike. *See Hernandez*, 500 U.S. at 365 ("In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed."). This is determined by the facts and circumstances of each particular case and not by whether our Court or the United States Supreme Court has determined those reasons were not

pretextual in other cases. *Id.* Indeed, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror," *Batson*, 476 U.S. at 106 (Marshall, J., concurring), and it is this premise that Mr. Tucker's *Batson* claim addresses.

Namely, Mr. Tucker claims that the Batson Justifications Handout was used as a sort of "cheat sheet"[1] to simulate race-neutral reasons for striking African American jurors, when in fact those reasons were pretextual. Thus, the Batson Justifications Handout is an important piece of substantive evidence supporting Mr. Tucker's *Batson* claim. *See Miller-El*, 545 U.S. at 266 (finding a *Batson* violation where the prosecutor's training materials advocated for racially-based strikes).

Additionally, America has a long history of excluding African Americans from jury service. *See Pena-Rodrigez v. Colorado*, 137 S. Ct. 855, 867 (2017) ("In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial."). The Batson Justifications Handout cannot be divorced from its historical context, and characteristics like those included in the handout have previously been used to exclude African Americans from juries. In recognition of this issue, Washington State has instituted General Rule 37, which pertains to jury selection, and states that "allegations that [a] prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers" have "historically been associated with improper discrimination in jury selection." Wash. Gen. R. 37(i). Thus, "[i]f any party intends to offer one of these reasons or a similar reason as justification for a peremptory challenge," the court must be given "reasonable notice" such that the juror's behavior can be verified. *Id.* If the juror's purported behavior is not verified, then the reason given for the peremptory challenge will be invalidated. *Id.* Indeed, as the United States Supreme Court explained, while defendants are harmed when the right to a jury trial is compromised by racial discrimination, "racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish 'state-sponsored group stereotypes rooted in, and reflexive of, historical prejudice.' " *Miller-El*, 545 U.S. at 237–38 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994)).

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1. *See State v. Augustine*, 375 N.C. 376, 382 (2020) (quoting the trial court's order describing the prosecution's use of a "cheat sheet" to respond to *Batson* objections).

Moreover, in *Strauder v. West Virginia*, 100 U.S. 303 (1879), the United States Supreme Court overturned a state statute that restricted jury service to whites. Yet, during the Jim Crow era, local officials circumvented the intended effect of this holding by imposing vague requirements for jury service, such as intelligence, experience, and good moral character. *See Norris v. Alabama*, 294 U.S. 587 (1935). As applied, these requirements precluded African Americans from serving on juries. In *Norris*, the Court invalidated one of those laws after a jury commissioner testified that no African Americans had ever served on a jury in that county because:

> [he did] not know of any [African American person] in Morgan County . . . who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn't afflicted with a permanent disease or physical weakness which would render him unfit to discharge the duties of a juror, and who can read English, and who has never been convicted of a crime involving moral turpitude.

Id. at 598–99. The Court found it "impossible to accept such a sweeping characterization" and reversed the conviction at issue. *Id.* at 599. Today, the exclusion of African Americans from juries may be less overt, but there remains the "practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad of legitimate influences." *Miller-El*, 545 U.S. at 238. Mr. Tucker's case exemplifies the difficulty of making this determination.

A prosecutor's "outright prevarication" is not the only relevant consideration in jury discrimination cases and sometimes "[a] prosecutor's own conscious or unconscious racism" may play a role in the prosecution's proffered reasons for striking a juror. *Batson*, 476 U.S. at 106 (Marshall, J., concurring). As relevant here, racism whether conscious or unconscious can lead a prosecutor "easily to the conclusion that a prospective black juror is 'sullen' or 'distant,' a characterization that would not have come to mind if a white juror had acted identically." *Id.* This concern is undoubtedly elevated in cases where a prosecutor is accused of relying on a preprinted list of acceptable strike reasons rather than providing the trial court with the true reason for their peremptory strike. The contents of the Batson Justifications Handout illustrate this notion.

Accordingly, United States Supreme Court precedent, as well as our Court's own precedent, allow a defendant to "rely on all relevant

circumstances" to support their claims for racial discrimination. *Flowers*, 139 S. Ct. at 2245 (cleaned up); *see also Hobbs*, 374 N.C. at 356 ("A defendant may rely on all relevant circumstances to support a claim of racial discrimination in jury selection." (cleaned up)). However, the benign classification the MAR court assigned the Batson Justifications Handout ignores this mandate. Specifically, it shows that the MAR court failed to consider all the relevant circumstances Mr. Tucker raised to support his claim of racial discrimination, namely the history of African American jury exclusion and its relationship to the creation of the Batson Justifications Handout contained in the prosecution's trial notebook. Thus, the MAR court's finding that the Batson Justifications Handout was not evidence of racial discrimination was erroneous. Indeed, an analysis of prosecutor Lang's proffered reasons for striking three prospective jurors at Mr. Tucker's trial, Thomas Smalls, Wayne Mills, and Debra Banner, supports that he relied on the Batson Justifications Handout when providing the trial court with reasons for his strikes.

a. Thomas Smalls

Mr. Smalls was one of the black venire members prosecutor Lang struck during jury selection. At the time of Mr. Tucker's trial, Mr. Smalls was sixty years old, employed, married, and had been living in Forsyth County for forty years. He also had an adult son that was a police detective in South Carolina. When asked about his views on the death penalty, Mr. Smalls stated that he "believe[d] in capital punishment."

Lang's reasons for striking Mr. Smalls mirrored the Batson Justifications Handout. Lang stated, "Your Honor, with regard to Mr. Smalls, juror number three, we felt we had appropriate justification. Number one, his body language and number two, his responses which were inappropriate." Lang's responses appear to have been taken verbatim from the handout. Lang also noted that Mr. Smalls "did not ever make eye contact with [him]," which is a justification stated in the handout under the heading "attitude."

At one point, Lang also described Mr. Smalls's body language as "absolutely horrible" but failed to explain his rationale for this finding. Lang also characterized Mr. Smalls as "very difficult." This language is similar to that in the handout, which suggested that jurors the prosecution wanted to strike should be characterized as "resistan[t] to authority," having an "air of defiance," or being "non-responsive" and "evasive." Furthermore, while Lang stated that Mr. Smalls had "nodded off" during jury selection, the record does not show the trial court made any determinations regarding Mr. Small's demeanor. *See Snyder*, 522 U.S. at 479 ("Deference is especially appropriate where a trial judge has

made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however the record does not show that the trial judge actually made a determination regarding [the juror's] demeanor." Accordingly, "we cannot presume that the trial judge credited the prosecutor's assertion").[2] Thus, rather than Mr. Smalls having "nodded off," it is more likely that Lang's choice of words evince Lang's reliance on the Batson Justifications Handout by echoing the handout's language of "obvious boredom [which] may show anti-prosecution tendencies." This supports that race may have been significant in Lang's decision to challenge Mr. Smalls.[3]

Indeed, Lang's explanations become more "difficult to credit" when Mr. Smalls is compared to white jurors who the prosecution passed despite possessing the same qualities that supposedly made Mr. Smalls an "unattractive juror." *See Foster*, 136 S. Ct. at 1750; *see also Miller-El*, 545 U.S. at 241 ("More powerful than . . . bare statistics . . . are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."). This is particularly evident in the area of death penalty reservations, which Lang cited as a reason for striking Mr. Smalls. Although it is true that when asked if he could impose the death penalty Mr. Smalls stated, "I guess so," "I don't know," and "I think so," Mr. Smalls also expressed unequivocal support for the death penalty, noting he "believe[d] in capital punishment." Despite this, Lang struck Mr. Smalls while passing white prospective jurors Alan Cubbedge, Robin Dillinger, and Louise Hester, all whose death penalty reservations were stronger and more apparent than Mr. Smalls's.

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2. While the majority suggests that *Snyder*, 522 U.S. at 479, stands for the proposition that we are required to defer to the trial court even in cases where that court does not make any findings regarding a juror's demeanor, this assertion is unreasoned. For it is impossible to give deference to a finding that was never made.

3. Although the trial court repeated prosecutor Lang's assertion, noting that "the district attorney observed that [Mr. Smalls] nodded off to sleep," the trial court did not state that it witnessed Mr. Smalls nod off to sleep, nor did it make a finding of fact to this effect, or state that it agreed with the prosecutor's assessment. Thus, "we cannot presume that the trial judge credited the prosecutor's assertion" regarding Mr. Small's demeanor. *See Snyder*, 552 U.S. at 479. Moreover, even if we were to assume for the sake of argument, that Mr. Smalls did nod off, this does not change the evidence in this case, which suggests Lang relied on the Batson Justifications Handout, a racially discriminatory cheat sheet, when providing reasons for his peremptory strike of Mr. Smalls. Under *Batson*, a constitutional violation occurs when race "was significant in determining who was challenged and who was not." *Miller-El*, 545 U.S. at 252. There is no requirement that race be the sole reason for a peremptory strike. *Id.* Accordingly, based on the record before us, including the evidence supporting Lang's use of the Batson Justifications Handout, it is not a "remarkable feat" to conclude that race may have been "significant" in Lang's decision to challenge Mr. Smalls. *See id.*

For example, when asked if he could "be part of a jury of twelve . . . that . . . makes a recommendation of death," Mr. Cubbedge stated he "supposed" so. But when asked if he could be the foreperson who signed the jury sheet and wrote the word "death" on the recommendation sheet, Mr. Cubbedge noted he did not think he "would feel very comfortable with that." Furthermore, when white prospective juror Robin Dillinger was asked about her feelings regarding the death penalty she expressed that she was "not sure if [she was] for it or against it." Similarly, Lang passed white juror Louise Hester, who stated that while she believed in capital punishment, she did not "know if [she] could make that decision for somebody to face that or not." Thus, when Lang's reasons for striking Mr. Smalls are compared to the Batson Justifications Handout and when Mr. Smalls's purported traits are compared to those of white jurors the State passed, it is evident that race may have played a substantial role in Lang's peremptory challenge of Mr. Smalls.

b. Wayne Mills

The prosecutors in Mr. Tucker's case also struck black prospective juror Wayne Mills, who at the time of Mr. Tucker's trial had lived in Forsyth County his entire life. Mr. Mills also disclosed that he was married, had a young daughter, and had held the same job for the preceding seventeen and a half years. The reasons Lang gave for striking Mr. Mills also appear to have been read from the Batson Justifications Handout. Lang expressed that Mr. Mills had used "monosyllabic" responses, had been "smiling inappropriately on a number of occasions," and had "appeared somewhat confused during the questioning."

Not only was the term "monosyllabic" taken directly from the Batson Justifications Handout, it also does not accurately reflect Mr. Mills's behavior. While Mr. Mills gave one-word answers when appropriate, in other circumstances he responded with longer answers. For example, when asked if it was "correct" that his name was Wayne Mills, Mr. Mills responded with "Yes." Yet when asked if he had prior knowledge of Mr. Tucker's case from reading or hearing about the case in the media, Mr. Mills noted, "I very seldom read the newspaper. I'm usually pretty busy at work."

In reference to Lang's assertion that Mr. Mills was smiling inappropriately, the word "inappropriate" appears to have been taken verbatim from the Batson Justifications Handout. What is more, because the trial court's findings are devoid of any suggestion that Mr. Mills engaged in "inappropriate" smiling, we cannot presume the trial court agreed with Lang's assertion. *See Snyder*, 552 U.S. at 479 (providing that deference

is only appropriate where the trial court has made a determination concerning a juror's demeanor). Additionally, the only evidence in the record suggesting that Mr. Mills may have been confused is that he asked the trial court to repeat a lengthy question about capital sentencing instructions. However, asking that one question be repeated is not evidence of confusion, particularly when after having repeated the question, Mr. Mills answered it without issue.

As with prospective juror Smalls, when a side-by-side comparison is conducted of Mr. Mills and white jurors Lang passed, Lang's reasons for striking Mr. Mills appear pretextual. First, the record shows that many white venire members, such as Michael Calcutt, Raymond Marshall, Kelly Richardson, and Lester Hutchins, also responded to Lang's questions with "monosyllabic" or "yes, no" answers. Second, at least two white prospective jurors expressed "confusion" on the record. Namely, after hearing information related to the capital sentencing scheme, prospective juror Don Caldwell asked if he could ask a clarifying question. Moreover, prospective juror Kelly Richardson admitted to being confused regarding her views on the death penalty and expressly stated, "I'm just real confused about that issue."

Lang also noted Mr. Mills not being registered to vote as a reason for striking him. However, several white prospective jurors, such as Lester Hutchins, Raymond Marshall, Winfrey Poindexter, David Porterfield, and Wilma Walker, all of whom were not registered to vote at the time Mr. Tucker's jury selection took place, were passed by the State. Additionally, Lang purported to have struck Mr. Mills, in part, because he "hesitated on death penalty questions." But this assertion is not supported by the record. Namely because the only exchange which could evidence "hesitation" involved Mr. Mills: (1) stating that he believed in the death penalty; (2) asking for Lang to repeat the following question: "Do you think or have you ever had a personal belief or religious belief in opposition to the death penalty"; and (3) once the question was repeated, unequivocally answering "no." Additionally, as noted above, the prosecution passed many white venire members who expressed uncertainty regarding the death penalty.

Lastly, while Lang stated he also struck Mr. Mills based on his being untruthful about his prior criminal record, Lang passed Wesely Hine, a white prospective juror who had also been untruthful about his criminal record. Despite significant questioning from the prosecution, including being asked whether he had "been to court for any reason," Mr. Hine did not disclose his prior criminal charge. Accordingly, when Lang's proffered reasons are compared with the Batson Justifications Handout, it

becomes apparent that he may have relied on it and provided the trial court with pretextual reasons for striking Mr. Mills. Moreover, side-by-side juror comparisons also support that Lang's reason for striking Mr. Mills may have been based on race.

c. Debra Banner

Lang's reasons for striking Ms. Banner also support that his use of peremptory challenges was based on race. At the time of Mr. Tucker's trial, Ms. Banner had lived in Forsyth County all her life, was married, and had children there. She had also been employed at the local hospital for the preceding nine years. Despite this, Lang described Ms. Banner as lacking a stake in the community and cited this as a reason for striking her.

Moreover, despite having passed many white jurors who were not registered to vote, Lang purported that he struck Ms. Banner for this same reason. Lang also expressed he struck Ms. Banner because she was a health care professional, and "[i]t ha[d] been [his] experience that those who save lives are often hesitant to make a recommendation for death." However, the State passed another medical professional, Brenton Sharpe, who was a pharmacist working exclusively with cancer patients. Mr. Sharpe expressed having direct contact with these patients, and agreed it was his job to "save [his patient's] lives or to make what life they had left as comfortable as possible." In contrast, Ms. Banner was a nursing assistant whose tasks involved feeding patients, turning them, and checking their vital signs. Most of her patients were elderly or had suffered a stroke. Based on Ms. Banner's and Mr. Sharpe's job duties, it stands to reason that if Lang was truly concerned that Ms. Banner's medical work would have made it more difficult for her to recommend a death sentence, he would have also challenged Mr. Sharpe, whose own characterization of his work as saving lives likely provided an even stronger reason to strike. What is more, Lang did not ask Ms. Banner if her work would preclude her from voting for a death sentence. *See Snyder*, 552 U.S. at 481–83 (noting that a prosecutor's justification for striking a juror was "suspicious" where the "prosecution did not choose to question [the juror] more deeply about this matter"). Yet, Lang asked Mr. Sharpe, "Do you think that since you're in that field of medical assistance that it would make it difficult for you to be on a jury that may end up facing the death penalty . . . as punishment?" *See Flowers*, 139 S. Ct. at 2248 (stating that a prosecutor's "dramatically disparate" questioning of black and white prospective jurors can "supply a clue" for racially discriminatory intent).

Moreover, Ms. Banner's support for the death penalty was stronger than Mr. Sharpe's, and she expressed no doubts or hesitation during

Lang's questioning on the topic. In contrast, when asked whether he had any deep moral, religious, or philosophical opposition to the death penalty, Mr. Sharpe noted he felt his "conscience would be at issue." Lang also claimed that he struck Ms. Banner because she indicated her work schedule posed a hardship to serving on the jury. Yet, at the same time, Lang passed white jurors who also expressed hardship. First, Mr. Cubbedge noted that he ran a jewelry store and was concerned about losing business due to his absence from work. This was especially true given his absence from work had already cost the store "a good bit of business," and he worried that if he were chosen to serve, the store would "lose a good bit of money." He also agreed that his work situation would cause him to "give less than [his] full attention" to Mr. Tucker's trial. Wesley Hine also explicitly stated he did not want to serve on Mr. Tucker's jury, while juror Brooke Burr expressed that her work and childcare situation posed such a hardship that she would only serve if forced to do so. Ms. Burr noted "if I'm forced to stay, I would say I could be fair but it's really a hardship."

Regarding Ms. Banner's expression of hardship, Lang stated he was concerned that due to working second shift at the hospital, Ms. Banner would not be "awake or aware" and that she would be "worried about work." However, Lang did not appear to share this concern for Mr. Sharpe who admitted to getting poor sleep due to having a baby at home. Similarly, Lang did not seem concerned that Mr. Cubbedge had expressed he would be distracted by work if he was asked to serve.

In *Snyder*, the United States Supreme Court found that the prosecution's purported reliance on a prospective black juror's expression of hardship was pretextual. *Snyder*, 552 U.S. at 482. In doing so, the Court noted that while an expression of hardship might cause a juror to favor a "quick resolution," it did not necessarily dictate how a juror would vote. *Id.* In fact, the desire for a quick resolution could cause a juror to favor the "outcome that other jurors agreed with, which might in many cases, be a favorable outcome for the prosecution." *Id.*

Lastly, while Lang asserted that Ms. Banner fell asleep during voir dire, the trial court made no finding that this occurred. *See id.* at 479. While the record may support that Ms. Banner had been "sleepy," the Batson Justifications Handout that Lang relied on throughout jury selection directs prosecutors to reference a juror's "obvious boredom" as a race-neutral reason for striking them. Thus, taking this information together with Lang's other justifications for striking Ms. Banner shows that race was likely a substantial factor in Ms. Banner's strike.

2. The MSU Study as racial discrimination

The MSU Study compiled data from capital trials in North Carolina to analyze whether race played a role in prosecutorial strikes. *Race in Jury Selection* at 1542–47. Based on this study, Mr. Tucker alleges that, in Forsyth County, where his trial took place, Forsyth County prosecutors struck African American venire members 2.25 times more than other prospective jurors. Moreover, the study reviewed four Forsyth County capital trials involving the same prosecutor involved in Mr. Tucker's case, David Spence. According to Mr. Tucker's MAR, that data showed that prosecutor Spence's use of strikes constituted a strike ratio of 3 to 1.

The United States Supreme Court and our Court have stated that trial courts must consider historical evidence of discrimination. Specifically, in *Flowers*, the Court stated that "relevant history of the State's peremptory strikes in past cases" and any "other relevant circumstances that bear upon the issue of discrimination" can, *inter alia*, be used to prove racial discrimination pursuant to *Batson*. 139 S. Ct. at 2243. Our Court reiterated this principle in *Hobbs*, stating that "a court must consider historical evidence of discrimination in a jurisdiction." 374 N.C. at 351.

Despite having the benefit of *Batson* and its progeny before it, the MAR court rejected the MSU Study, determining it could not be evidence of racial discrimination because our courts had not found a *Batson* violation in the cases the study reviewed. The court also criticized the study as "unreliable, fatally flawed and meritless" for the same reason. However, in making its determination, the MAR court placed an impermissibly high burden on Mr. Tucker. Essentially, rather than interpret the study as "relevant history of the State's peremptory strikes" or as evidence of "relevant circumstances that can bear upon the issue of discrimination," the trial court determined it was invalid simply because its findings contradicted our Court's holdings. The majority makes the same mistake.

But whether a defendant can meet the legal requirements of *Batson* is a separate and distinct question from whether a jurisdiction or a particular prosecutor has a history of disparately using peremptory strikes to remove people of color from the jury. And that evidence of strike patterns from other trials is relevant under *Batson* and *Hobbs*, regardless of whether those defendants could meet *Batson*'s legal requirements. *Flowers*, 139 S. Ct. at. 2243 (explaining that "relevant history of the State's peremptory strikes in past cases" can be used to show racial discrimination); *Hobbs*, 374 N.C. at 351("[A] court must consider historical evidence of discrimination in a jurisdiction."). Moreover, under this logic it would be impossible for any defendant to rely on any study detailing the disparate use of peremptory challenges against people of

color in North Carolina. Namely, because since *Batson* was decided, our courts have only once found a substantive *Batson* violation. *See State v. Clegg*, 380 N.C. 127, 162 (2022). This stands in stark contrast to every state appellate court located in the Fourth Circuit. Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1957, 1961 (2016). Accordingly, it was legal error for the MAR court to disregard the MSU Study and determine it was not evidence of racial discrimination.

IV. Procedural Bar Pursuant to N.C.G.S. § 15A-1419(a)(1) and (3)

Without citing any caselaw, the majority asserts that because (1) "the trial court identified the *Batson* issue as a possible issue on appeal and said so in the presence of the parties," and (2) "[d]efendant was on actual notice that a *Batson* claim could be an appellate issue," this means Mr. Tucker was in adequate position to raise his *Batson* claim on direct appeal or a prior MAR. However, N.C.G.S. § 15A-1419(a)(1) and (3) and our caselaw interpreting that provision do not establish that a defendant who knows that an issue might be relevant on appeal is required to raise it or risk losing that claim forever. Instead, the text of the statute expressly provides that when a defendant "was in a position to adequately raise the ground or issue underlying the present motion [either on direct appeal or in a previous MAR] but did not do so" that MAR is procedurally barred. N.C.G.S. § 15A-1419(a)(1), (3).

Yet our Court has indicated that this is not a general rule, and the correct analysis requires a reviewing court "to determine whether the particular claim could have been brought on direct review [or in a previous MAR]." *State v. Hyman*, 371 N.C. 363, 383 (2018) (quoting *State v. Fair*, 354 N.C. 131, 166 (2001)). This Court has further acknowledged that for a claim to be subject to N.C.G.S. § 15A-1419's procedural default, the record in the case must contain "sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim in question." *Id.* In part, this requires our Court to determine whether the record at trial would have allowed Mr. Tucker to make a viable *Batson* claim. *Id.* at 384.

Thus, the majority's and the MAR court's conclusion that Mr. Tucker's claim is procedurally barred because he was in a "position to adequately raise" the claim on direct appeal or in a prior MAR contradicts the standard articulated in *Hyman*, which provides that a claim is only subject to N.C.G.S. § 15A-1419's procedural default if the record contains "sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim." 371 N.C. at 383.

A. Batson Justifications Handout

Prior to the discovery of the Batson Justifications Handout, the record in Mr. Tucker's case, as it pertained to *Batson*, was sparse and only included the jury selection transcript as well as the trial court's ruling following the defense's objections pursuant to *Batson*. However, now, and through the discovery of the Batson Justifications Handout, a reviewing court can make the "factual and legal determinations necessary to allow a proper resolution" of Mr. Tucker's *Batson* claim.

The MAR court determined that prior to trial or before Mr. Tucker's direct appeal, the defense could have obtained prosecutor Lang's continuing legal education record and learned that he had attended the Top Gun II seminar. And thus, according to the MAR court, Mr. Tucker could have raised his *Batson* claim at an earlier time. Additionally, because the MAR court equated the handout's contents to "accurate and correct statements of law" regarding the *Batson* standard, which had been previously explained by our appellate courts and the United States Supreme Court, it concluded that the contents of this handout were available to Mr. Tucker either on direct appeal or at the time of his previous MAR filing. Namely, the MAR court asserted that to obtain the information contained in the Batson Justifications Handout, Mr. Tucker "by exercise of reasonable diligence, could have conducted legal research," the same way the MAR court had.

However, this reasoning misses the premise of Mr. Tucker's *Batson* claim, which depends not only on Lang attending the Top Gun II training session and receiving the Batson Justifications Handout but also on Lang using this handout to defend his strikes of African American jurors in Mr. Tucker's case. The fact that Lang attended the training does not alone indicate that he relied on the handout while prosecuting Mr. Tucker. However, the handout's presence in the prosecution's trial notebook, along with the transcripts from voir dire, provide Mr. Tucker with a strong argument that the prosecution relied on the handout and provided pretextual reasons for striking jurors in violation of *Batson*. *See Snyder*, 552 U.S. at 485 ("The prosecution's proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent."). Thus, until Mr. Tucker found the handout in the prosecution's file, thereby linking its use to his case, Mr. Tucker was not in a position to adequately raise his *Batson* claim on direct appeal or in a previous MAR.

B. The MSU Study

The MAR court also found that Mr. Tucker could have presented the MSU Study during a prior MAR filing, because "[d]efendant, by the

exercise of reasonable diligence, could have had a substantially similar study to use in his direct appeal or in one of his prior MARs." To reach this conclusion, the MAR court made several assumptions: (1) that the study was completed for Mr. Tucker; (2) that Mr. Tucker had control over when the study was completed; and (3) that Mr. Tucker had the resources to complete this study or a "substantially similar study" prior to his direct appeal or a previous MAR filing. However, none of these assumptions are supported by the record.

First, the MSU Study was not completed for Mr. Tucker. Instead, in their published law review article, the study's authors explained that the study was "undertaken in order to evaluate the potential for statistical evidence to support claims under . . . the RJA." *Race in Jury Selection* at 1533. Thus, while the evidence contained in this study may be helpful to Mr. Tucker and others seeking to bring *Batson* claims, the MSU Study was not created for Mr. Tucker or any other specific capital defendant. Second, Mr. Tucker did not have control over when the MSU Study was completed. The RJA was passed in 2009, *see* North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214, and "prohibited capital punishment if race was a significant factor in the decision to seek or impose the penalty," *Robinson*, 375 N.C. at 176. The authors of the MSU Study clearly stated in the article's introduction that the MSU Study was intended to ascertain whether statistical evidence could support RJA claims, and thus the RJA's passing was at least in part the inspiration for this study. *Race in Jury Selection* at 1533. Thus, it follows that the earliest the MSU Study could have begun was in 2009 when the RJA was passed. *See* North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214.

Additionally, the MSU Study was the result of a joint effort between Michigan State University College of Law and various sources of funding. *Race in Jury Selection* at 1531 n.1. Thus, the willingness of these sources to complete the MSU Study also dictated the MSU Study's timing and completion. Third, because the MSU Study required funding from various sources and Mr. Tucker is incarcerated and indigent it is difficult to understand how Mr. Tucker could have completed this study on his own. Interestingly, absent from the MAR court's order is any discussion on how Mr. Tucker could have raised the money to complete this study on his own, or how Mr. Tucker alone could have completed the statistical analysis necessary for the MSU Study.[4]

4. In their affidavit, the MSU Study's authors, Catherine Grosso and Barbara O'Brien, provided an overview of their methodology, which required obtaining and reviewing strike patterns by race in 173 proceedings.

Ultimately, the MSU Study was not published until July 2012 and thus was not available to Mr. Tucker during his direct appeal or his previous MAR. *See Race in Jury Selection* at 1531. Accordingly, Mr. Tucker was not in an adequate position to raise his *Batson* claim on either direct appeal or in a prior MAR filing. *See* N.C.G.S. § 15A-1419(a)(1), (3).

C. Change in Our Court's Interpretation of *Batson*

Lastly, Mr. Tucker's claim is not procedurally barred because under North Carolina law, as it existed prior to 2010, Mr. Tucker's claim would have been subject to an impossibly high standard that most claimants could not meet. Prior to 2010, our law required a showing that race was the "sole" factor for the use of a peremptory strike. *See, e.g.*, *State v. Davis*, 325 N.C. 607, 617 (1989). The difficulty of meeting this standard is illustrated by the Court of Appeals' opinion in *State v. White*, 131 N.C. App. 734 (1998), in which the prosecutor stated in open court that he was striking two African American jurors, in part, because they were "[b]oth black females." *Id.* at 739. Despite this direct evidence of racial discrimination, the Court of Appeals noted that "[w]hile race was certainly a factor in the prosecutor's reasons for challenging [the two jurors]," it could not find that the peremptory strike was solely based on race. *Id.* at 740.

In 2010, in *Waring*, our Court rejected the sole factor test. 364 N.C. 443. In doing so, it explained that "[a]s stated in *Miller-El*, the third step in a *Batson* analysis is the less stringent question whether the defendant has shown 'race was *significant* in determining who was challenged and who was not.' " *Id.* at 480 (quoting *Miller-El*, 545 U.S. at 252). This standard was later reaffirmed in *Hobbs*, where this Court reiterated the standard from *Miller-El* and noted that it was an incorrect statement of law to suggest "a strike is only impermissible if race is the sole reason." 374 N.C. at 352 n.2. This means that prior to 2010, Mr. Tucker's appellate and post-conviction counsel would have had no choice but to review Mr. Tucker's case under the sole factor test, which would have been difficult, if not impossible, for Mr. Tucker to meet. Thus, until 2010, when this Court provided the correct legal standard under which to bring a *Batson* claim, Mr. Tucker's claim was not viable and he was not in a position to adequately raise his *Batson* claim. *See Hyman*, 371 N.C. at 384; *see also* N.C.G.S. § 15A-1419(a)(1), (3).

V. Conclusion

"[R]acial discrimination in jury selection offends the Equal Protection Clause." *Batson*, 476 U.S. at 85 (citing *Strauder*, 100 U.S. 303). When this type of discrimination is present, "defendants are harmed" because their

right to a jury trial is compromised. *Miller-El*, 545 U.S. at 238. But as the United States Supreme Court stated over thirty-seven years ago in *Batson*, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." 476 U.S. at 87. "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* Moreover, a prosecutor's use of these same racially discriminatory procedures jeopardizes the integrity of our courts. *Miller-El*, 545 U.S. at 238. Thus, it is of paramount importance for both the defendant and our state that our courts reach the merits of a *Batson* claim whenever they have the opportunity to properly do so.

"In reality, the finding of a *Batson* violation does not amount to an absolutely certain determination that a peremptory strike was the product of racial discrimination." *Clegg*, 380 N.C. at 162. Instead, "the *Batson* process represents our best" perhaps "imperfect[ ] attempt at drawing a line in the sand establishing the level of risk of racial discrimination that we deem acceptable or unacceptable. If a prosecutor provides adequate legitimate race-neutral explanations for a peremptory strike, we deem that risk acceptably low. If not, we deem it unacceptably high." *Id.* In Mr. Tucker's case, the risk is unacceptably high.

Mr. Tucker did not have access to the Batson Justifications Handout or the MSU Study at the time of his direct appeal or his prior MAR filing. Moreover, the change in our caselaw, which provided Mr. Tucker with the opportunity to make a "viable" racial discrimination claim pursuant to *Batson*, did not occur until 2010. *See Hyman*, 371 N.C. at 384. Thus, without the discovery of new evidence and the change to our *Batson* standard, first articulated in *Waring*, Mr. Tucker was not in a "position to adequately raise" a *Batson* claim on direct appeal or during a previous MAR filing. Because of this, N.C.G.S. § 15A-1419(c) and (d) are inapplicable, and Mr. Tucker is not required to show good cause or actual prejudice for his claim to proceed.[5] Accordingly, I would hold Mr. Tucker's claim is not procedurally barred and remand to the trial court for consideration of the merits of Mr. Tucker's *Batson* claim.

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5. In reaching the fundamental miscarriage of justice exception to N.C.G.S. § 15A-1419's procedural bar, the majority suggests that if Mr. Tucker were innocent his claims would not be barred. However, a defendant is not required to be innocent to claim *Batson*'s protections. Instead, a defendant whether guilty or innocent, must only show that "race was significant in determining [which jurors were] challenged and [which were] not." *Miller-El*, 545 U.S. at 252; *see also Flowers*, 139 S. Ct. at 2244 ("The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.' ").

STATE OF NORTH CAROLINA
v.
JAHZION WILSON

No. 187A22

Filed 15 December 2023

Homicide—first-degree—felony murder—jury instruction on lesser-included offense—no evidentiary support

In defendant's prosecution for first-degree murder under the felony murder theory (and under no other theory) based on attempted robbery with a dangerous weapon—where the victim was found deceased from a gunshot wound with approximately two hundred dollars of loose cash and a bloodied iPhone on or near his body—the trial court properly denied defendant's request for a jury instruction on second-degree murder as a lesser-included offense, because the evidence of the underlying felony was not in conflict. Defendant's own statements that he planned to sell a cell phone and not rob the victim could not, alone, create a conflict in the evidence; a witness's statement that defendant planned to buy a cell phone, not sell one, did not negate any element of the underlying felony; and the loose cash found near the victim's body did not negate the evidence that defendant attempted to rob the victim with a dangerous weapon.

Justice EARLS dissenting.

Justice RIGGS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2021) from the decision of a divided panel of the Court of Appeals, 283 N.C. App. 419, 873 S.E.2d 41 (2022), finding no error after an appeal from a judgment entered on 13 June 2019 by Judge Forrest D. Bridges in Superior Court, Mecklenburg County. Heard in the Supreme Court on 7 November 2023.

Joshua H. Stein, Attorney General, by Marissa K. Jensen, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by David W. Andrews, Assistant Appellate Defender, for defendant-appellant.

NEWBY, Chief Justice.

In this case we consider whether the trial court properly denied defendant's request for a jury instruction on second-degree murder as a lesser-included offense of first-degree murder under the felony-murder theory. When the State charges a defendant with first-degree murder only under the felony-murder theory, our cases have held that the defendant may be entitled to a jury instruction on second-degree murder as a lesser-included offense. But in such a scenario, the defendant is only entitled to an instruction on second-degree murder if the evidence of the underlying felony is in conflict and the evidence would support second-degree murder. To create a conflict in the evidence supporting the underlying felony, a defendant must identify evidence other than his own statements denying his involvement in the criminal offense. In the present case, we conclude that there is not a conflict in the evidence supporting the underlying felony of attempted robbery with a dangerous weapon. Accordingly, defendant was not entitled to an instruction on second-degree murder. The decision of the Court of Appeals is modified and affirmed.

On 16 January 2018, defendant was indicted for attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and first-degree murder. Regarding the first-degree murder charge, the State proceeded solely on a theory of felony murder based on attempted robbery with a dangerous weapon.

At trial the State's evidence tended to show the following. On 18 June 2017, which was Father's Day, officers from the Charlotte-Mecklenburg Police Department responded to a shooting and potential robbery at the Arbor Glen Apartments in Charlotte, North Carolina. According to officer testimony, the officers found Zachary Finch deceased from a gunshot wound with approximately two hundred dollars of loose cash and a bloodied iPhone on or near his body. Although officers did not locate either the firearm or the discharged bullet, they found a shell casing at the scene of the crime. The forensic pathologist and medical examiner confirmed that Finch was killed by a gunshot wound. At that time, however, the officers did not identify any suspects.

Later that day, officers learned from Finch's parents that Finch had arranged to purchase a cell phone via the "LetGo" app. According to Finch's mother, Finch was supposed to purchase the cell phone from "a dad with his two kids." The officers subsequently obtained records from LetGo, however, and they eventually discovered that Finch had arranged to buy the cell phone from defendant.

Officers interviewed defendant, who was fifteen years old at the time, on 20 July 2017, and the State entered a transcript and recording

of that interview into evidence. Notably, defendant did not testify at his trial, and this interview is the only account of the incident from defendant's perspective.

According to defendant's statements to the interviewing officer, defendant had arranged to sell a cell phone to Finch through LetGo. Defendant recounted that after agreeing with Finch to meet at the Arbor Glen Apartments, he went to meet Finch with his friends, "Tink" and Demonte "Monte" McCain.[1] Defendant explained that because he did not know Finch, and because he had experienced bad transactions in the past, defendant "didn't really trust [the transaction]." As such, defendant told the interviewing officer that he asked Tink to speak with Finch. In exchange, defendant said that he promised to "break[ ] [Tink] off" sixty dollars—that is, to give Tink a portion of the money he received. Defendant stated that when Finch arrived, Finch spoke with Tink about the price of the cell phone and the SIM card. According to defendant, however, after Tink and Finch spoke for several minutes, the "deal went wrong." Defendant recounted that Tink pointed a gun at Finch, who turned to run away because "he was fixin[g] to get robbed by . . . Tink." Defendant stated that Tink shot one time, striking and killing Finch. Defendant then told the interviewing officer that after the incident, he, Tink, and Monte ran to Tink's sister's house.

Throughout the police interview, the interviewing officer asked defendant several times if he knew that Tink went to the transaction armed with a firearm. Defendant initially denied it, but he eventually admitted to the interviewing officer that, prior to the meeting with Finch, he knew Tink was bringing a gun to the meeting. Similarly, the interviewing officer asked defendant if he brought a firearm to the meeting with Finch. Again, defendant initially denied that he brought a firearm, but he eventually admitted to bringing one of Tink's guns with him. Defendant also stated that Monte brought a firearm to the transaction.

Additionally, the interviewing officer asked defendant whether he was going to actually sell Finch the cell phone. Defendant maintained that he planned to sell the cell phone, but he also revealed to the interviewing officer that Tink had proposed robbing Finch. Defendant said that he tried to dissuade Tink, telling him, "[Y]ou ain't got to rob him just sell him the phone." But when the interviewing officer asked if he

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1. The evidence tended to show that Monte was not part of any arrangement with defendant and/or Tink. In fact, defendant expressly stated to the interviewing officer that "[Monte] was never in"—i.e., Monte was never part of the arrangement. Rather, according to defendant's statements, Monte coincidentally was in the area at this time.

knew that Tink was going to rob Finch, defendant replied, "I didn't know for sure if [Tink] was gonna rob him[,] but he had talked about it, yes." Defendant clarified, however, that there was no plan to shoot Finch.

In addition, the State called Ashanti Gatewood, who was defendant's girlfriend in the summer of 2017, to testify. Gatewood testified that defendant called her after the events of 18 June 2017 and told her that "he just shot and robbed somebody." The State also called defendant's friend, Travis Moore, to testify. Two portions of Moore's testimony are pertinent to this appeal. First, Moore testified that defendant planned to buy a cell phone, not sell one. Second, Moore testified that defendant told him "that he killed somebody around . . . Father's Day."

Defendant did not put on any evidence at trial. Prior to the jury charge, however, defendant requested that the trial court instruct the jury on second-degree murder as a lesser-included offense of first-degree murder. The trial court denied defendant's request and instructed the jury on first-degree murder under the felony-murder theory, attempted robbery with a dangerous weapon, and conspiracy with Monte to commit robbery with a dangerous weapon. The trial court further instructed the jury that it could find defendant had committed the criminal acts himself or by acting in concert with another. The jury found defendant guilty of attempted robbery with a dangerous weapon and first-degree murder based upon the felony-murder rule.[2]

On appeal, defendant argued, among other things, that the trial court erred by failing to instruct the jury on second-degree murder as a lesser-included offense of first-degree murder. *State v. Wilson*, 283 N.C. App. 419, 421, 873 S.E.2d 41, 44 (2022). The Court of Appeals' majority found no error in defendant's trial. It relied on this Court's statement in *State v. Gwynn* that "when the [S]tate proceeds on a first-degree murder theory of felony murder only, the trial court must instruct on all lesser-included offenses if the evidence of the underlying felony supporting felony murder is in conflict and the evidence would support a lesser-included offense of first-degree murder." 362 N.C. 334, 336, 661 S.E.2d 706, 707 (2008) (internal punctuation omitted) (quoting *State v. Millsaps*, 356 N.C. 556, 565, 572 S.E.2d 767, 773 (2002)), *construed in Wilson*, 283 N.C. App. at 435–38, 873 S.E.2d at 51–53. Focusing on the second part of the test, the Court of Appeals' majority concluded that defendant was not entitled to a second-degree murder instruction because "there [was] no evidence in the record from which a rational juror could find

2. The jury acquitted defendant of conspiracy with Monte to commit robbery with a dangerous weapon.

[d]efendant guilty of second-degree murder and not guilty of felony murder." *Wilson*, 283 N.C. App. at 436, 873 S.E.2d at 52 (determining that whether the evidence supporting the underlying felony was in conflict was "irrelevant").

The dissent, in contrast, relied on this Court's statement in *Gwynn* that "the trial court should not instruct on lesser-included offenses if the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder." 362 N.C. at 336, 661 S.E.2d at 707 (internal punctuation omitted) (quoting *Millsaps*, 356 N.C. at 565, 572 S.E.2d at 774), *construed in Wilson*, 283 N.C. App. at 440–44, 873 S.E.2d at 55–57 (Stroud, C.J., concurring in part and dissenting in part). The dissent reasoned that if *any* evidence supported the contention that defendant did not attempt to rob Finch, then defendant was entitled to an instruction on second-degree murder as a lesser-included offense. *Wilson*, 283 N.C. App. at 442, 873 S.E.2d at 56. According to the dissent, defendant's statements that he intended to sell the phone and not rob Finch amounted to "conflicting evidence" that "present[ed] a question of credibility and weight of the evidence [that] must be resolved by a jury."[3] *Id.* at 443, 873 S.E.2d at 56. The dissent also reasoned that the error was prejudicial notwithstanding defendant's conviction of attempted robbery with a dangerous weapon because, in essence, the jury's only options were to convict or acquit defendant outright. *Id.* at 444–45, 873 S.E.2d at 57. Defendant appealed to this Court based on the dissent at the Court of Appeals.[4]

The issue here is whether the Court of Appeals erred in holding that defendant was not entitled to an instruction on second-degree murder. We review decisions of the Court of Appeals for errors of law. *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). When determining

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3. The dissent at the Court of Appeals emphasized that defendant was acquitted of a conspiracy to commit robbery with a dangerous weapon, stating "it appear[ed] the jury believed at least some of defendant's account of events or was not fully convinced by the State's evidence regarding a plan to commit robbery." *Id.* at 443–44, 873 S.E.2d at 57. The dissent at this Court also adopts this reasoning. We note, however, that the conspiracy charge alleged a conspiracy between defendant and Monte, who does not appear to have been a part of the arrangements between defendant and Tink. Therefore, defendant's acquittal of the conspiracy charge with Monte does not inform whether defendant and Tink planned to rob Finch.

4. *See* N.C.G.S. § 7A-30(2) (2021), *repealed by* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-134.pdf. The repeal of N.C.G.S. § 7A-30(2) only applies to cases filed with the Court of Appeals on or after 3 October 2023. *See* Current Operations Appropriations Act § 16.21(e).

whether the evidence is sufficient for the submission of a lesser-included offense, we view the evidence in the light most favorable to the defendant. *State v. Barlowe*, 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994).

"[A] defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts." *State v. Palmer*, 293 N.C. 633, 643–44, 239 S.E.2d 406, 413 (1977). When determining whether a defendant is entitled to an instruction on a lesser-included offense, the first determination is "whether the lesser offense is, as a matter of law, an included offense of the crime for which [the] defendant is indicted." *State v. Thomas*, 325 N.C. 583, 590, 386 S.E.2d 555, 559 (1989). Then the court must determine whether the evidence supports a conviction of the lesser-included offense. *Id.* at 591, 386 S.E.2d at 559. Specifically, when the State charges first-degree murder but proceeds only under the felony-murder theory, the trial court must instruct on all lesser-included offenses if (1) the evidence supporting the underlying felony is "in conflict," and (2) the evidence would support a lesser-included offense of first-degree murder. *Gwynn*, 362 N.C. at 336, 661 S.E.2d at 707 (quoting *Millsaps*, 356 N.C. at 565, 572 S.E.2d at 773).

For evidence to be "in conflict," there must be evidence that tends to negate the State's positive evidence as to the elements of the crime. *Thomas*, 325 N.C. at 594, 386 S.E.2d at 561. "Such conflicts may arise from evidence introduced by the State, or the defendant. They may [also] arise when only the State has introduced evidence." *Id.* (citations omitted). In order to identify a conflict in the evidence, however, the defendant must rely on more than his own statements denying his involvement in the crime. *See, e.g.*, *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled on other grounds by* 317 N.C. 193, 344 S.E.2d 775 (1986); *State v. Thomas*, 350 N.C. 315, 347, 514 S.E.2d 486, 506 (1999). Indeed,

> [t]he determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree . . . and there is *no evidence to negate these elements other than defendant's denial that he committed the offense*, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Millsaps, 356 N.C. at 560, 572 S.E.2d at 771 (emphasis added) (quoting *Strickland*, 307 N.C. at 293, 298 S.E.2d at 658). Because "the underlying

felony constitutes an element of first-degree murder" when the State proceeds under the felony-murder theory, *id.* at 560, 572 S.E.2d at 770, the same standard applies when considering if there is a conflict in the evidence of the underlying felony.[5]

If there is a conflict in the evidence supporting the underlying felony, the evidence must then also support a lesser-included offense of first-degree murder. *Gwynn*, 362 N.C. at 336, 661 S.E.2d at 707. To warrant a lesser-included offense instruction, the evidence must "permit the jury *rationally* to find defendant guilty of the lesser offense and to acquit him of the greater." *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771 (emphasis added). When the State charges first-degree murder but proceeds only under the felony-murder theory, the "defendant is entitled to a second-degree murder instruction only if evidence also tend[s] to show that the murder was not committed in the course of the commission of a felony." *State v. Wilson*, 354 N.C. 493, 506, 556 S.E.2d 272, 281 (2001), *overruled on other grounds*, 356 N.C. at 567, 572 S.E.2d at 775.

If there is a conflict in the evidence and the evidence supports an instruction on a lesser-included offense, the trial court must give an instruction on the lesser-included offense. *Gwynn*, 362 N.C. at 336, 661 S.E.2d at 707. With these principles in mind, we turn to the present case.

We start by describing the relevant crimes. As noted, defendant was tried for first-degree murder under the felony-murder theory with attempted robbery with a dangerous weapon as the underlying felony. Defendant insists he was entitled to an instruction on second-degree murder as a lesser-included offense.

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5. Contrary to the dissent's assertion, this rule does not clash with *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382 (1980). There, the United States Supreme Court observed how the defendant's statements contradicted the State's evidence. *Id.* at 629–30, 100 S. Ct. at 2385–86. It then made this observation: "As the State has conceded, absent the statutory prohibition on such instructions, this testimony would have entitled petitioner to a lesser included offense instruction on felony murder *as a matter of state law*." *Id.* at 630, 100 S. Ct. at 2386 (emphasis added); *see also id.* at 630 n.5, 100 S. Ct. at 2386 n.5. Read in context, the Court's statement was not a declaration of a universal rule applicable to all states. Rather, it was simply a summary of Alabama's law and how it applied to the facts of that case. As the Court itself observed, "the [s]tates vary in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included offense instruction," *id.* at 636 n.12, 100 S. Ct. at 2389 n.12, and it did not purport to hold that a defendant is always entitled to a lesser-included offense instruction when his statements contradict the State's evidence. Therefore, nothing in *Beck* casts doubt on this Court's rule that a defendant must identify more than his own statements denying his involvement in a crime to create a conflict in the evidence.

"The crime is first-degree murder," and felony-murder is a theory that the State may use to pursue a conviction. *Millsaps*, 356 N.C. at 560, 572 S.E.2d at 770. Felony murder is a murder "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, *robbery*, kidnapping, burglary, or *other felony committed or attempted with the use of a deadly weapon*." N.C.G.S. § 14-17(a) (2021) (emphasis added). *See generally State v. Juarez*, 369 N.C. 351, 354, 794 S.E.2d 293, 297 (2016) (observing that the felony-murder theory is "the legislature's deliberate policy choice to hold individuals accountable for deaths occurring during the commission of felonies, regardless of whether the murder was intentional or unintentional" (internal quotation marks omitted) (quoting *State v. Bell*, 338 N.C. 363, 386, 450 S.E.2d 710, 723 (1994))).

In this case, attempted robbery with a dangerous weapon is the felony underlying felony murder. Under our laws, if an individual intends to commit a crime and performs an overt act beyond mere preparation for that purpose but falls short of completing the criminal offense, he is guilty of attempting the crime. *State v. Melton*, 371 N.C. 750, 756, 821 S.E.2d 424, 428 (2018). Specifically, "[a]n attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about th[at] result." *State v. Allison*, 319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987); *cf.* N.C.G.S. § 14-87(a) (2021) (criminalizing robbery with a firearm or other dangerous weapon).

Second-degree murder is "the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Thibodeaux*, 352 N.C. 570, 582, 532 S.E.2d 797, 806 (2000) (quoting *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997)); *see also* N.C.G.S. § 14-17(b) (2021). Malice may be established in several ways: (1) express hatred, ill-will, or spite; (2) commission of an inherently dangerous act in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief; or (3) a condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. *State v. Coble*, 351 N.C. 448, 450–51, 527 S.E.2d 45, 47 (2000). Malice may also be established by the use of a deadly weapon to inflict a wound that proximately results in death. *Id.* at 451, 527 S.E.2d at 47.

For each of these offenses, "[h]e who actually perpetrates the crime . . . by his own hand" is guilty of the crime. *State v. Small*, 301 N.C. 407, 412, 272 S.E.2d 128, 132 (1980), *superseded in part by statute*, An Act to Abolish the Distinction Between Accessories Before the Fact

and Principals and to Make Accessories Before the Fact Punishable as Principal Felons, ch. 686, § 1, 1981 N.C. Sess. Laws 984, 984 (codified as amended at N.C.G.S. § 14-5.2). But furthermore, a person may be guilty if he "acts in concert" with the crime's principal perpetrator. *Id.* Indeed,

> [i]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose or as a natural and probable consequence thereof.

State v. Barnes, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (internal punctuation omitted) (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)). In other words, a person who works together with another to bring about a criminal objective may be convicted of the same crime as the one who actually perpetrates the criminal act.

Although sharply divided, this Court ruled that, as a matter of law, second-degree murder is a lesser-included offense of first-degree murder, even when the State proceeds under the felony-murder theory. *Thomas*, 325 N.C. at 592–93, 386 S.E.2d at 560. This Court did so despite second-degree murder having essential elements that are not essential elements of first-degree murder when pursued under the felony-murder theory. *See id.* at 600–05, 386 S.E.2d at 564–68 (Mitchell, J., dissenting) (reasoning that, under a definitional test, second-degree murder is not a lesser-included offense of first-degree murder when pursued under the felony-murder theory because it has two different essential elements: (1) malice and (2) an intentional act that proximately causes the victim's death). Nevertheless, because the dissent below did not draw this holding into question and the State did not seek discretionary review, we turn our attention to the issue at hand: whether, under *Gwynn*, the evidence supported a second-degree murder instruction in this case. *See* N.C. R. App. P. 16(b) ("When the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues that are . . . specifically set out in the dissenting opinion as the basis for that dissent . . . .").

Under the framework set out in *Gwynn*, we must first determine if the evidence of the underlying felony of attempted robbery with a dangerous weapon is "in conflict." *Gwynn*, 362 N.C. at 336, 661 S.E.2d at 707. At the outset, we note that the State presented positive evidence as to each element of attempted robbery with a dangerous weapon. First,

the evidence showed that defendant and Tink discussed the idea of robbing Finch before meeting him. Defendant and Tink also agreed to split the money between them. Thereafter, defendant armed himself with one of Tink's weapons, and both he and Tink went armed with firearms to meet Finch. Defendant's statements indicated that Tink pointed his gun at Finch at the meeting in order to rob him. Furthermore, Gatewood's testimony that defendant admitted to "sho[oting] and robb[ing] somebody" and Moore's testimony that defendant admitted to "kill[ing] somebody" suggest that defendant was personally involved in the attempted robbery with a dangerous weapon. Defendant, however, proffers three arguments as to why the evidence is in conflict. Each is unavailing.

First, defendant insists that Travis Moore's statement that defendant planned to buy a cell phone, not sell one, creates a conflict in the evidence. Defendant, however, does not explain how this discrepancy creates a conflict in the evidence supporting attempted robbery with a dangerous weapon. At most, it creates a conflict as to what object of Finch's personal property may have been the target of the attempted robbery: his money or his cell phone. Even viewing this discrepancy in the light most favorable to defendant, we hold that it does not negate any element of attempted robbery with a dangerous weapon, and therefore it does not create a conflict in the evidence.

Second, defendant argues that the loose cash found on or near Finch's body creates a conflict in the evidence. According to defendant, this fact suggests that defendant did not have the specific intent to rob Finch. This argument, however, ignores the fact that attempted robbery with a dangerous weapon is an inchoate crime, meaning the attempted crime is not completed. *Inchoate*, *Black's Law Dictionary* (11th ed. 2019) (defining "inchoate" as "[p]artially completed or imperfectly formed; just begun"). Defendant therefore did not need to complete the robbery to be guilty of attempted robbery with a dangerous weapon. Thus, the presence of the cash on or near the victim's body does not negate evidence that defendant attempted to rob Finch with a dangerous weapon, and therefore it does not create a conflict in the evidence.

Third, defendant's principal argument is that his statements that he planned to sell his cell phone rather than rob Finch create a conflict in the evidence supporting the underlying felony of attempted robbery with a dangerous weapon. This Court's precedents foreclose defendant's argument. *E.g.*, *Millsaps*, 356 N.C. at 560, 572 S.E.2d at 771; *Thomas*, 350 N.C. at 347, 514 S.E.2d at 506 ("[T]he only evidence offered by defendant to negate first-degree murder was his own testimony denying his involvement in the crime, *which alone does not tend to negate premeditation*

and deliberation." (emphasis added)).[6] Defendant's statements that he planned to sell the cell phone and not rob Finch are, in essence, the same as a denial that he was involved in Tink's scheme to rob Finch. Therefore, his statements alone do not create a conflict in the evidence supporting attempted robbery with a dangerous weapon.

Defendant, however, invites this Court to distinguish *Thomas*, arguing that case involved a "blanket denial of guilt" whereas "[his] statements were far more than mere denials." According to defendant, "his statements negated a specific element of the State's theory of acting in concert." We do not agree. In *Thomas*, the defendant was charged with first-degree murder based on premeditation and deliberation and the felony-murder theory. 350 N.C. at 325, 514 S.E.2d at 493. The defendant, who testified at trial and admitted to being at the victim's home on the night of the murder, gave a detailed account of the night's events. *Id.* at 327, 514 S.E.2d at 494. According to his testimony, the defendant drove another individual "to a 'white dude's house' to settle a drug debt." *Id.* The defendant stated, however, "that when he left the house . . . , [the other individual] stayed behind, and [the victim] was still alive." *Id.* Clearly, the defendant's statements in *Thomas* were far more than "blanket denials of guilt." Thus, the holding in *Thomas* is applicable to the present case.

Because there was not a conflict in the evidence, we need not proceed to the next step of the *Gwynn* analysis to consider whether the evidence would support a lesser-included offense of first-degree murder. Defendant was not entitled to an instruction on second-degree murder as a lesser-included offense. Therefore, the trial court did not err in refusing to give the jury an instruction on second-degree murder. The decision of the Court of Appeals is modified and affirmed.

MODIFIED AND AFFIRMED.

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6. Although there are cases from this Court where we found that a defendant's statements generated a conflict in the evidence, *see*, *e.g.*, *Thomas*, 325 N.C. at 595–98, 386 S.E.2d at 562–63; *State v. Camacho*, 337 N.C. 224, 231–33, 446 S.E.2d 8, 12–13 (1994), those cases were abrogated by our subsequent holdings in *Thomas*, 350 N.C. at 347, 514 S.E.2d at 506 (1999), and *Millsaps*, 356 N.C. at 560, 572 S.E.2d at 771 (2002).

Justice EARLS dissenting.

Under deep-seated principles and long-standing precedent, a defendant is "entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts." *State v. Palmer*, 293 N.C. 633, 643–44 (1977). We have minted special rules when the State prosecutes a defendant for first-degree felony murder. In those cases, a trial judge must instruct the jury on a lesser-included offense if (1) the evidence of the underlying felony is "in conflict" and (2) the evidence would support a lesser-included offense of first-degree murder. *State v. Gwynn*, 362 N.C. 334, 336 (2008).

The majority here stops after the first step. As it defines it, a conflict exists—and triggers a lesser-included offense instruction—if evidence "tends to negate the State's positive evidence as to the elements of the crime." But not all evidence counts, says the majority. More specifically, a defendant's "own statements denying his involvement in the criminal offense" do not raise a conflict in the evidence. Applying that rule to Mr. Wilson's case, the majority finds no evidentiary conflict that required a lesser-included offense instruction.

I disagree with the majority's artificially truncated rule. In practice, it threatens unfair and impractical results. It also clashes with the principles animating our lesser-included offense jurisprudence. In my view, the evidence was "in conflict" on Mr. Wilson's specific intent to rob Mr. Finch. *See id*. Because of that conflict, I would proceed to *Gwynn*'s second step and find that, since second-degree murder is a lesser-included offense of first-degree murder, the trial court should have instructed jurors on that crime.

I. What did the State need to prove to convict Mr. Wilson of first-degree felony murder?

To convict Mr. Wilson of felony murder—a species of first-degree murder—the State had to prove that Mr. Finch's "killing took place while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies." *State v. Richardson*, 341 N.C. 658, 666 (1995). In this case, the "enumerated" felony was attempted robbery with a dangerous weapon. Attempted robbery is an inchoate crime—a defendant need not complete the offense to have committed it. Even so, the State had to prove that Mr. Wilson specifically intended to "unlawfully deprive" Mr. Finch of his "personal property by endangering or threatening his life with a dangerous weapon." *State v. Allison*, 319 N.C. 92, 96 (1987). Intent established, the State had to also show that Mr. Wilson performed

an "overt act" beyond mere preparation that was "calculated to bring about" the planned crime. *Id.*

The parties focus on Mr. Wilson's specific intent to commit the underlying felony. For as this Court has explained, the intent element is central to felony murder. *See State v. Jones*, 353 N.C. 159, 166–69 (2000). A defendant "must be purposely resolved to commit" the predicate felony "to be held accountable for unlawful killings that occur during the crime's commission." *Id.* at 167; *see also id.* ("[T]he actual intent to kill may be present or absent; however, the actual intent to commit the underlying felony is required."). Culpable negligence is not enough—the State must prove that "the defendant actually intended to commit" the predicate felony. *Id.* at 167–68. And so for Mr. Wilson, the State could not simply show that he acted recklessly or with "heedless indifference to the safety and rights of others." *Id.* at 165 (quoting *State v. Weston*, 273 N.C. 275, 280 (1968)) (defining criminal negligence). To commit attempted robbery, he had to be "purposely resolved" to taking Mr. Finch's personal property using a dangerous weapon. *Id.* at 167. And so if evidence cuts against Mr. Wilson's specific intent to commit armed robbery, it cuts against his guilt of the predicate felony and—by extension—felony murder.

II. When must a court instruct the jury on a lesser-included offense?

Time and again, this Court has recognized a defendant's right "to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts." *Palmer*, 293 N.C. at 643–44; *State v. Thomas*, 325 N.C. 583, 594 (1989) (explaining that a lesser-included offense instruction is required if the evidence "would permit a jury rationally to find defendant guilty of the lesser offense and acquit him of the greater" (cleaned up)).

That rule flows from constitutional guarantees of due process. A judge's charge to the jury, we have explained, is "one of the most critical parts of a criminal trial." *State v. Walston*, 367 N.C. 721, 730 (2014). It provides jurors with a menu of choices, thus shaping whether, why, and for what they return a verdict. And so for "over a century," this Court has required judges to instruct the jury on "an included crime of lesser degree than that charged" if "there is evidence tending to support" it. *State v. Brichikov*, 383 N.C. 543, 553 (2022) (quoting *State v. Hicks*, 241 N.C. 156, 160 (1954)); *see also State v. Jones*, 79 N.C. 630, 631 (1878) ("It was [defendant's] privilege to have the State's evidence applied to any theory justified by it. . . . This right he demanded in his prayer for instructions which ought to have been given.").

In practice, that safeguard "reduce[s] the risk of an unwarranted conviction." *State v. Conaway*, 339 N.C. 487, 514 (1995). And as the Supreme Court has explained, that danger is greatest when "one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense." *Beck v. Alabama*, 447 U.S. 625, 634 (1980) (quoting *Keeble v. United States*, 412 U.S. 205, 212–13 (1973)). A jury left with "only two options"—"convicting the defendant" or "acquitting him outright"—is "likely to resolve its doubts" by convicting the defendant. *Id.* Instructing jurors on a lesser-included offense provides a "third option." *Id.* And by affording "the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal," *id.* at 633, the instruction thus "accord[s] the defendant the full benefit of the reasonable-doubt standard," *id.* at 634.

In light of those due process concerns, our cases do not set a high bar for lesser-included offense instructions. Before charging jurors, a trial court must ask whether "the State's evidence is positive as to each and every element of the crime charged." *Thomas*, 325 N.C. at 594 (cleaned up); *accord State v. Locklear*, 331 N.C. 239, 246 (1992). A judge may decline to instruct the jury on a lesser crime only if "there is *no* contradictory evidence relating to *any* element" of that offense. *Id.* (emphases added) (citing *State v. Peacock*, 313 N.C. 554 (1985)).

But the calculus changes if "there is any evidence or if any inference can be fairly deduced therefrom, tending to prove one of the lower grades of murder." *State v. Spivey*, 151 N.C. 676, 686 (1909); *see also State v. Strickland*, 307 N.C. 274, 293 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 203–04 (1986). If so, the evidence is "in conflict." *Gwynn*, 362 N.C. at 336. And because that conflict raises a "risk of an unwarranted conviction," it requires a lesser-included offense instruction. *Conaway*, 339 N.C. at 514; *see also Beck*, 447 U.S. at 634–36.

This case focuses on when the evidence is "in conflict," and how a defendant may identify that factual discord. Analytically, that matters to Mr. Wilson. When the State charges a defendant with felony murder and there is a "conflict in the evidence regarding whether defendant committed the underlying felony," then the court must instruct jurors on "all lesser degrees of homicide charged in the indictment" and "supported by the evidence." *State v. Camacho*, 337 N.C. 224, 231 (1994).

Despite the majority's narrow formulation of a conflict, our precedent has adopted a more generous approach. A conflict exists "if any other evidence tended to negate" the elements of the charged crime

"when viewed in the light most favorable to defendant." *Brichikov*, 383 N.C. at 554. So too is the evidence in conflict when it "permits more than one inference" as to an essential element. *State v. Leroux*, 326 N.C. 368, 378, *cert. denied*, 498 U.S. 871 (1990); *see also State v. Perry*, 209 N.C. 604, 606 (1936) ("Whenever there is any evidence or when any inference can be fairly deduced therefrom tending to show a lower grade of murder, it is the duty of the trial judge, under appropriate instructions, to submit that view to the jury."); *State v. Gause*, 227 N.C. 26, 30 (1946) (requiring trial court to instruct on second-degree murder when "more than one inference may be drawn from the evidence in respect to lying in wait").

As detailed above, specific intent is an essential ingredient for first-degree murder. For felony murder, the State needed to prove that Mr. Wilson specifically intended—or "purposely resolved"—to commit the underlying felony. *See Jones*, 353 N.C. at 167. So a conflict exists—and a court must instruct on a lesser degree of homicide—if "any evidence" or "any inference. . . fairly deduced" from it cuts against Mr. Wilson's specific intent to commit attempted robbery with a dangerous weapon. *See Perry*, 209 N.C. at 606.

III. Was the evidence in conflict as to Mr. Wilson's specific intent to commit the underlying felony?

According to the majority, Mr. Wilson cannot show a conflict because the State "presented positive evidence as to each element of attempted robbery with a dangerous weapon." To support that claim, the majority surveys the State's evidence.

At trial, the majority recounts, prosecutors used Mr. Wilson's statements as evidence that he and Tink "discussed the idea of robbing [Mr.] Finch before meeting him." The State also showed that Mr. Wilson—wary about meeting with an unknown person—asked Tink to do the talking, promising him $60 from the sale. On the day of the meet-up, Mr. Wilson and Tink "went armed with firearms to meet Finch." At the meeting, Mr. Wilson's statements suggested that Tink "pointed his gun" at Mr. Finch "in order to rob him." In the wake of the killing, the majority notes, Mr. Wilson's girlfriend testified that he admitted to "sho[oting] and robb[ing] somebody." Mr. Wilson's comments to a friend suggested, too, that he "was personally involved in the attempted robbery with a dangerous weapon." So according to the majority, the State "presented positive evidence" for each element of the underlying felony, including specific intent.

But that account omits key information. When officers interviewed him, Mr. Wilson stated at least seven times that he intended to *sell* his phone to Mr. Finch, not rob him. Though Tink floated the idea of a robbery, Mr. Wilson repeatedly shot it down. Regardless of Tink's half-baked designs, Mr. Wilson had no plan to rob Mr. Finch or help Tink do so. From Mr. Wilson's perspective, too, it was not unusual for him or Tink to carry guns. His statement suggests that Tink was always armed but seldom used his weapon. *See State v. Wilson*, 283 N.C. App. 419, 443 (2022) (Stroud, C.J., concurring in part and dissenting in part). At trial, a friend also testified that Mr. Wilson told him that he planned to buy a phone on the LetGo app. And at the crime scene itself, officers found the iPhone and loose cash near Mr. Finch's body. In his pockets, they discovered another $200.

Viewed in the light most favorable to Mr. Wilson, that evidence tends to negate Mr. Wilson's specific intent. It shows that Tink—not Mr. Wilson—was the only person who mentioned a robbery. It shows, too, that Mr. Wilson tried to dissuade Tink from that course, insisting, "[Y]ou ain't got to rob him just sell him the phone." And it shows that neither Mr. Wilson nor Tink took any money or property from Mr. Finch—the alleged purpose of the meet-up—after the deal went south. Taken together, that evidence undercuts Mr. Wilson's specific intent to commit the underlying felony. *Id.* at 167. At worst, Mr. Wilson knew that Tink was armed and had "talked about" robbing Mr. Finch. But he "didn't know for sure" if Tink would do so, and he had no intent to assist Tink or commit the robbery himself. Culpable negligence is not enough for felony murder. *Id.* Even if Mr. Wilson acted recklessly or with "heedless indifference" to Mr. Finch's safety, the evidence—viewed in his favor—does not show that he "purposely resolved" to commit the underlying felony. *See id.* at 165, 167.

IV. What are the problems with the majority's approach?

The majority avoids the conflicting evidence by scrubbing it from consideration. A defendant's statements cannot themselves raise a conflict, the majority holds. But that rule clashes with Supreme Court precedent. In *Beck*, like this case, the defendant implicated himself in a robbery-turned-homicide. *Beck*, 447 U.S. at 629. But the defendant "consistently denied" that "he killed the man or that he intended his death." *Id.* As the defendant told it, "he and an accomplice entered their victim's home in the afternoon." *Id.* at 629–30. And after the defendant "seized the man intending to bind him with a rope, his accomplice unexpectedly struck and killed him." *Id.* at 630.

The defendant's testimony, according to the Court, was enough to require a lesser-included offense instruction. *See id.* at 635–38. When the evidence shows that "the defendant is guilty of a serious, violent offense" but "leaves some doubt with respect to an element that would justify conviction" of a more serious crime, the failure "to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637. The Court reaffirmed the guiding principle of that due-process safeguard: A "defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Id.* at 635 (quoting *Keeble*, 412 U.S. at 208). So the lodestar is not the precise source of the evidence but whether it raises a "doubt with respect to an element that would justify conviction" of a less-serious crime. *Id.* at 637.[1]

This Court, too, has relied on a defendant's statements to find a conflict in the evidence. *See Camacho*, 337 N.C. at 232–33; *see also Thomas*, 325 N.C. at 597 (relying on defendant's statements to police officer as basis for finding a conflict in evidence about whether "defendant

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1. The majority downplays the dissonance of its position with *Beck*, claiming that that decision did not declare "a universal rule applicable to all States," but provided "simply a summary of Alabama's law and how it applied to the facts of that case." In support of that point, it notes *Beck*'s observation that "[A]bsent the statutory prohibition on such instructions, this testimony would have entitled petitioner to a lesser included offense instruction on felony murder *as a matter of state law*." *Beck*, 447 U.S. at 360 (emphasis added).

The majority identifies the very same constitutional flaw with the challenged statute: That it precluded a lesser-included offense instruction when the evidence would warrant one. By doing so, the Court explained, the statute "interject[ed] irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id.* at 642. More specifically, the "unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished." *Id.*

While states may define crimes and the lesser-included offenses that comprise them, the due-process clause requires a lesser-included offense instruction when the evidence would support one. *See id.* at 635–37. Indeed, the Court underscored that point in the footnote the majority only partly cites. Reproduced in full, the opinion says: "Although the States vary in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included offense instruction, *they agree that it must be given when supported by the evidence*." *Id.* at 636 n.12 (emphasis added). In Mr. Wilson's case, then, if evidence would support a second-degree murder conviction, *Beck* requires one. And by artificially narrowing the relevant evidence, the ruling here runs into the same constitutional problems that animated *Beck*: When there is "some doubt with respect to an element that would justify conviction" of a serious crime, denying jurors the "third option" impermissibly "enhance[s] the risk of an unwarranted conviction." *Id.* at 637.

shared a common purpose or plan" to commit the underlying felony).[2] In *Camacho*, for instance, we reversed a conviction because the trial court refused to instruct jurors on second-degree murder. *See Camacho*, 337 N.C. at 232–33. We first asked whether the evidence was in conflict for any element of the first-degree murder charge. *See id.* In that case, the State prosecuted the defendant for homicide by lying in wait—a species of first-degree murder. *Id.* at 231. And at trial, the State's "evidence tend[ed] to show that the defendant hid in the victim's closet and waited for her to return to her room before jumping out of the closet and assaulting her with a hammer, leading to her death." *Id.* at 232.

But the defendant's testimony, on the other hand, "tend[ed] to show he did not lie in wait for his victim." *Id.* He told jurors that "he was in the victim's room only to retrieve some personal belongings when he was overcome with 'head rushes' resulting from his excessive use of alcohol and cocaine." *Id.* When he stooped "to pick up some tools he had dropped," the victim entered the room and attacked "him with a knife." *Id.* During their struggle, the defendant struck the fatal blow with a hammer. *Id.*

Because the evidence pointed both ways, this Court concluded that it was "in conflict as to whether the crime was committed by lying in wait." *Id.* at 231. Although the "State's evidence tend[ed] to show that it was," the "defendant's evidence tend[ed] to show that it was not." *Id.* at 231. Because of that conflict, the "trial judge should have given the jury an instruction based upon any version of the crime supported by the evidence favorable to defendant." *Id.* at 232. In other words, we required that jurors have the option to consider and convict the defendant for "any version of the crime which did not involve lying in wait, and which is supported by other evidence and charged in the indictment." *Id.* (cleaned up). And since the defendant's statements showed "that he did not intend to kill the victim" but "did intend to beat the victim in the

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2. According to the majority, these cases were "abrogated" by our decisions in *Millsaps* and *Thomas*. But neither of those later rulings purported to change or "abrogate" our precedent. In fact, *Millsaps* repeatedly cited the very case that it (per the majority) did away with. *See Millsaps*, 356 N.C. at 560 (citing *State v. Thomas*, 325 N.C. 583, 593 (1989), when explaining "certain well-settled principles applicable to first-degree murder"); *id.* at 561 (citing *Thomas*, 325 N.C. 583); *id.* at 561–62 (citing *Thomas*, 325 N.C. at 594); *id.* at 565 (citing *Thomas*, 325 N.C. 583); *id.* at 569 (citing *Thomas*, 325 N.C. at 593). And at one point, *Millsaps* excerpted full paragraphs from that earlier decision, relying on its formulation of the rules governing lesser-included offense instructions. *See id.* at 561–62. On top of that, this Court's 2016 opinion in *Juarez* cited the "abrogated" decisions as good law. *See State v. Juarez*, 369 N.C. 351, 355–56 (2016). And just last year, this Court quoted one "abrogated" case with approval. *See Brichikov*, 383 N.C. at 557 (citing *Thomas*, 325 N.C. at 599).

head with a hammer," a second-degree murder instruction was required. *Id.* at 232–33.

The majority skips past that precedent, rooting its rule in a distinct species of cases: Those in which a defendant—through statements or testimony—categorically denies any role in the crime, without explanation. The majority, for instance, relies on *State v. Thomas*, 350 N.C. 315 (1999). In that case, the defendant requested a second-degree murder instruction, arguing that the evidence was in conflict about his premeditation. *See id.* at 346. The only basis for that conflict: The defendant's "own testimony denying his involvement in the crime." *Id.* at 347. We held that the defendant's wholesale disavowal of guilt did not, standing alone, "tend to negate premeditation and deliberation." *Id.* In *Millsaps*—also cited by the majority—we declined to find a conflict based on nothing "other than defendant's denial that he committed the offense." *State v. Millsaps*, 356 N.C. 556, 560 (2002) (cleaned up).

But those cases differ critically from this one. When a defendant disclaims any role in a crime, he disavows the conduct that makes up both the greater *and* lesser-included offenses. The defendant, in effect, contends that he engaged in no crime at all. And for that reason, his bare "denial that he committed the offense" does not support a lesser-included offense instruction. *See id.*; *see also Conaway*, 339 N.C. at 515 (declining to require a second-degree murder instruction when defendant pointed to no evidence negating premeditation and deliberation aside from his testimony "that he did not commit the murders").

The analysis changes when a defendant's statements do not categorically disclaim criminal culpability but instead contradict a discrete element of the charged crime—an element that separates a more serious offense from lesser-included ones. That defendant—unlike those in the cases cited by the majority—does not entirely disavow his role in the events that make up the greater and lesser-included offenses. His words bear on *which* crime he committed, not on whether he committed a crime at all. When offered for that distinct purpose, a defendant's statements are not a naked "denial that he committed the offense." *Cf. Millsaps*, 356 N.C. at 560.[3]

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3. Per the majority, *State v. Thomas*, 350 N.C. 315 (1999), forecloses this argument because the defendant's statements in that case "were far more than 'blanket denials of guilt.' " But that conclusion does not follow from the majority's premises. In *Thomas*, the defendant admitted his presence at the victim's home on the night of the murder. *See id.* at 327. But according to the defendant, he left to go "settle a drug debt." *Id.* When he drove away from the house, he testified that the victim "was still alive." *Id.*

That logic applies to Mr. Wilson's case. Unlike the defendants in the majority's cases, Mr. Wilson does not "deny[ ] his involvement in the crime" or disclaim any role in any offense. *Cf. Thomas*, 350 N.C. at 347. Just the opposite. His own words link him to Mr. Finch, the crime scene, and the crime. Mr. Wilson instead offers his statements to show a conflict in the evidence on a discrete point: His specific intent to commit an attempted armed robbery with a dangerous weapon. Put differently, Mr. Wilson's words call into question whether his intent matched the elements of second- versus first-degree felony murder.

In my view, Mr. Wilson's statements are key data points. The State admitted them into evidence, read them to the jury, leaned on them to make its case, and addressed them during closing arguments. And since Mr. Wilson does not categorically disclaim any involvement in the crime but instead disputes his specific intent to commit first-degree felony murder, our precedent does not demand the rule the majority extracts from it.

On a practical level, the majority's approach also overlooks the nature of inchoate crimes. To commit an attempted robbery, Mr. Wilson did not need to go through with it. The crime was complete when the participants "purposely resolved" to rob Mr. Finch using a dangerous weapon, and overtly acted to that end. Specific intent is key. But specific intent is also notoriously difficult to ferret out. For many inchoate crimes, the participants themselves are the only ones with insight into whether, how, and why they pursued a course of conduct. And so the participants' statements and testimony will be the primary—often the only—evidence for and against their guilt.

Just look at the State's evidence here. To convict Mr. Wilson of attempted robbery, prosecutors admitted into evidence his statements to police and leaned on them to meet their burden. *Wilson*, 283 N.C. App. at 442 (Stroud, C.J., concurring in part and dissenting in part). They

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In other words, the defendant flatly denied his participation in the events comprising the murder charge. Though he conceded that he was at the victim's house that night, he insisted that he left before anything happened. *See id*. And because the defendant categorically disavowed his role in and proximity to the murder, his statements did not negate a discrete element of first-degree murder. While the majority flattens *Thomas* into a categorical rule, its own summary of that case distinguishes it from Mr. Wilson's. Unlike the defendant in *Thomas*, Mr. Wilson does not entirely remove himself from the events underlying the murder charge—he instead disputes whether he had the intent needed for first- versus second-degree murder. Thus, unlike the defendant in *Thomas*, Mr. Wilson's words bear on his *degree* of culpability rather than disclaiming any culpability at all.

played his words to the jury, and even referenced them during closing arguments. *Id.* But though the State used Mr. Wilson's statements as evidence of his intent, the majority now bars Mr. Wilson from using those same statements to show a conflict on the same point.

In fact, the majority itself deploys that one-way ratchet. In finding no conflict in the evidence, the majority points to Mr. Wilson's comments. It notes that, as Mr. Wilson told officers, he and Tink "discussed the idea of robbing Finch before meeting him." It observes too that Mr. Wilson and Tink agreed to split the proceeds of the sale. And it cites Mr. Wilson's "statements" as evidence that "Tink pointed his gun at [Mr.] Finch at the meeting in order to rob him." So for the majority, Mr. Wilson's words work one way only—though the majority may use them as evidence of his guilt, Mr. Wilson cannot use them to question it. That "heads-I-win, tails-you-lose" approach flouts basic principles of fairness.

Finally, the majority ignores how Mr. Wilson's youth bears on his intent. At the time of the crime, Mr. Wilson was just fifteen years old. And as the Supreme Court has recognized, intent and age are closely intertwined. *See Miller v. Alabama*, 567 U.S. 460, 471–72 (2012). A child's criminal culpability is tempered by the "distinctive attributes of youth"—their "transient rashness, proclivity for risk, and inability to assess consequences." *Id.* at 472 (cleaned up). Chief Judge Stroud made a similar point below. Although a "reasonable adult considering the situation would likely know something more was going to occur than just selling the phone," Mr. Wilson "was not a reasonable adult." *Wilson*, 283 N.C. App. at 443 (Stroud, C.J., concurring and dissenting). He was an impulsive teenager "who plainly, throughout his statement, seemed to believe Tink could talk a big game, but he would not actually shoot anyone, even though he was armed." *Id.*

The jury was the proper body to weigh the conflicting evidence and assess whether and how Mr. Wilson's age mattered. And if instructed on second-degree murder, it may well have found that offense a closer fit to the facts. Indeed, we know that jurors did not fully swallow the State's version of events. In acquitting Mr. Wilson of conspiracy to commit robbery with a firearm, the jury signaled that it "believed at least some of defendant's account of events or was not fully convinced by the State's evidence regarding a plan to commit robbery." *Id.* at 443–44.

Though it minimizes the jury's acquittal, the majority proves the very point it purports to rebut. Relying on Mr. Wilson's admissions to officers, the majority concludes that Monte did "not appear to have been a part of the arrangements between defendant and Tink." Because

the "conspiracy charge alleged a conspiracy between defendant and Monte," the majority continues, the jury's acquittal for that crime "does not inform whether defendant and Tink planned to rob Finch."

But for that logic to hold true, the jury *must* have believed at least some of Mr. Wilson's words. Indeed, the majority cites Mr. Wilson's statements as the sole evidence "tend[ing] to show that Monte was not part of any arrangement with defendant and/or Tink." If jurors believed Mr. Wilson when he disclaimed a conspiracy, then it is more likely that they believed him when he disputed his specific intent to commit an attempted armed robbery. Given jurors' skepticism on the conspiracy count, they may well have reached a different verdict on the murder charge had they received different instructions.[4]

For that reason, this case raises the due process concerns that have long animated our precedent. Beyond question, the evidence "points to some criminal culpability" on Mr. Wilson's part. *Thomas*, 325 N.C. at 599. Even so, his specific intent—the key element of the predicate felony—"remains in doubt." *Beck*, 447 U.S. at 634. And viewed in Mr. Wilson's favor, the evidence is "in conflict" on whether he "purposely resolve[d]" or "actually intend[ed]" to rob Mr. Finch or help Tink do so. *See Jones*, 353 N.C. at 167–68.

But despite that conflict, the trial court declined to instruct jurors on second-degree murder, leaving them with just two options—to convict Mr. Wilson or acquit him entirely. *See Beck*, 447 U.S. at 634. That binary, we have explained, creates an impermissible "risk of an unwarranted conviction." *Conaway*, 339 N.C. at 514. Left with no other choices, jurors may have felt "compelled to convict" for "*some* offense in light of the gravity of the accused's admitted transgressions." *Brichikov*, 383 N.C. at 557. In this case, a second-degree murder instruction would have

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4. In brushing aside the conspiracy acquittal, the majority also underscores the unfairness of a rule that bars defendants from offering their words to show a conflict in the evidence. According to the majority, the "evidence tended to show that Monte was not part of any arrangement with defendant and/or Tink." That "evidence": Mr. Wilson's statements to officers that Monte—his alleged co-conspirator—was "never part of the arrangement" and "coincidentally was in the area [of the crime] at this time." In other words, the majority offers Mr. Wilson's words as evidence that "tended to show" the lack of a conspiracy. Likewise, the majority points to Mr. Wilson's statements as evidence that he committed first-degree felony murder.

But when Mr. Wilson offers those same statements to question his intent, the majority's rule would have us close our eyes and cover our ears. In my view, if Mr. Wilson's words are competent evidence to support the State's case and exculpate Monte from a conspiracy, then they are competent evidence to dispute Mr. Wilson's specific intent to commit first-degree murder.

offered "a less drastic alternative," affording Mr. Wilson "the full benefit of the reasonable-doubt standard" and allowing jurors to select a verdict from the full menu of criminal offenses. *See Beck*, 447 U.S. at 633–34. By denying Mr. Wilson that instruction, the trial court below—and the majority today—withholds a key "procedural safeguard" and blesses a dangerously unreliable verdict. *See id.* at 637.

Because I would vacate Mr. Wilson's conviction and remand his case for full and fair proceedings, I respectfully dissent.

Justice RIGGS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
MELVIN RAY WOOLARD, JR.

No. 208PA22

Filed 15 December 2023

1. Appeal and Error—appellate jurisdiction—petition for certiorari—order granting motion to suppress—no statutory mechanism for appeal to lower court

In a prosecution for driving while impaired, where the district court preliminarily granted defendant's motion to suppress evidence from his arrest; the State appealed that ruling to the superior court, which upheld the ruling; and then the district court entered a final suppression order per the superior court's instructions, the Supreme Court properly allowed the State's petition for a writ of certiorari to review the State's appeal from the final suppression order. The State's petition met the requirements for certiorari jurisdiction under Appellate Rule 21, where the district court's final order was interlocutory and where no right of appeal from that order existed because the State lacked a statutory basis to challenge it in the superior court.

2. Motor Vehicles—driving while impaired—probable cause to arrest—evidence viewed as a whole—erratic driving—signs of impairment

In a prosecution for driving while impaired, the trial court erred in granting defendant's motion to suppress evidence from his arrest where, viewing the evidence as a whole, the officer who arrested

defendant had probable cause to do so. Although some evidence at trial cut against a finding that defendant was driving while impaired, a reasonable officer still would have had a substantial basis to suspect defendant of drunk driving where: at the time of the arrest, defendant was driving erratically, veering over the centerline six to seven times, swerving onto the oncoming lane twice, and skating onto the right shoulder of the road; both defendant's breath and the interior of his truck smelled of alcohol, and defendant's eyes were red and glassy; defendant confessed to drinking "a couple of beers" before driving; and defendant showed all six clues of impairment during a horizontal gaze nystagmus test.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review order granting defendant's motion to suppress entered on 29 March 2022 by Judge Darrell B. Cayton Jr. in District Court, Beaufort County. Heard in the Supreme Court on 13 September 2023.

Joshua H. Stein, Attorney General, by Kathryne E. Hathcock, Special Deputy Attorney General, for the State-appellant.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellee.

EARLS, Justice.

On 11 April 2020, Captain Rodney Sawyer arrested Melvin Woolard Jr. for driving while impaired. Before trial, Mr. Woolard moved to suppress evidence seized during his arrest. The district court preliminarily granted his motion, ruling that Captain Sawyer lacked probable cause to suspect Mr. Woolard of drunk driving.

The State appealed that decision to superior court. That court also found that Mr. Woolard's arrest violated the Fourth Amendment. At the superior court's instruction, the district court entered a final order suppressing the evidence. Dissatisfied with that ruling, the State sought review in the Court of Appeals and then this Court. We agreed to review the district court's final order.

The question before us is simple: Did Captain Sawyer have probable cause to arrest Mr. Woolard for impaired driving? Our answer is yes. Drawing on the district court's factual findings, we hold that Captain Sawyer's "belief of guilt" was objectively reasonable and rooted in concrete evidence. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

Because Mr. Woolard's arrest thus satisfied the Fourth Amendment, we reverse the district court's suppression order and remand this case for further proceedings.

I. Facts

A. The Arrest

On the afternoon of 11 April 2020, Captain Sawyer—a State Highway Patrol Officer—was driving along a rural road in Beaufort County. For a while, he found himself a solo traveler.

That changed when a truck pulled onto the road in front of him. Captain Sawyer and the truck were the only cars in sight. About a mile separated them. Like Captain Sawyer, the truck travelled south. But unlike Captain Sawyer, the truck wove in and out of its lane.

The officer watched as the truck darted over the centerline—six to seven times by his count. Twice, the truck lurched into the oncoming lane. And at one point, it even skidded onto the road's right shoulder.

Concerned, Captain Sawyer flashed his lights to stop the truck. The other driver quickly pulled over. Although canals and ditches flanked both sides of the road, the truck avoided them as it stopped.

As Captain Sawyer approached the truck, he saw Mr. Woolard behind the wheel. A woman sat beside him. On first glance, Mr. Woolard seemed normal. Captain Sawyer saw no alcohol or contraband in the truck, and nothing in the vehicle alarmed him.

The officer told Mr. Woolard the reason for the stop: Mr. Woolard's erratic driving. Mr. Woolard replied that he was headed to work. He explained that he noticed bees inside the truck, and his efforts to shoo them out the window caused him to swerve. At Captain Sawyer's request, Mr. Woolard produced his driver's license and registration.

As they spoke, Captain Sawyer smelled alcohol on Mr. Woolard's breath and from inside his truck. The officer's suspicions grew when he noticed Mr. Woolard's flushed cheeks, and red and glassy eyes. Still, Mr. Woolard seemed coherent—he chatted normally with Captain Sawyer and appeared in control of his mind and body.

Captain Sawyer returned to his patrol car to check Mr. Woolard's license and registration. He found "nothing unusual." But back at Mr. Woolard's truck, Captain Sawyer questioned him about the smell of alcohol. Mr. Woolard confessed that he drank "a couple of beers earlier."

At that point, Captain Sawyer asked Mr. Woolard to take a preliminary breath test (PBT). Mr. Woolard agreed. As he exited his truck, Mr. Woolard's balance was unremarkable.

Captain Sawyer gave Mr. Woolard two PBTs and a Horizontal Gaze Nystagmus (HGN) test. During an HGN test, an officer checks for involuntary nystagmus—the jerking or fluttering of the eyes—as a person watches an object move.[1] *See State v. Helms*, 348 N.C. 578, 579 (1998). As that object "travels toward the outside of the subject's vision," the officer monitors whether the eyes twitch or bounce. *Id.* at 580. If they do—especially before the "object has traveled 45 degrees from the center of the person's vision"—it signals intoxication. *Id.* At six points during the HGN test, an officer notes "clues" of impairment. The more clues he gathers, the more likely the driver is impaired. When Captain Sawyer tested Mr. Woolard, he logged all six possible clues.

After the HGN test, Captain Sawyer arrested and charged Mr. Woolard for driving while impaired in violation of N.C.G.S. § 20-138.1(a)(1). In relevant part, that statute prohibits people from "driv[ing] any vehicle upon any highway, any street, or any public vehicular area within this State" while "under the influence of an impairing substance." N.C.G.S. § 20-138.1(a)(1) (2021).[2]

B. The Suppression Ruling

Mr. Woolard's case came before Judge Darrell B. Cayton Jr. of District Court, Beaufort County. Before trial, Mr. Woolard moved to suppress portions of the State's evidence.

Mr. Woolard first challenged the PBT results. In his view, Captain Sawyer broke from the procedures set by N.C.G.S. § 20-16.3(c). That provision—aptly titled "Tests Must Be Made with Approved Devices and in Approved Manner"—instructs that "No screening test for alcohol

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1. We have more precisely defined "nystagmus" as "a physiological condition that involves an involuntary rapid movement of the eyeball, which may be horizontal, vertical, or rotary. An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as horizontal gaze nystagmus, or HGN." *See State v. Helms*, 348 N.C. 578, 579 (1998) (cleaned up).

2. Under our precedent, a person is "under the influence of intoxicating liquor or narcotic drugs"—and thus in violation of N.C.G.S. § 20-138.1—when "he has drunk a sufficient quantity of intoxicating beverages or taken a sufficient amount of narcotic drugs to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of those faculties." *See State v. Parisi*, 372 N.C. 639, 649–50 (2019) (quoting *State v. Carroll*, 226 N.C. 237, 241 (1946)).

concentration is a valid one" unless "conducted in accordance with the applicable regulations of the Department as to the manner of its use." N.C.G.S. § 20-16.3(c) (2021). When Captain Sawyer tested Mr. Woolard, those "applicable regulations" required him to first ensure that Mr. Woolard "removed all food, drink, tobacco products, chewing gum and other substances and objects from his mouth." 10A N.C. Admin. Code 41B.0502 (2022). Because the officer neglected to do so, Mr. Woolard faulted the PBTs as unreliable and procedurally defective. The district court agreed and excluded them.

Mr. Woolard also disputed the HGN test. Although no statute sets specific protocols, Mr. Woolard pointed to the procedures recommended by the National Highway Traffic Safety Association (NHTSA). Because Captain Sawyer diverged from those protocols, Mr. Woolard argued, the HGN test—like the PBTs—should be discarded. The district court disagreed. Although Captain Sawyer strayed from the NHSTA's guidelines, the court reasoned that his oversight went to the weight of the HGN results, "not their admissibility."[3]

Most relevant here, Mr. Woolard urged the district court to suppress evidence seized during his arrest. In his view, that arrest violated the Fourth Amendment because Captain Sawyer lacked probable cause to suspect him of impaired driving. The district court agreed and entered a Pre-Trial Indication to suppress the evidence. It filed a written order soon after.

C. The State's Appeals

The State sought review from the Superior Court, Beaufort County as permitted by statute. *See* N.C.G.S. § 20-38.7(a) (2021). That court also found that Captain Sawyer lacked probable cause to arrest Mr. Woolard for impaired driving. The superior court thus directed the district court to suppress the evidence. A few weeks later, the district court entered its final suppression order.

The State disagreed with that ruling and petitioned the Court of Appeals for a writ of certiorari. When that court denied its request, the State sought this Court's review. We granted certiorari to examine the district court's final suppression order.

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3. Specifically, the district court noted that Captain Sawyer "testified the time period to conduct a pass on the lack of smooth pursuit for both the left and right eye was a total of two seconds for both eyes, not the four seconds required for each eye (total of 8 second for one pass of both eyes). [Captain] Sawyer testified the speed for passing the stimulus on the maximum deviation pass was the same and that the stimulus should be held for three seconds at maximum deviation not the four seconds required."

II. This Court's Jurisdiction and the Scope of Our Review

A. Jurisdiction

[1] Before reaching the merits, we resolve two procedural issues. First, Mr. Woolard disputes whether this Court may hear his case at all. In his view, the State improperly leapfrogged the superior court. According to Mr. Woolard, the State needed to go to superior court before seeking review from the Court of Appeals. And since the State broke the proper chain of appeal, Mr. Woolard urges, it improperly sought certiorari and we improperly granted its petition.

However, the State's petition does fall within our certiorari jurisdiction. Under Rule 21, parties may seek a writ of certiorari in "appropriate circumstances" to appeal the "orders of trial tribunals when . . . no right of appeal from an interlocutory order exists." N.C. R. App. P. 21. The State's petition here fits that condition. For one, the district court's final suppression order is interlocutory. Though it excludes portions of the State's evidence, it requires "further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362 (1950); *cf. State v. Fowler*, 197 N.C. App. 1, 5–6 (2009), *disc. rev. denied and appeal dismissed*, 364 N.C. 129 (2010) (concluding that a superior court order allowing motion to suppress did not end a criminal case because, even if the ruling "may have the same 'effect' of a final order," it "requires further action for finality").

The question, then, is whether the State could appeal that interlocutory order as of right. If not, Rule 21 allowed it to petition this Court for certiorari. The parties disagree on that score. According to the State, it lacks a statutory vehicle to challenge the district court's ruling. And because the order is not a "final disposition" of Mr. Woolard's case, the State is suspended in procedural limbo—an "interlocutory no-man's land." With no avenue to appeal the suppression order, the State contends, a writ of certiorari was its only opportunity to seek review.[4] Mr. Woolard, on the other hand, points to statutes purportedly allowing the State to obtain redress in the superior court. According to him, the State could—and should—have used those statutory mechanisms before seeking certiorari from the Court of Appeals.

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4. Counsel for the State underscored this point at oral argument. Specifically, the State explained that it "is stuck in this interlocutory no-man's land, for lack of a better word. The case has not been called yet for trial, so there's nothing for the State to appeal. But the State also has an ethical obligation not to move forward with evidence that has been suppressed. So the State can't appeal, and the State can't move forward unless the suppressed evidence is reversed. So there is no way for the State to appeal."

After examining the statutory scheme, it is apparent that no provision authorized the State to challenge the district court's final order in superior court. And because the State could not appeal that final order and would otherwise be marooned in an "interlocutory no-man's land," Rule 21 allowed it to petition this Court for certiorari. *See* N.C. R. App. P. 21.

When Mr. Woolard moved to suppress evidence, the district court preliminarily granted his motion. At that stage, its decision was tentative. Under N.C.G.S. § 20-38.6(f), the district court could not enter a "final judgment on the motion" until the State appealed its ruling and the superior court reviewed it.[5] N.C.G.S. § 20-38.6(f) (2021). Another statute—N.C.G.S. § 20-38.7(a)—allowed the State to challenge the district court's decision in the superior court. *See* N.C.G.S. § 20-38.7(a) (2021). So when the district court provisionally granted Mr. Woolard's suppression motion, the State could use subsection 20-38.7(a) to contest that ruling.

But that statute only covers a district court's "*preliminary* determination granting a motion to suppress." *Id.* (emphasis added). That makes the difference in Mr. Woolard's case. After the superior court affirmed the district court's ruling, it directed the entry of a final order suppressing the evidence. And when the district court complied, its "preliminary determination" became a "final judgment on the motion." *Id.*; N.C.G.S. § 20-38.6(f). Because that order was final, the State could no longer use section 20-38.7 to challenge it.

In other words, the State had to look elsewhere for a right of appeal. And per subsection 20-38.7(a), "[a]ny further appeal shall be governed by Article 90 of Chapter 15A." But those statutes, too, offer little help to the State. By its terms, section 15A-1432—the provision parsing the State's right to contest a district court decision in superior court—sweeps narrowly. *See* N.C.G.S. § 15A-1432(a) (2021). It lets the State challenge just two species of district court rulings: (1) a "decision or judgment dismissing criminal charges," and (2) the grant of "a motion for a new trial on the ground of newly discovered or newly available evidence." *See* N.C.G.S. § 15A-1432(a)(1)–(2). But that provision is silent on whether the State may appeal a district court's *final suppression order* to superior court. And without a "statute clearly conferring that right," the State here could not challenge the district court's ruling. *State v. Harrell*, 279

5. We note as well that the district court may "enter a final judgment on the motion" if the State "has indicated it does not intend to appeal." N.C.G.S. § 20-38.6(f).

N.C. 464, 466 (1971) (quoting *State v. Vaughan*, 268 N.C. 105, 108 (1966)). In short, the State was up a creek without a statutory paddle.

Our Court of Appeals has twice faced a similar issue. *See Fowler*, 197 N.C. App. at 5–8; *State v. Palmer*, 197 N.C. App. 201 (2009), *disc. rev. denied and appeal dismissed*, 363 N.C. 810 (2010). And twice, that court has rejected the State's efforts to conjure up a right of appeal where none exists. In *Fowler*, for instance, the court interpreted subsection 20-38.7(a) and section 15A-1432, the provisions at issue here. *See Fowler*, 197 N.C. App. at 6. In that case—like this one—the district court preliminarily granted the defendant's motion to suppress. *Id.* at 4. And in that case—like this one—the superior court affirmed that ruling. *Id.* The difference between *Fowler* and Mr. Woolard's case: In *Fowler*, the State appealed the superior court's decision *before* the district court entered a final order. *Id.* at 4–5.

According to the Court of Appeals, the State erred by doing so, as it lacked a statutory right to challenge the superior court's ruling. *Id.* at 7. The State, for its part, tried to stitch together a right to appeal from different statutes. *See id.* at 6–7. Subsection 20-38.7(a), it noted, allowed it to appeal a district court's "preliminary determination" to superior court. *Id.* at 6. And that provision—read alongside subsection 15A-1432(e)—permitted it to then contest the superior court's ruling in the Court of Appeals. *Id.*

The Court of Appeals, however, disagreed. *Id.* at 6–8. By its plain text, the court explained, subsection 20-38.7(a) gave the State "a right of appeal to superior court from a district court's *preliminary* determination indicating that it *would* grant a defendant's pretrial motion to *dismiss or suppress*." *Id.* at 7. Section 15A-1432, however, covered different ground. *Id.* If the district court dismissed the charges against a defendant or granted a new trial, subsection 15A-1432(a) allowed the State to seek review in superior court. *Id.* And if the superior court affirmed the district court, subsection 15A-1432(e) allowed the State to challenge that ruling in the Court of Appeals. *Id.*

But the State's right of appeal ended there. *Id.* By their plain language, the statutes withheld from the State a vehicle to appeal a district court's final suppression order. *Id.* at 29–30. To challenge that decision, the Court of Appeals explained, the State had to rely on other statutes or remedial writs. *See id.* at 8, 29. Writs like the writ of certiorari.

Though *Fowler* and *Palmer* concluded that the State had no statutory right to raise its claims, the court in both cases "exercised [its] discretion to grant the State's petition for writ of certiorari." *Fowler*, 197

N.C. App. at 8; *Palmer*, 197 N.C. App. at 204. Rule 21, the court reasoned, was crafted for just these cases—those where no right of appeal exists. *See Fowler*, 197 N.C. App. at 8; *Palmer*, 197 N.C. App. at 204. When a party "is without any other remedy," a writ of certiorari fills the gaps, permitting appellate courts to intervene when they could otherwise not. *See Bayer v. Raleigh & Augusta Air Line R.R. Co.*, 125 N.C. 17, 20 (1899); *see also id.* at 25 ("It seems to us . . . that, to refuse the writ in this case, 'the defendant would be undone.' ").

The same is true of the State's petition here. Because no statute allowed the State to appeal the district court's final suppression order, it lacked a statutory basis to challenge that ruling in superior court. And since the State had no "right of appeal from an interlocutory order," N.C. R. App. P. 21, it could petition this Court for certiorari. *Warren v. Maxwell*, 223 N.C. 604, 608 (1943) (underscoring that "the proper method of review is by *certiorari*" if "there has been an error in law, prejudicial to the parties" and a "statute provides no appeal").

Despite Mr. Woolard's arguments, we did not err by issuing the writ. In large part, that is because our jurisdiction is constitutionally etched. N.C. Const. art. IV, §§ 1, 12. We may "review upon appeal any decision of the courts below, upon any matter of law or legal inference." N.C. Const. art. IV, § 12(1). And we may "issue any remedial writs necessary to give [us] general supervision and control over the proceedings of the other courts." *Id.*

Certiorari, of course, is an "extraordinary remedial writ." *State v. Roux*, 263 N.C. 149, 153 (1964). We deploy it sparingly, reserving it "to correct errors of law," *State v. Simmington*, 235 N.C. 612, 613 (1952), or to cure a "manifest injustice," *State v. Cochran*, 230 N.C. 523, 526 (1949). To that end, a petitioner must "show merit or that error was probably committed below." *Cryan v. Nat'l Council of YMCA*, 384 N.C. 569, 572 (2023) (cleaned up). In the past, this Court has granted certiorari to resolve legal questions raised by interlocutory orders in criminal cases, even when the petitioner lacked a right of appeal. *See, e.g.*, *State v. Jefferson*, 66 N.C. 309 (1872) (noting that petitioner had no right to appeal but still issuing writ of certiorari to review whether the trial court erroneously discharged a criminal jury); *Ex parte Biggs*, 64 N.C. 202 (1870).

Ultimately, though, the writ is "discretionary." *See State v. Ross*, 369 N.C. 393, 400 (2016) (citing *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579 (1927)). And here, since the State is "without any other remedy" to challenge the district court's final suppression order, it could seek—and we could grant—a writ of certiorari. *See Bayer*, 125 N.C. at 20. In

this case, we exercised our "sound discretion" to release the State from procedural limbo. *See State v. Niccum*, 293 N.C. 276, 278 (1971). This does not mean we should deploy our certiorari jurisdiction whenever the State loses a motion to suppress in these circumstances. But since we properly granted the writ in this case, we have jurisdiction to reach the merits.

B. Scope of Review

With our jurisdiction settled, we next clarify *what* we review. After Mr. Woolard moved to suppress evidence, the district court "preliminarily indicate[d that] the motion should be granted." *See* N.C.G.S. § 20-38.6(f). On review, the superior court affirmed the district court's ruling and directed it to "enter its final order." The district court complied—in a 29 March 2022 order, it adopted the Pre-Trial Indication as its final decision.

The district court's final order is the only one before us. We do not consider the superior court's ruling or the Court of Appeals' denial of certiorari. Because we examine the district court's order alone, we rest our analysis on that court's factual findings.[6]

III. Standard of Review

This Court reviews a trial court's suppression order in two steps. *See State v. Bullock*, 370 N.C. 256, 258 (2017). We first ask "whether the trial court's underlying findings of fact are supported by competent evidence." *State v. Parisi*, 372 N.C. 639, 649 (2019) (cleaned up). We then examine "whether those factual findings in turn support the trial court's ultimate conclusions of law." *Id.* (cleaned up).

Under that framework, we start with the facts. And here, that step is key because probable cause is context-specific—it hinges "on the totality of the circumstances present in each case." *State v. Sanders*, 327 N.C. 319, 339 (1990) (cleaned up); *see Ker v. California*, 374 U. S. 23, 33 (1963). The trial court's findings steer our review. *See Parisi*, 372 N.C.

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6. At oral argument the State contended that the district court's final order "adopted" or "incorporated" the superior court's factual findings. We disagree. In its final order, the district court specified that "the Pre-Trial Indication entered by the Court on 15 November 2021 is now the final order of the Court." The district court never mentioned the superior court's factual findings. True, if "there is a dispute about the findings of fact," the superior court may "determine the matter de novo." N.C.G.S. § 20-38.7(a). But here, it does not appear that the State disagreed with the district court's factual conclusions or challenged them in superior court. Because the district court relied solely on its findings of fact, we, too, rely on those findings in reviewing its final order.

at 655; *see also State v. Bartlett*, 368 N.C. 309, 313 (2015). Because that tribunal is closer to the case and steeped in the evidence, it is better equipped to distill "what happened in space and time." *Parisi*, 372 N.C. at 655 (quoting *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 351 (1987)).

In cases like Mr. Woolard's, then, the district court gauges "the actual observations made by arresting officers" and "the extent to which a person suspected of driving while impaired exhibits indicia of impairment." *Id.* at 656. If backed "by competent evidence," we treat those findings as "conclusive on appeal." *State v. Eason*, 336 N.C. 730, 745 (1994).

At the second step, we decide whether—based on the facts—Captain Sawyer had probable cause as a matter of law. That task "inherently requires" us to exercise judgment and apply "legal principles." *Parisi*, 372 N.C. at 655 (cleaned up). For that reason, probable cause is a legal question. *Id.* at 656; *see also Ornelas v. United States*, 517 U.S. 690, 697–98 (1996). And for the same reason, we review it de novo. *See Parisi*, 372 N.C. at 655. We thus examine the issue with fresh eyes and may "freely substitute" our judgment for the district court's. *Id.* (quoting *State v. Biber*, 365 N.C. 162, 168 (2011)).

IV. Probable Cause to Arrest for Impaired Driving

A. Probable Cause Standard

[2] Before arresting a person, an officer must have probable cause to suspect him of a crime "at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004); *State v. Streeter*, 283 N.C. 203, 207 (1973). That requirement is key to the Fourth Amendment's protections, and its roots grow "deep in our history." *Bailey v. United States*, 568 U.S. 186, 192 (2013) (quoting *Henry v. United States*, 361 U.S. 98, 100 (1959)). The Founders' "[h]ostility to seizures based on mere suspicion" spurred the Fourth Amendment's adoption and served as the springboard for its probable-cause requirement. *Dunaway v. New York*, 442 U.S. 200, 213 (1979); *see also Stanford v. Texas*, 379 U.S. 476, 481 (1965). In purpose and practice, the probable-cause standard shields "citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime." *Pringle*, 540 U.S. at 370 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

Probable cause to arrest exists when an officer has a reasonable belief, anchored in specific facts and objectively rational inferences, that a particular person has committed a crime. *See id.*; *see also Beck v. Ohio*, 379 U.S. 89, 91 (1964). Under that framework, we take the "facts

as a whole" rather than "one by one." *District of Columbia v. Wesby*, 583 U.S. 48, 61 (2018); *see also Sanders*, 327 N.C. at 339. And though officers must find a "particularized and objective basis for suspecting legal wrongdoing," *United States v. Arvizu*, 534 U.S. 266, 273 (2002), they are not required "to rule out a suspect's innocent explanation for suspicious facts," *Wesby*, 583 U.S. at 61.

But not all evidence satisfies the Fourth Amendment. An officer may not arrest based on a "mere hunch" or gut feeling. *See Arvizu*, 534 U.S. at 274 (cleaned up); *see also United States v. Sokolow*, 490 U.S. 1, 7 (1989); *State v. Jackson*, 368 N.C. 75, 78 (2015). Nebulous suspicions are also insufficient—an officer's "belief of guilt must be particularized with respect to the person to be searched or seized." *Pringle*, 540 U.S. at 371 (citing *Ybarra v. Illinois*, 444 U. S. 85, 91 (1979)). So the key question is whether a reasonable officer would find a supported, "good faith," and objectively rational basis to suspect a person of a crime. *See State v. Zuniga*, 312 N.C. 251, 262 (1984); *see also Biber*, 365 N.C. at 169.

Those principles apply on the road, too. An officer has probable cause to arrest for impaired driving when, under the "totality of the circumstances," he reasonably believes that a motorist "consumed alcoholic beverages" and drove "in a faulty manner or provided other indicia of impairment." *Parisi*, 372 N.C. at 651. Our cases have plotted what evidence may support that belief. Erratic driving, we have explained, provides strong grounds for suspicion. *Id.*; *see State v. Otto*, 366 N.C. 134, 138 (2012) (finding reasonable suspicion for traffic stop based on the defendant's "constant and continual" weaving for three quarters of a mile on a weekend evening). So too does the "fact that a motorist has been drinking." *Parisi*, 372 N.C. at 650 (citing *State v. Hewitt*, 263 N.C. 759, 764 (1965)); *cf. State v. Ellis*, 261 N.C. 606, 607 (1964).

"[O]ther conduct" may also suggest impairment. *Parisi*, 372 N.C. at 650. Take the smell of alcohol on a motorist. That fact, "*standing alone*, is no evidence that a driver is under the influence of an intoxicant." *State v. Rich*, 351 N.C. 386, 398 (2000) (cleaned up). But it may signal "that [the driver] has been drinking," especially when coupled with other clues. *Atkins v. Moye*, 277 N.C. 179, 185 (1970); *cf. State v. Romano*, 369 N.C. 678, 693 (2017) (noting that defendant "smelled strongly of alcohol"). The same holds true when a driver has red and glassy eyes. *Parisi*, 372 N.C. at 650–51 (cataloguing cases). And field-sobriety tests—performed in line with statutory and constitutional standards—may offer reliable metrics of impairment. *Id.* at 653 (noting that the "defendant exhibited multiple indicia of impairment while performing various sobriety tests"); *see Romano*, 369 N.C. 678; *State v. Godwin*, 369 N.C. 604, 612–13

(2017) (allowing an officer, properly qualified as an expert, to testify about HGN tests).

Any single fact alone may not establish probable cause. But taken together, they may clear that hurdle. The probable-cause inquiry is, after all, an additive one. *See Wesby*, 583 U.S. at 61. And so courts—like officers—must examine "each case in the light of the particular circumstances and the particular offense involved." *State v. Harris*, 279 N.C. 307, 311 (1971); *see also Atkins*, 277 N.C. at 185 ("[T]he fact that a motorist has been drinking, when considered in connection with faulty driving or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of [section] 20-138." (cleaned up)).

We most recently tackled this topic in *Parisi*. In that case, a police officer stopped Mr. Parisi's car at a checkpoint. *Parisi*, 372 N.C. at 640. After requesting his license, the officer smelled alcohol on Mr. Parisi's breath and noticed his "glassy and watery" eyes. *Id.* An "open box of beer" sat "on the passenger's side floorboard," though the officer did not see any open containers. *Id.* When asked, Mr. Parisi admitted that he had been drinking that evening—three beers, all told. *Id.*

On top of those observations, the officer conducted field-sobriety tests. *Id.* Each confirmed Mr. Parisi's intoxication. On the HGN test, Mr. Parisi showed six clues of impairment. *Id.* On the walk-and-turn test, he miscounted his steps walking each way. *Id.* And on the one-leg-stand test, he swayed and held out his arms to balance. *Id.*

To the officer, the evidence suggested that Mr. Parisi had consumed enough "alcohol to appreciably impair his mental and physical faculties." *Id.* He thus arrested and charged Mr. Parisi for driving while impaired. *Id.* at 640–41. But the trial court disagreed. *Id.* at 641. On Mr. Parisi's motion, that court suppressed evidence seized during his arrest, holding that the officer lacked probable cause. *Id.* The Court of Appeals reversed that decision.

We unanimously affirmed the Court of Appeals. In our view, a "prudent officer" viewing all the evidence would reasonably suspect Mr. Parisi of drunk driving. *Id.* at 650. We noted:

- That Mr. Parisi "had been driving";
- That he "admitted having consumed three beers";
- That his "eyes were red and glassy";

- That "a moderate odor of alcohol emanated from [his] person"; and
- That he "exhibited multiple indicia of impairment while performing various sobriety tests."

Id. at 653.

Given those facts, we had "no hesitation" in finding probable cause. *Id.* That was so, we explained, because a "prudent officer" in the same position would harbor the same suspicions. *Id.* at 650. And since the officer reasonably believed that Mr. Parisi "consumed alcohol" and that "his faculties were appreciably impaired," Mr. Parisi's arrest squared with the Fourth Amendment. *Id.* at 655.

B. Application

Because probable cause pivots on the facts, we rely on the district court's findings. *See id.* at 649. We start where Captain Sawyer did—with Mr. Woolard's erratic driving. As he trailed Mr. Woolard, the officer watched him swerve over the centerline six to seven times. Twice, Mr. Woolard ventured into the oncoming lane. And Mr. Woolard veered the other way, too—at one point, he drifted off the asphalt and onto the road's right shoulder.

Concerned, Captain Sawyer pulled Mr. Woolard over to investigate his weaving. And during that stop, the clues of impairment mounted. As in *Parisi*, Captain Sawyer smelled alcohol on Mr. Woolard's breath and from inside his truck. *See id.* at 653. As in *Parisi*, he noticed Mr. Woolard's red and glassy eyes. *See id.* And as in *Parisi*, Mr. Woolard admitted that he drank several beers before driving. *See id.* Captain Sawyer supplemented his observations with an HGN test.[7] When checking Mr. Woolard's eyes for nystagmus, Captain Sawyer logged all six clues of impairment—another parallel to *Parisi*. *See id.*

So "at the time of the arrest," *Devenpeck*, 543 U.S. at 152, Captain Sawyer faced these facts:

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7. Although the State also challenges the trial court's suppression of the PBTs, it did not appeal the trial court's orders on those tests. *See* State's Petition for Writ of Certiorari at 1, 12, *State v. Woolard*, No. 208PA22 (N.C. July 8, 2022) (seeking this Court's "review of the Beaufort County district court's Order of Suppression"). Nor did we grant certiorari to examine those rulings. Instead, we agreed only to consider the district court's final suppression order and whether, based on its factual findings, that court correctly determined whether Captain Sawyer had probable cause to arrest.

- That while driving, Mr. Woolard veered over the centerline six to seven times;
- That he twice swerved into the oncoming lane;
- That he skated onto the right shoulder of the road;
- That the inside of his truck smelled of alcohol;
- That his breath smelled of alcohol, too;
- That his eyes were red and glassy;
- That he confessed to drinking "a couple of beers" before driving; and
- That he showed all six clues of impairment on the HGN test.

In Mr. Woolard's view, that evidence does not amount to probable cause. As he tells it, he swerved on the road because he was shooing bees out of his truck. Besides, he continues, some evidence cut *against* his impairment. When pulling over, Mr. Woolard deftly avoided the ditches flanking the road. He spoke and acted normally during the traffic stop. He retrieved his license without difficulty. And he easily exited the truck when asked. So according to Mr. Woolard, the "whole picture" of the evidence negated Captain Sawyer's suspicions. *See United States v. Cortez*, 449 U.S. 411, 417 (1981).

However, an "objectively reasonable police officer" in Captain Sawyer's shoes would draw the same conclusions that he did. *See Pringle*, 540 U.S. at 371. Though duly considered, Mr. Woolard's arguments do not change our holding. While the totality of the circumstances may include a defendant's explanations for his conduct, probable cause does not require officers to rule out a defendant's version of events. *See Wesby*, 583 U.S. at 61. What matters is whether a reasonable officer, viewing the "evidence as a whole," would have a "substantial basis" to suspect Mr. Woolard of a crime. *See State v. Lowe*, 369 N.C. 360, 364 (2016) (quoting *State v. Beam*, 325 N.C. 217, 221 (1989)); *accord Wesby*, 583 U.S. at 61.

We think that a reasonable officer would find a "substantial basis" to arrest in this case. *See Lowe*, 369 N.C. at 364 (cleaned up). As Mr. Woolard urges, his explanation of the incident ran counter to Captain Sawyer's suspicions of "wrongdoing." *Cf. Kansas v. Glover*, 140 S. Ct. 1183, 1191 (2020). A sober driver, after all, is more likely than a drunk

one to navigate hilly terrain, retrieve his ID, chat normally, and follow instructions. But the "evidence as a whole" gave Captain Sawyer probable cause to suspect Mr. Woolard of impaired driving. *See Lowe*, 369 N.C. at 364 (cleaned up). Despite some arguably innocuous conduct, Mr. Woolard still drove erratically; banked onto the road's shoulder; smelled of alcohol; had red, glassy eyes; admitted to drinking before driving; and showed every clue of impairment on the HGN test.

V. Conclusion

Probable cause is a "fluid concept," not a fixed formula. *See Ornelas*, 517 U.S. at 695–96 (cleaned up). It draws content from "particular factual contexts" as "viewed through the lens of common sense." *Florida v. Harris*, 568 U.S. 237, 244, 248 (2013) (cleaned up). For that reason, the constitutional doctrine rejects rigid rules in favor of a "flexible, all-things-considered approach." *Id.* at 244. We keep with that fact-intensive, "common-sensical standard" in this case. *Id.*

On these facts, we hold that Captain Sawyer had probable cause to arrest Mr. Woolard for impaired driving. An "objectively reasonable" officer in Captain Sawyer's shoes would discern a "substantial chance of criminal activity" from Mr. Woolard's erratic weaving; the smell of alcohol on his breath and in his truck; his red, glassy eyes; his admission to drinking; and his performance on the HGN test. *See Wesby*, 583 U.S. at 57, 61.

Because Captain Sawyer's "belief of guilt" was objectively reasonable and rooted in sound evidence, Mr. Woolard's arrest did not violate the Fourth Amendment. *See Pringle*, 540 U.S. at 371. The district court erred in holding the opposite. We thus reverse the district court's suppression order and remand Mr. Woolard's case for further proceedings.

REVERSED.

PAUL STEVEN WYNN
v.
REX FREDERICK, IN HIS OFFICIAL CAPACITY AS A MAGISTRATE, AND
GREAT AMERICAN INSURANCE COMPANY

No. 314PA21

Filed 15 December 2023

1. Immunity—sovereign—magistrate—statutory waiver—applicability

In a statutory bond action against a magistrate who failed to timely serve plaintiff's nephew with an involuntary commitment order (subsequently, the nephew shot plaintiff with a crossbow during an acute psychotic episode), the magistrate's sovereign immunity barred the suit. Section 58-76-5 of the N.C. General Statutes, which provides a limited waiver of sovereign immunity for certain officials covered by statutory bonds, did not encompass magistrates, which are state officers, when it provided the limited waiver for five specifically named categories of county officers "or other officer." The section's internal structure, broader statutory context, and statutory history made clear that the General Assembly intended to limit the section's scope to bonded county officers.

2. Immunity—judicial—magistrate—sued in official capacity—applicability

In a statutory bond action against a magistrate who failed to timely serve plaintiff's nephew with an involuntary commitment order (subsequently, the nephew shot plaintiff with a crossbow during an acute psychotic episode), the Court of Appeals erred by holding that judicial immunity is a categorically unavailable defense to an official capacity claim against a judicial officer. Judicial immunity applies to both official capacity and individual capacity claims.

Justice EARLS concurring in part and dissenting in part.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 278 N.C. App. 596, 863 S.E.2d 790 (2021), affirming an order entered on 15 January 2020 by Judge John O. Craig III in Superior Court, Orange County. On 17 August 2022, the

Supreme Court allowed plaintiff's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court on 21 September 2023.

Carlos E. Mahoney and Barry D. Nakell for plaintiff-appellee.

Joshua H. Stein, Attorney General, by Sarah G. Boyce, Deputy Solicitor General, Nicholas S. Brod, Deputy Solicitor General, and Lindsay Vance Smith, Deputy Solicitor General, for defendant-appellant Rex Frederick.

NEWBY, Chief Justice.

In this case we consider whether magistrates can be sued in a statutory bond action under N.C.G.S. § 58-76-5 based on actions they take in their official capacities or whether sovereign immunity and/or judicial immunity bars suit. To answer this question, we must first determine whether magistrates are "other officer[s]" under N.C.G.S. § 58-76-5. Because the provision's text, history, and broader statutory context reveal that section 58-76-5 encompasses only county, rather than state, officers, magistrates fall outside the scope of "other officer[s]" under the statute and accordingly retain their sovereign immunity. Additionally, we hold, in accordance with our established precedent, that judicial immunity applies to official and individual capacity claims. We therefore reverse the decision of the Court of Appeals.

Plaintiff alleges the following facts. In 2016, plaintiff owned two nearby properties in Mebane, North Carolina. Plaintiff lived at one property and rented the second property to his sister, Judy Wynn, and her twenty-four-year-old son, Robert Morris. Morris had suffered from severe mental health issues since he was a teenager and was diagnosed with schizoaffective disorder, schizophrenia, and bipolar disorder. In addition, Morris engaged in significant alcohol and drug use and was diagnosed with substance abuse disorders. When Morris did not take his medications, his conditions caused him to become violent towards others. As a result, Morris had been involuntarily committed to UNC Hospitals on several occasions, including three separate times during 2016. To monitor Morris's condition and medication compliance, Morris received regular visits at his home from the UNC Center for Excellence in Community Mental Health's Assertive Community Treatment (ACT) team. The ACT team provides medical support and treatment to individuals with severe mental illnesses who live at home in Orange County.

Dr. Austin Hall, a psychiatrist at the UNC Center for Excellence in Community Mental Health, served as the ACT team's Medical Director and provided psychiatric care and treatment to Morris.

During the week of 12 December 2016, Morris was living with Ms. Wynn at the Mebane property that she rented from plaintiff. Morris was not taking his medications, had not slept for three days, and stayed outside at night guarding the house with a crossbow. In addition, earlier that week, Morris drained Ms. Wynn's car battery to prevent her from leaving the house. Accordingly, Ms. Wynn informed the ACT team and Dr. Hall about Morris's condition. On the morning of 16 December 2016, Dr. Hall met with Ms. Wynn and Morris at the Mebane property, and upon evaluating Morris, Dr. Hall determined that Morris needed to be involuntarily committed. Dr. Hall returned to his office, prepared an Affidavit and Petition for Involuntary Commitment, and faxed it to the Orange County Magistrate's Office. Defendant, a magistrate in Orange County, received the faxed affidavit and petition.

Upon reviewing the affidavit and petition, defendant issued a Findings and Custody Order for Involuntary Commitment and faxed the custody order to UNC Hospitals so that Morris could be served and committed at the hospital. Defendant thought Morris was already at the hospital; however, Morris was still at his home in Mebane. Therefore, Morris was not served with the custody order on 16 December 2016.

On the morning of 17 December 2016, Dr. Hall called Ms. Wynn to ask if the Orange County Sheriff's Office had served Morris with the custody order and taken him to UNC Hospitals. Ms. Wynn told Dr. Hall that Morris was still at the Mebane property. Dr. Hall then called defendant to ask about the status of the custody order, and defendant informed Dr. Hall that he faxed the custody order to UNC Hospitals. Dr. Hall explained that Morris was still at his home and accordingly told defendant he would again fax the documents to defendant so that Morris could be served at the Mebane property.

At 9:27 a.m., Dr. Hall again faxed the Affidavit and Petition for Involuntary Commitment to the Magistrate's Office, and Chief Magistrate Tony Oakley received the documents. By 11:02 a.m., Chief Magistrate Oakley had also received a copy of the custody order. He then contacted the Sheriff's Office and requested a deputy to serve Morris at his house. Around 11:20 a.m., Deputy Malcolm Hester retrieved the custody order from the Magistrate's Office and began driving to the Mebane property.

Meanwhile, around 11:00 a.m., plaintiff went to his sister's property to jump-start her car battery. After starting the car, plaintiff went inside

Ms. Wynn's home not knowing that Morris was off his medication and experiencing a psychotic episode. After plaintiff entered the house, Morris used a crossbow to shoot plaintiff in the neck with an arrow, instantly paralyzing plaintiff. Ms. Wynn called 911 at 11:18 a.m. Deputy Hester arrived at the Mebane property with the custody order by 11:36 a.m., and emergency services arrived shortly thereafter. At that time, Morris was taken into custody.

On 17 September 2019, plaintiff filed suit against defendant, in his official capacity as a magistrate, under defendant's official bond pursuant to N.C.G.S. § 58-76-5, and Great American Insurance Company, defendant's insurer. Plaintiff alleged defendant was negligent in faxing the custody order to UNC Hospitals rather than to the Sheriff's Office so that a deputy could serve Morris with the custody order at his home. Plaintiff sought damages under the bond in the amount of $100,000.

Defendant filed a motion to dismiss on 21 October 2019 asserting sovereign immunity, absolute judicial immunity, public official immunity, and that plaintiff otherwise failed to state a claim upon which relief could be granted. Great American Insurance Company also filed a motion to dismiss, joining in and adopting defendant's motion. On 6 January 2020, the trial court held a hearing on the motions, in which it heard arguments, reviewed the complaint, and considered briefs submitted by the parties. On 15 January 2020, the trial court entered an order denying defendant's motion to dismiss.[1] The trial court determined that the factual allegations in the complaint establish that defendant is not entitled to sovereign immunity or judicial immunity for the statutory bond action and that plaintiff stated a claim upon which relief could be granted against defendant in his official capacity.[2] Defendant appealed.

On appeal, the Court of Appeals affirmed the trial court's denial of defendant's motion to dismiss. *Wynn v. Frederick*, 278 N.C. App. 596, 597, 863 S.E.2d 790, 792 (2021). First, the Court of Appeals held that N.C.G.S. § 58-76-5, which waives sovereign immunity for certain officials covered by a statutory bond, applies to magistrates. *Id.* at 601, 603, 863 S.E.2d at 794–95; *see* N.C.G.S. § 58-76-5 (2021) (waiving sovereign immunity for a "register, surveyor, sheriff, coroner, county treasurer, or other officer" to the extent of their respective bonds). The Court of

1. The trial court also denied Great American Insurance Company's motion to dismiss. Great American Insurance Company, however, withdrew its appeal at the Court of Appeals and is therefore no longer a party to this appeal.

2. At the hearing on the motion, defendant waived his argument of dismissal based on public official immunity. Thus, that issue is not before this Court.

Appeals explained that while magistrates are not specifically enumerated in the statute's list of officers, magistrates nonetheless fall into the statute's general category of "other officer[s]." *Wynn*, 278 N.C. App. at 602–03, 863 S.E.2d at 795. Thus, according to the Court of Appeals, section 58-76-5 plainly waived defendant's sovereign immunity. *Id.*

The Court of Appeals next addressed the issue of judicial immunity. The Court of Appeals held that "judicial immunity is [only] an available defense for judicial officers sued as individuals." *Id.* at 603, 863 S.E.2d at 796. According to the Court of Appeals, because plaintiff sued defendant in his official capacity, rather than in his individual capacity, defendant could not assert judicial immunity as a defense to suit. *Id.* The Court of Appeals thus categorically limited judicial immunity to suits in which judicial officers are sued in their individual capacity. *Id.*

Defendant filed a petition for discretionary review with this Court on 24 August 2021, and plaintiff filed a conditional petition for discretionary review on 3 September 2021. On 17 August 2022, this Court allowed defendant's petition for discretionary review and allowed in part plaintiff's conditional petition for discretionary review.[3]

In this case we consider whether sovereign immunity and judicial immunity are available defenses in a statutory bond action for a magistrate sued in his official capacity under N.C.G.S. § 58-76-5. We review de novo a trial court's denial of a motion to dismiss that raises immunity as a ground for dismissal. *White v. Trew*, 366 N.C. 360, 362–63, 736 S.E.2d 166, 168 (2013).

[1] This Court has long recognized the doctrine of sovereign immunity, acknowledging that "[i]t is an established principle of jurisprudence . . . that a state may not be sued . . . unless by statute it has consented to be sued or has otherwise waived its immunity from suit." *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952). Unless waived, this protection extends to public officials of the State sued in their official capacities. *White*, 366 N.C. at 363, 736 S.E.2d at 168. "Waiver of sovereign immunity may not be lightly inferred[,] and [s]tate statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 538–39, 299 S.E.2d 618, 627 (1983).

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3. The issue allowed in plaintiff's conditional petition for discretionary review is substantially the same as the judicial immunity issue we allowed in defendant's petition for discretionary review. We therefore address two primary issues on appeal.

Section 58-76-5 of the North Carolina General Statutes provides a limited waiver of sovereign immunity for certain officials covered by statutory bonds. Specifically, section 58-76-5 provides that "[e]very person injured by the neglect, misconduct, or misbehavior in office of any register, surveyor, sheriff, coroner, county treasurer, or other officer, may institute a suit . . . against said officer . . . upon their respective bonds." N.C.G.S. § 58-76-5. Prior to 21 July 2023, magistrates were statutorily required to hold a bond "conditioned upon the faithful performance of the duties of the office of magistrate."[4] N.C.G.S. § 7A-174 (2021) (repealed 2023). Therefore, we must determine whether N.C.G.S. § 58-76-5 waives sovereign immunity for magistrates sued under their official bond. To do so, we examine the text and structure of section 58-76-5, its broader statutory context, and the provision's statutory history.

Our primary goal in construing a statute is "to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citing *Hunt v. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981)). When construing a statute, we first examine "the plain words of the statute," *id.* (citing *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)), as "[t]he best indicia of [legislative intent is] the language of the statute" itself, *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). If the plain language of the statute is unambiguous, we "apply the statute[ ] as written." *N.C. Dep't of Correction v. N.C. Med. Bd.*, 363 N.C. 189, 202, 675 S.E.2d 641, 649 (2009). If the plain language of the statute is ambiguous, however, we then look to other methods of statutory construction such as the broader statutory context, "the structure of the statute[,] and certain canons of statutory construction" to ascertain the legislature's intent. *Elec. Supply Co. of Durham*, 328 N.C. at 656, 403 S.E.2d at 294; *see Meyer v. Walls*, 347 N.C. 97, 106, 489 S.E.2d 880, 885 (1997) ("Where words of general enumeration follow

4. The General Assembly repealed the statutory bond requirement for magistrates in N.C.G.S. § 7A-174 effective on 21 July 2023. *See* An Act to Make Various Changes and Technical Corrections to the Laws Governing the Administration of Justice, As Recommended by the Administrative Office of the Courts and to Allow for the Expunction of the Offense of Breaking and Entering of a Building with Intent to Commit a Felony or Larceny and Amend the Conditions that Result in a Petition for Expunction Being Denied, S.L. 2023-103, § 5(b), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-103.pdf. Because plaintiff initiated this statutory bond suit against defendant prior to the repeal of N.C.G.S. § 7A-174, plaintiff's rights have vested. Accordingly, we consider the issues presented in the appeal.

those of specific classification, the general words will be interpreted to fall within the same category as those previously designated." (quoting *Turner v. Bd. of Educ.*, 250 N.C. 456, 463, 109 S.E.2d 211, 216 (1959))); *State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970) ("[G]eneral words [that] follow a designation of particular subjects or things . . . includ[e] only things of the same kind, character and nature as those specifically enumerated." (quoting *State v. Fenner*, 263 N.C. 694, 697–98, 140 S.E.2d 349, 352 (1965))). Additionally, the legislature's intent may be revealed from the legislative history of the statute in question, *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001), as changes the legislature makes to a statute's text over time provide evidence of the statute's intended meaning, *Elec. Supply Co. of Durham*, 328 N.C. at 656, 403 S.E.2d at 295.

Here we must determine whether N.C.G.S. § 58-76-5 applies to state and county officials or only county officials. We start with the text of the statute. The plain language of section 58-76-5 provides a right of action against "any register, surveyor, sheriff, coroner, county treasurer, or other officer" under their respective bonds. N.C.G.S. § 58-76-5. The text of section 58-76-5 reveals that magistrates are not specifically included in the statute's enumerated list of officers. Therefore, we next examine section 58-76-5's internal structure and its broader statutory context to determine whether the legislature intended magistrates to fall within the statute's scope of "other officer[s]."

We often utilize canons of statutory construction to aid in discerning the legislature's intent. In *Meyer*, this Court invoked the canon *ejusdem generi*s to determine whether a local entity fell within the scope of the general terms "departments, institutions, and agencies" in the State Tort Claims Act. 347 N.C. at 106, 489 S.E.2d at 885 (quoting *Turner*, 250 N.C. at 462–63, 109 S.E.2d at 216). According to that canon, "[w]here words of general enumeration follow those of specific classification, the general words will be interpreted to fall within the same category as those previously designated." *Id.* (quoting *Turner*, 250 N.C. at 463, 109 S.E.2d at 216). Thus, in *Meyer*, we concluded that the local entity fell outside the scope of those general terms because all of the "departments, institutions, and agencies" specifically enumerated within the statute were state entities. *Id.* at 104, 489 S.E.2d at 884.

Here a closer reading of the enumerated list of officers in section 58-76-5 reveals that five specific categories of officers—registers, surveyors, sheriffs, coroners, and county treasurers—precede the more general phrase "or other officer[s]." *See* N.C.G.S. § 58-76-5. Significantly, each of the five specifically-enumerated officers are county officers rather than

state officers such as magistrates.[5] Under the canon of *ejusdem generis*, "other officer[s]" fall "within the same category as those previously [and expressly] designated" in section 58-76-5. *Meyer*, 347 N.C. at 106, 489 S.E.2d at 885 (quoting *Turner*, 250 N.C. at 463, 109 S.E.2d at 216). Because the specifically-enumerated officers preceding the general phrase in section 58-76-5 are all county officers, the structure of section 58-76-5 counsels in favor of reading "other officer[s]" to include only other county officers. A contrary reading of the statute to include *any* "other officer" required to be bonded would render the statute's specific reference to registers, surveyors, sheriffs, coroners, and county treasurers unnecessary. *See id.* ("[I]f the legislative body had intended the general words to be used in their unrestricted sense the specific words would have been omitted." (quoting *Turner*, 250 N.C. at 463, 109 S.E.2d at 216)); *see also Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) ("Courts should 'give effect to the words actually used in a statute' . . . ." (quoting *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014))).

Reading section 58-76-5 to include only county officers is also consistent with how the General Assembly structured the provisions governing official bonds over one hundred years ago. In the early 1900s, Chapter 9 of the Revised Code contained all of the statutes governing official bonds. *See* N.C. Revised Code of 1905, ch. 9 (1905). Chapter 9 consisted of eleven articles, one of which was entitled "State Officers" and another of which was entitled "County Officers." *See id.* §§ 287–306. The two articles regulated the official bonds for the state and county officers specifically enumerated within each article. The "State Officers" article included state officials, such as the secretary of state, treasurer, insurance commissioner, clerk of supreme court, and public printer. *See id.* §§ 287–88, 290, 292–94. Alternatively, the "County Officers" article expressly included officials such as county treasurers, sheriffs, coroners, registers of deeds, and county surveyors. *Id.* §§ 297–303. Most notably, each of the officers identified in the "County Officers" article of Chapter 9 of the Revised Code are the same officers that are specifically enumerated in section 58-76-5 today. None of the officers listed in the "State Officers" article are found in section 58-76-5. The General Assembly has therefore historically categorized the enumerated officers in section 58-76-5 as county officers. This historical classification reflects the General Assembly's intent that the statute provide a right of action

5. The parties do not contest that magistrates are state officials.

against only bonded county officers, which necessarily excludes magistrates as state officers.

The broader statutory context of the articles governing official bonds today similarly confirms that section 58-76-5 is limited to county officials. Articles 72 through 76 of Chapter 58 of the North Carolina General Statutes address official bonds today. Many of the provisions throughout the five articles include the same list of officers provided in section 58-76-5. *See* N.C.G.S. § 58-72-10 (2021) (governing the condition and terms of official bonds for "[e]very treasurer, sheriff, coroner, register of deeds, surveyor, and every *other officer of the several counties* who is required by law to give a bond for the faithful performance of the duties of his office" (emphasis added)). None of the provisions specifically address magistrates or magistrates' bonds. Additionally, many of the provisions within the five articles consistently reference county commissioners, who are heavily involved in the bond process for county officials. *See* N.C.G.S. § 58-72-25 (2021) (tasking the board of commissioners with filling vacancies if an officer fails to renew his bond); N.C.G.S. § 58-72-60 (2021) (declaring every commissioner who approves an official bond that he knows to be insufficient liable as if he were a surety thereto). Conversely, county commissioners play no role in the process surrounding magistrates' bonds.[6] The differing procurement procedures for magistrates' bonds as compared to the procedures for bonds for county officers reflect the legislature's intent that magistrates are excluded from the scope of "other officer[s]" in section 58-76-5. Thus, not only has the General Assembly historically categorized the officers enumerated in section 58-76-5 as county officers, but the broader statutory context today also indicates that the General Assembly has intended to continue to limit section 58-76-5 to county officers.

The statutory history of section 58-76-5 further reinforces that the statute applies only to claims against county officers and does not extend to claims against state officials. In 1965, the General Assembly enacted the Judicial Department Act, which reorganized our state court system into its current structure. *See* An Act to Implement Article IV of the Constitution of North Carolina by Providing for a New Chapter of The General Statutes of North Carolina, ch. 310, 1965 N.C. Sess. Laws 369, 369–420. The changes transformed the State's more local, county-centric

6. Magistrates' bonds are overseen by the Administrative Officer of the Courts, a state officer, who determines the amount by which magistrates shall be bonded and procures such bonds from the indemnity or guaranty company. *See* N.C.G.S. § 7A-174.

court system into one unified statewide system divided into an Appellate Division, a Superior Court Division, and a District Court division. *Id.* at 370 (codified at N.C.G.S. § 7A-4). As a necessary corollary of this transition "to a uniform system completely operational in all counties of the State," *id.* at 370, the General Assembly eliminated several local judicial offices, such as justices of the peace and constables,[7] and created several state judicial offices, such as magistrates, *id.* at 380–82 (codified at N.C.G.S. §§ 7A-170 to -176).

Because of this reorganization, the General Assembly twice revised section 58-76-5. Both revisions reflect the statute's local focus on county officers. First, in 1973, the General Assembly deleted a reference to constables in an earlier version of section 58-76-5 (then codified at N.C.G.S. § 109-34) because the legislature had eliminated that office with the passing of the Judicial Department Act. *See* Act of Mar. 28, 1973, ch. 108, § 59, 1973 N.C. Sess. Laws 84, 88.[8] Notably, the General Assembly did not simultaneously add magistrates to section 58-76-5's enumerated list of officers. In the same session law, however, the General Assembly specifically added "magistrates" to several other provisions throughout the General Statutes. These deliberate decisions support the conclusion that "magistrates" fall outside the scope of "other officer[s]" in section 58-76-5.

Subsequently, the General Assembly deleted the office of "clerk of the superior court" from section 58-76-5's list of enumerated officers. *See* An Act to Make Technical Corrections to the General Statutes as Recommended by the General Statutes Commission and to Make Various Other Technical Changes to the General Statutes and the Session Laws, S.L. 2010-96, § 29, 2010 N.C. Sess. Laws 377, 385. This change was also a warranted consequence of the enactment of the Judicial Department Act and reflects section 58-76-5's local focus on county officers. Before

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7. Constables were elected county officers who generally served under the justices of the peace in a specific township. N.C. Revised Code of 1905, ch. 9, § 302. They shared similar duties to the county sheriffs and could make arrests and enforce criminal laws throughout the county that their township covered. *See State v. Corpening*, 207 N.C. 805, 178 S.E. 564 (1935). Constables also often served as "collecting agent[s]." *Morgan v. Horne*, 44 N.C. (Busb.) 25, 26 (1852).

8. Constables were expressly classified as county officials in Chapter 9 of the N.C. Revised Code of 1905. This classification reinforces section 58-76-5's local focus and the General Assembly's historic consideration of the statute as encompassing only county officers. The deletion of constable—a county officer—from the list does not detract from the county-specific nature of the list. Rather, the deletion was necessary because the office no longer existed.

1965, superior court clerks were considered county officials, consistent with the local nature of our state's court system prior to the reorganization. Upon the enactment of the Judicial Department Act, however, superior court clerks became classified as state officials. *See* N.C.G.S. § 7A-101(a) (2021) ("The clerk of superior court is a full-time employee of the State . . . ."). Therefore, because superior court clerks were no longer classified as county officers, the General Assembly's deletion of superior court clerks from the statute was necessary in order to retain section 58-76-5's county focus.[9]

A broad reading of section 58-76-5 to include *all* bonded officials would render the legislature's deletion of superior court clerks from the statute's enumerated list of officers futile. Under this reading, superior court clerks would seemingly qualify as "other officer[s]" even after their express deletion from the statute simply because they were statutorily required to hold a bond. Such a reading, however, would fail to give effect to the legislature's specific amendment to the statute. *See Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992) ("[W]e follow the maxim[ ] of statutory construction that . . . [statutory] amendments are presumed not to be without purpose."). The changes the legislature has made to section 58-76-5 reflect the legislature's continued intention to confine the statute to county officers.

Section 58-76-5's internal structure, broader statutory context, and statutory history make clear that the General Assembly intended to limit section 58-76-5 to statutory bond actions against bonded county officers. We therefore hold that magistrates are not included within the scope of "other officer[s]" under N.C.G.S. § 58-76-5. Accordingly, N.C.G.S. § 58-76-5 does not waive defendant's sovereign immunity.

[2] We next consider whether defendant may assert judicial immunity as a defense to plaintiff's official capacity bond claim. Because judicial immunity protects judicial officials from litigation arising out of acts performed in their judicial capacity, we conclude that judicial immunity applies to official capacity and individual capacity claims. The essential question is whether the judicial officer acted in a judicial capacity, or in the discharge of his official duties. The availability of judicial immunity

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9. Similar to constables, clerks of superior court were expressly classified as county officials in Chapter 9 of the N.C. Revised Code of 1905. The deletion of superior court clerks from the enumerated list of officers does not detract from the county-centric nature of the list. Instead, the deletion likewise reinforces the statute's local focus. The deletion was necessary in order to reflect superior court clerks' conversion from county officers to state officers with the enactment of the Judicial Department Act.

as a defense does not hinge upon whether the plaintiff decided to bring an official capacity or individual capacity claim against a judicial officer.

It has long been recognized that judicial immunity is "a general principle of the highest importance to the proper administration of justice." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871). "[A] judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* Recognizing this principle, this Court has broadly held that a "judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties." *Town of Fuquay Springs v. Rowland*, 239 N.C. 299, 301, 79 S.E.2d 774, 776 (1954); *see also Hedgepeth v. Swanson*, 223 N.C. 442, 444, 27 S.E.2d 122, 123 (1943) ("[O]fficers acting in a judicial capacity or quasi-judicial capacity are exempt from civil liability and cannot be called upon to respond in damages to private individuals for the honest exercise of [their] judgment though [the] judgment may have been erroneous . . . ." (emphasis omitted)). Only when a judicial or quasi-judicial officer "acts corruptly or of malice" rather than "in . . . honest exercise of his judgment . . . is he liable in such a suit instituted against him." *Id.*

Despite this precedent, the Court of Appeals held that judicial immunity is a categorically unavailable defense to an official capacity claim against a judicial officer.[10] *Wynn*, 278 N.C. App. at 603, 863 S.E.2d at 795–96. The Court of Appeals reasoned, and plaintiff here similarly contends, that judicial immunity applies to individuals, while sovereign immunity applies to the State and its public officials in their official capacity. *Id.* at 603, 863 S.E.2d at 795. Therefore, according to the Court of Appeals, "[t]hese differences show that the doctrines of sovereign immunity and judicial immunity are not intended to be parallels applicable under the same circumstances." *Id.* at 603, 863 S.E.2d at 796.

Our case law, however, clearly establishes that judicial immunity protects judicial officers from liability when they perform judicial acts and presents a complete and absolute bar to recovery regardless of whether the plaintiff brings an official or individual capacity claim. In *Fuquay Springs*, for instance, this Court specifically held that a judge could assert judicial immunity as a defense to an official capacity claim.

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10. In an official capacity claim, the plaintiff "seeks recovery from the entity of which the public servant defendant is an agent." *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887. An official capacity claim therefore seeks damages from the State itself. *Id.* Alternatively, in an individual capacity claim, the plaintiff "seeks recovery from the defendant directly" and personally. *Id.*

In that case, the town of Fuquay Springs filed suit against a judge in his official capacity, alleging the judge had instructed the clerk of court to refrain from taxing certain fees in select cases. 239 N.C. at 299–300, 79 S.E.2d at 775–76. The judge, however, contended that the complaint failed to state a valid claim because the town could not sue him in his official capacity. *Id.* at 300, 79 S.E.2d at 775. This Court agreed and held that "[a] judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties." *Id.* at 301, 79 S.E.2d at 776. Accordingly, judicial immunity barred the plaintiff's official capacity claim against the judicial official.[11]

Similarly, in *Hedgepeth*, the plaintiff brought an official capacity claim against a county sheriff who "procur[ed] [a] search warrant for the plaintiff's premises and [a] warrant for [the plaintiff's] arrest." 223 N.C. at 445, 27 S.E.2d at 123. At the time, county sheriffs could enforce the law and also act in a judicial or quasi-judicial capacity in certain circumstances. Although the specific official capacity claim at issue ultimately involved a sheriff, we first noted the general rule that public officers acting in a judicial capacity may assert judicial immunity as a defense "for the honest exercise of [their] judgment though [the] judgment may have been erroneous." *Id.* at 444, 27 S.E.2d at 123. Therefore, in both cases, rather than basing our analysis on whether the plaintiff brought an official or individual capacity claim, we instead began with the general rule that officers are judicially immune from suit for acts performed in their judicial capacity and then considered whether the officer "committed [the error] in the discharge of his official duties," *Fuquay Springs*, 239 N.C. at 300, 79 S.E.2d at 776, or "act[ed] in a judicial capacity," *Hedgepeth*, 223 N.C. at 444, 27 S.E.2d at 123.

Here plaintiff sued defendant in his official capacity as a magistrate. Magistrates are judicial officers of the State. *See Foust v. Hughes*, 21 N.C. App. 268, 270, 204 S.E.2d 230, 231 (1974). Accordingly, under our precedent in *Fuquay Springs* and *Hedgepeth*, judicial immunity is an

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11. The Court of Appeals has consistently relied on *Fuquay Springs* in holding that public officials may assert judicial or quasi-judicial immunity when they engage in judicial acts pursuant to the discharge of their official duties. *See Price v. Calder*, 240 N.C. App. 190, 192–95, 770 S.E.2d 752, 754 (2015) (court-appointed commissioner had judicial immunity when overseeing a real property partition proceeding); *Bare v. Atwood*, 204 N.C. App. 310, 314–15, 693 S.E.2d 746, 750–51 (2010) (clerk of court had judicial immunity for acts in connection with partition of real property); *Sharp v. Gulley*, 120 N.C. App. 878, 880, 463 S.E.2d 577, 578 (1995) (family court-appointed referee had judicial immunity regarding equitable distribution determination for a marital estate); *Foust v. Hughes*, 21 N.C. App. 268, 270, 204 S.E.2d 230, 231–32 (1974) (magistrate had judicial immunity when issuing a warrant).

available defense to defendant. Because plaintiff's claim is independently barred by sovereign immunity, however, we need not consider whether defendant performed a judicial act in faxing the custody order to UNC Hospitals.[12]

In sum, section 58-76-5's text, structure, and history make clear that the statute encompasses only county, rather than state, officers. Magistrates therefore fall outside the scope of "other officer[s]" under the statute and accordingly retain their sovereign immunity in a statutory bond action under section 58-76-5. Judicial immunity is also an available defense because judicial immunity applies to both official and individual capacity claims. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

Justices DIETZ and ALLEN did not participate in the consideration or decision of this case.

Justice EARLS concurring in part and dissenting in part.

Across North Carolina, public officers at every level of government do their jobs with care and caution. Within their role, those officers are entrusted with "some portion of the sovereign power." *State v. Hord*, 264 N.C. 149, 155 (1965). But that "power, once granted, does not disappear like a magic gift when it is wrongfully used." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971). While most public servants faithfully discharge their duties, some do not. And even the best-intentioned officials make mistakes.

Recognizing that truth, our legislature granted citizens a path to relief: Bond actions. Before many public officers assume their role, they must secure bonds conditioned on the "faithful performance of the[ir] duties." *See, e.g.*, N.C.G.S. § 7A-174 (2021) (requiring magistrates

12. It should be noted that we discuss judicial immunity to correct a mistake made by the Court of Appeals which had limited the defense of judicial immunity. The dissent would go much further and summarily find defendant's conduct as not the type of conduct normally performed by a judicial officer, without the benefit of full briefing or argument on the issue. In fact, this Court specifically declined to consider how judicial immunity applies to the facts of this case by denying this very issue in plaintiff's conditional petition for discretionary review. Additionally, both parties concede in their briefs that this issue is not properly before the Court and would need to be remanded for its initial consideration.

to secure bonds as a condition of office). And in practice, those bonds protect "the public from any injuries caused by the public official" while "in office." *See* Jeffrey S. Price et al., *The Public Officials Bond—A Statutory Obligation Requiring "Faithful Performance," "Fidelity," and Flexibility*, 11 Fid. L. Ass'n J. 151, 160 (2006). When an officer's misfeasance causes harm, Section 58-76-5—the bond-action statute—allows injured citizens to sue that officer and his surety on the official bond. N.C.G.S. § 58-76-5 (2021).

By its terms, Section 58-76-5 sweeps broadly. It allows "[e]very person injured" to seek relief from an officer for "all acts" done "by virtue or under color" of his office. *Id.* The statute also lists some officials within its ambit, authorizing suits against "any register, surveyor, sheriff, coroner, county treasurer, or other officer." *Id.* The precise question is whether magistrates are "other officer[s]" liable on their official bonds. If they are, then sovereign immunity does not bar Mr. Wynn's claim against Magistrate Frederick. At stake, then, is whether Mr. Wynn may have his day in court. Whatever the merits of his suit, he cannot raise it at all if the bond-action statute does not apply and sovereign immunity remains intact.

But despite the provision's broad scope and broad purpose, the majority reads "other officer[s]" to include just county officials. And since magistrates are state officers, the majority exempts them from liability on their bonds. But that county-officer limit is missing from Section 58-76-5's text. It also clashes with the rest of the statute's language and the provisions surrounding it. And most importantly, it runs counter to the purposes of official bonds and bond actions: To make citizens "secure in their rights" and provide "adequate remedy for wrongs" flowing from official misconduct. *See State ex rel. Kivett v. Young*, 106 N.C. 567, 569 (1890). Because the majority improperly extinguishes Mr. Wynn's access to the courts and chance for relief, I respectfully dissent.

I. Judicial Immunity Does Not Shield Magistrate Frederick for Nonjudicial Acts

Analytically, I would address judicial immunity first. I agree with the majority that judicial immunity is at play when a magistrate is sued in both his individual or official capacity. But capacity itself is not the key focus—what matters instead is the nature of the magistrate's challenged conduct.

Judicial immunity attaches to acts, not offices. *Forrester v. White*, 484 U.S. 219, 227 (1988). Under that doctrine, a judicial officer is absolutely immune for his judicial conduct. *See Stump v. Sparkman*, 435

U.S. 349, 359 (1978). Magistrates are "judicial officers." *Bradshaw v. Admin. Off. of the Cts.*, 320 N.C. 132, 134 (1987); *see also id.* ("Our legislature has prescribed by statute many of the functions performed by magistrates, most of which require such independent judgment by a judicial officer."). And so here, the question is whether Mr. Wynn has sued Magistrate Frederick for a judicial act. If so, judicial immunity bars Mr. Wynn's claim. If not, we then ask whether sovereign immunity applies and whether the state has waived it.

At its core, judicial immunity safeguards the "independent and impartial exercise of judgment vital to the judiciary." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435 (1993). Still, an absolute bar to liability is "strong medicine." *Forrester*, 484 U.S. at 230 (cleaned up). So rather than woodenly insulating judicial officers, judicial immunity "is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Id.* at 227; *see also id.* at 224 (explaining that immunity turns on "the nature of the functions with which a particular official or class of officials has been lawfully entrusted"). Courts have thus drawn a firm "line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges." *Id.* at 227. And so a judge's acts *as a judge* are distinct from "the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Id.*; *see also Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731 (1980). Anchoring judicial immunity in judicial acts aligns the doctrine with its purpose and historical roots. *See Antoine*, 508 U.S. at 432–36.

The "touchstone" of a judicial act is whether the officer performs the "function of resolving disputes between parties, or of authoritatively adjudicating private rights." *Id.* at 435–36 (cleaned up); *accord Forrester*, 484 U.S. at 227 (describing "paradigmatic judicial acts" as those "involved in resolving disputes between parties who have invoked the jurisdiction of a court"). Courts also consider whether an act "is a function normally performed by" a judicial officer. *Stump*, 435 U.S. at 362; *see also Ex parte Va.*, 100 U.S. 339, 348 (1879) (declining to apply judicial immunity for conduct that "might as well have been committed to a private person as to one holding the office of a judge"). Relevant, too, is the officer's discretion in carrying out the conduct. *See Hedgepeth v. Swanson*, 223 N.C. 442, 444–45 (1943) (explaining that immunity protects "public officers acting in a judicial capacity or quasi-judicial capacity" when they are "engaged in official acts involving the exercise of judgment and discretion"); *Antoine*, 508 U.S. at 436 (withholding judicial immunity from court reporters transcribing proceedings because

they are "afforded no discretion" in that task and must simply "record, as accurately as possible, what transpires in court"). But the key point is clear: A judicial officer is only immune for the "kind of discretionary decisionmaking that the doctrine of judicial immunity is designed to protect." *Antoine*, 508 U.S. at 435; *see also Peavey v. Robbins*, 48 N.C. 339, 341–42 (1856) (granting immunity to election inspectors who were "acting judicially under a public law" and exercising "judicial power to adjudge upon the right of every man to vote at that precinct"). The reverse is true, too—judicial immunity does not extend to "such acts as are not judicial." *See Furr v. Moss*, 52 N.C. 525, 526–27 (1860).

Under that framework, Magistrate Frederick is immune for his judicial acts in considering and issuing the custody order for Mr. Morris. That decision required him to exercise discretion in "adjudicating private rights"—whether to involuntarily commit Mr. Morris. *See Antoine*, 508 U.S. at 436 (cleaned up); *see also* N.C.G.S. § 122C-281(b) (2021) (allowing a designated officer to issue a custody order if he "finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably a substance abuser and dangerous to self or others"). And custody determinations are "normally performed by" a judicial officer. *Stump*, 435 U.S. at 362; *see also id.* at 364 (explaining that "controversial" decisions about the "liberty and character of the parties" are "being constantly determined in . . . courts" (cleaned up)).

But judicial immunity does not shield Magistrate Frederick for negligently faxing the custody order to the wrong place. Sending a fax—unlike resolving a custody request—is not the "kind of discretionary decisionmaking that the doctrine of judicial immunity is designed to protect." *See Antoine*, 508 U.S. at 435. In fact, it requires virtually no discretion at all. *See City of Bayou La Batre v. Robinson*, 785 So. 2d 1128, 1133 (Ala. 2000) (withholding judicial immunity from a magistrate because she was "executing an administrative duty that did not involve the exercise of judgment" when she faxed a "warrant-recall order to the police department upside down"). Sending a fax does not invoke a magistrate's "judicial or adjudicative" power, *see Forrester*, 484 U.S. at 229, nor require him to "exercise the kind of judgment" inherent in judicial decision-making, *see Antoine*, 508 U.S. at 437. Any person—whether a Supreme Court justice or a part-time secretary—goes through the same mechanical actions to fax a document. Because that conduct is not normally performed by a judicial officer, it "might as well have been committed to a private person," *Ex parte Va.*, 100 U.S. at 348; *see also Forrester*, 484 U.S. at 228. Mr. Wynn thus seeks relief from Magistrate Frederick for an "administrative" function beyond the embrace of judicial immunity. *See Forrester*, 484 U.S. at 228.

Since Magistrate Frederick is not judicially immune for nonjudicial acts, the next question is whether sovereign immunity bars Mr. Wynn's claim. When a plaintiff sues a state officer in his official capacity, the state itself is the true party in action. *See Meyer v. Walls*, 347 N.C. 97, 110 (1997) (explaining that an official capacity claim "seeks recovery from the entity of which the public servant defendant is an agent"). But the state—as a sovereign—is absolutely immune from suit unless it consents. *See Corum v. Univ. of North Carolina*, 330 N.C. 761, 785–86 (1992). Thus, Mr. Wynn may sue Magistrate Frederick in his official capacity for nonjudicial acts only if the state waived sovereign immunity from that claim.

II. The Bond-Action Statute Waives Magistrates' Sovereign Immunity from Suit on their Official Bonds

Everyone agrees that the bond-action statute allows suit against covered officers when they cause injury through "neglect, misconduct, or misbehavior in office." *See* N.C.G.S. § 58-76-5. Mr. Wynn alleges that Magistrate Frederick "neglect[ed]" to send Mr. Morris' custody order to a proper law enforcement officer, thereby causing Mr. Wynn's injuries "by virtue or under the color" of his office as magistrate. *See id.* The question is whether the bond-action statute applies to Magistrate Frederick at all. If it does, then the state—by rendering magistrates liable on their official bonds—consented to claims like Mr. Wynn's. If it does not, then sovereign immunity remains intact. Because I would hold that a magistrate is an "officer" covered by the bond-action statute, I would allow Mr. Wynn to sue Magistrate Frederick on his official bond.

A. Statutory Text

1. Ordinary and Legal Meaning

Like the majority, I start with the statute's text. *See Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992). The bond-action provision, as the majority notes, does not expressly list magistrates. After mentioning some public officials, it reaches further, including "other officer[s]" within its compass. That language is broad, but intentional. In practice, that catch-all clause is a statutory safety net. By including it, the legislature expanded the provision beyond the specific officers it lists. Otherwise, there would be no reason to mention "other officer[s]" at all. And to underscore the provision's breadth, the legislature did not attach any qualifier or limit to the term "officer."

When the legislature has not supplied a definition, we generally give a term its ordinary meaning. *Wilkie v. City of Boiling Spring Lakes*, 370

N.C. 540, 550 (2018). In common use, an "officer" is "a person holding public office under a national, state, or local government, and authorized by that government to exercise some specific function." *See Officer*, *Black's Law Dictionary* (11th ed. 2019). Magistrates fit that description. The legislature created their position, *see* N.C.G.S. § 7A-170(a) (2021), set qualifications on it, *see* N.C.G.S. §§ 7A-171, -171.2, 171.3, 173, 177 (2021), and fixed the functions magistrates perform, *see*, *e.g.*, N.C.G.S. §§ 7A-211, 211.1, 213 (2021). So in ordinary language, magistrates are "officers."

That common meaning fits with common legal use. Other provisions of law classify magistrates as "officers." Our Constitution designates magistrates as "officers of the District Court" where they sit. N.C. Const. art. IV, § 10. Our statutes say the same. N.C.G.S. § 7A-170(a) ("A magistrate is an officer of the district court"); *see also* N.C.G.S. § 14-230(a) (listing magistrate as one "such officer" who is subject to criminal penalties for willfully failing to discharge official duties). And this Court has drawn on those provisions in labeling magistrates "judicial officers." *Bradshaw*, 320 N.C. at 134.

In reading statutes, this Court presumes that the legislature acts with awareness of the law. We presume that it chooses its words with care. We presume, too, that it intends language to have its ordinary meaning unless it says otherwise. *Wilkie*, 370 N.C. at 550. Since a magistrate is an "officer"—both in common speech and broader legal parlance—I would give that word its "natural, approved, and recognized meaning." *Black v. Littlejohn*, 312 N.C. 626, 638 (1985).

2. The Other Language in the Bond-Action Statute

All the same, we do not interpret language in a vacuum. We read a statute with an eye towards its context and internal structure. *See Smith v. United States*, 508 U.S. 223, 229 (1993). But here, text, structure, and context point the same way: Throughout the bond-action statute, the legislature chose broad language to reinforce the provision's broad sweep. In defining the scope of a bond action, for instance, the provision focuses on the nature of the injuring act rather than the title of the injuring officer. It grants a right of action to "[e]very person injured" by an officer's "neglect, misconduct, or misbehavior in office." N.C.G.S. § 58-76-5. The "person injured" may sue the officer and the surety on the bond "for the due performance of their duties in office in the name of the State." *Id.* The provision closes with a broad statement of its purpose: An officer and his surety "shall be liable to the person injured for all acts done by said officer by virtue or under color of that officer's office." *Id.*

So the statute does not distinguish between state and county officers. Throughout, it refers to "every such officer," "the officer's official bond," and "that officer's office" without limiting these terms. And so taken as a whole, the text focuses on whether an officer caused injury "by virtue or under color" of his position and official authority. This Court has recognized the language's sweep. The bond-action statute, we have explained, is "very comprehensive in its terms, scope and purpose." *Kivett*, 106 N.C. at 569. By enacting it, the legislature "enlarge[d] the compass of the conditions of official bonds and their purpose." *Id.* And rightfully so—that scheme tracked "serious" concerns of "justice and policy." *Id.* So the thrust of the statute's text and the principles animating it reach beyond the majority's cramped interpretation. *See id.* ("[S]uch officers, indeed all public officers, should be held to a faithful discharge of their duties as such. . . . So that now official bonds and the conditions of them embrace and extend to all acts done by virtue or under color of office of the officer giving the bond.").

3. The Language of the Statute Requiring Magistrates to Secure Bonds

Consider, too, the text of Section 7A-174—the provision mandating that magistrates secure a bond in the first place. N.C.G.S. § 7A-174. Starting in 1965, the General Assembly required magistrates to obtain bonds before taking office. *See* An Act to Implement Article IV of the Constitution of North Carolina by Providing for a New Chapter of The General Statutes of North Carolina, ch. 310, 1965 N.C. Sess. Laws 369, 382.[1] And the legislature conditioned those bonds "upon the faithful performance of the duties of the office." *Id.* If that language sounds familiar, it is—the bond-action statute uses parallel phrasing. That provision—echoing Section 7A-174—allows "[e]very person injured" to sue an officer on his bond "for the due performance of [the officer's] duties in office." N.C.G.S. § 58-76-5. So a citizen may recover on a bond for the same reason a magistrate must obtain one: To ensure the "due" or "faithful" performance of his official duties.

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1. Just this year, the legislature repealed the statute requiring magistrates to secure bonds. *See* An Act to Make Various Changes and Technical Corrections to the Laws Governing the Administration of Justice, As Recommended by the Administrative Office of the Courts and to Allow for the Expunction of the Offense of Breaking and Entering of a Building with Intent to Commit a Felony or Larceny and Amend the Conditions that Result in a Petition for Expunction Being Denied, S.L. 2023-103, § 5(b), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-103.pdf. Because that repeal took effect on 21 July 2023, the majority's holding applies to a narrow universe of claims—those filed before the repeal of N.C.G.S. § 7A-174.

I think that shared language signals a shared meaning. *See United Savings Assn. v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (cleaned up)). It also triggers a cardinal rule of construction: When statutes cover the same "matter or subject," this Court must construe them together *in pari materia*. *DTH Media Corp. v. Folt*, 374 N.C. 292, 300 (2020) (cleaned up). That requires us to harmonize the legislature's language, giving "effect, if possible, to all provisions without destroying" their meaning. *Id.* (cleaned up).

And here, reading Section 7A-174 *in pari materia* with the bond-action statute undercuts the majority's narrow construction. Because of his public office, a magistrate—just like a county officer—wields heightened power. To ensure responsible use of that power and the faithful performance of his official duties, a magistrate—just like a county officer—must secure a bond. When a magistrate—just like a county officer—engages in "neglect, misconduct, or misbehavior in office," he deviates from "due performance of [his] duties." *See* N.C.G.S. § 58-76-5. And when those actions injure a person, a magistrate—just like a county officer—effected that harm "by virtue or under color of [his] office." *See id.*

In that case, allowing injured citizens to seek relief realizes the purpose of a magistrate's bond and the purpose of a bond action. And so reading "officer" to cover magistrates harmonizes overlapping statutes, giving effect to what the legislature enacted and the language it used. By coupling magistrates' bond requirement with a broadly phrased waiver of immunity on those bonds, the legislature designed a principled scheme. One that anchors magistrates, like other public officers, to the people they serve.

But in its reading of the bond-action statute, the majority shunts aside Section 7A-174, effectively nullifying that provision's text and its purpose in requiring magistrate bonds. If, as the majority says, no one may sue a magistrate on his bond, then that bond is but a piece of paper. It has no function but to enrich bond companies who receive payment without ever needing to compensate injured people. And without any recourse under it, a magistrate's bond cannot—as the legislature intended and enacted—ensure "faithful performance of the duties of the office." N.C.G.S. § 7A-174. It is, in a word, surplusage. I do not think the General Assembly intended for magistrates' bonds to be a ticket to nowhere.

In short, I would give "other officer[s]" its ordinary meaning—a meaning that fits with its broader legal use and the rest of the statute's language. I think it significant that the statute says "officer" without qualifying that label or limiting its reach to specific strata of government. Other textual clues underscore that broad sweep. We know that the legislature included a catch-all phrase to widen the statute's aperture. We know, too, that the statute does not focus on an officer's precise job title, but on whether he caused injury "by virtue or under color" of his office. And we know that a magistrate's bond ensures the "faithful performance" of his duties—language echoed by the bond-action provision and consonant with its purpose. *See* N.C.G.S. § 7A-174.

More fundamentally, the majority's interpretation of the bond-action statute bleeds Section 7A-174 of meaning. If the General Assembly ordered magistrates to secure bonds but barred citizens from suing on them, then those bonds and the statute requiring them were little more than inkblots. And so on the majority's view, Section 7A-174 meant nothing—not when the legislature enacted it in 1965 and not in the nearly 60 years since. I cannot afford the bond-action statute such a piecemeal, disjointed interpretation.

Thus, giving "officer" its straightforward interpretation with an eye toward context and structure, the bond-action statute covers magistrates. For that reason, I would rely on "the words actually used in [the] statute" and decline to "insert words not used in the relevant statutory language during the statutory construction process." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258 (2016) (cleaned up).

B. The *Ejusdem Generis* Canon

In constricting the bond-action statute, the majority relies on the *ejusdem generis* canon. When general words follow specific ones, it reasons, the latter must cabin the former. And since the bond-action statute lists county officials before "other officers," the majority restricts that phrase to county officials, too.

But *ejusdem generis*—like every interpretive canon—is but a tool for divining legislative intent. *See State v. Fenner*, 263 N.C. 694, 698 (1965); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (explaining that "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation" (cleaned up)). It is a fallback means of construction rather than an unflinching "limitation in scope" of a statute's "general words or terms." *Fenner*, 263 N.C. at 698. For that reason, *ejusdem generis* does "not warrant the court subverting or defeating the legislative will." *Id.* And so it does not control

"when the whole context dictates a different conclusion." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991); *Rice v. Rehner*, 463 U.S. 713, 732 (1983) (explaining that courts should not use a canon of construction "when application would be tantamount to a formalistic disregard of congressional intent"). As discussed above and below, I think the "whole context" of the bond-action statute cuts against the majority's cramped reading.

Start with the linchpin of the majority's analysis: Our decision in *Meyer*. In that case, as the majority explains, we considered whether a county agency fell "within the scope of the general terms 'departments, institutions, and agencies' in the State Tort Claims Act." But as the majority tells it, this Court applied *ejusdem generis* "because all of the 'departments, institutions, and agencies' specifically enumerated within the statute were state entities." From that, the majority extracts a general rule: When a statute lists entities within a specific strata of government, that limit applies to any general terms that follow.

But that rendition of *Meyer* omits key distinctions between that case and this one. Reproduced in full, the State Tort Claims Act (STCA) allowed suits "against the State Board of Education, the Board of Transportation, and all other departments, institutions, and agencies *of the State*." *Meyer*, 347 N.C. at 105 (emphasis omitted) (quoting N.C.G.S. § 143-291(a) (1996)). So unlike the bond-action statute, the STCA expressly limited its scope to a specific sphere of government.

That state-specific qualification mattered to *Meyer*'s analysis. Relying on the statute's textual limit and its mention of particular state entities, *Meyer* read the STCA to "appl[y] only to actions against state departments, institutions, and agencies." *Id.* at 107. By its terms, the statute waived immunity for "the State departments and agencies" but did "not include local units." *Id.* at 106 (quoting *Turner v. Gastonia City Bd. of Educ.*, 250 N.C. 456, 463 (1959)). And though a county department of social services is an agent of North Carolina's Department of Human Resources, we explained that an "agent of the State and a state agency are fundamentally different and are treated differently by the [STCA]." *Id.* at 107. The provision only authorized "a claim against the State agency." *Id.* at 105 (quoting *Wirth v. Bracey*, 258 N.C. 505, 507–08 (1963)). And since a county entity was "not a state agency," the STCA did not waive its immunity. *Id.* at 104.

Placed in context, *Meyer* did not announce the flat rule the majority wrings from it. Our reasoning in that case tracked the precise statute before us. And since the STCA differs sharply from the bond-action statute, I would not pluck *Meyer*'s analysis from its context. Unlike the

provision here, the STCA lacks a catch-all clause. And more importantly, the STCA expressly limited its application to state government entities. In other words, the legislature signaled its intent to treat state and county actors differently. Those textual guardrails shaped how we applied *ejusdem generis*. We did not bar STCA claims against local entities simply because the parties "specifically enumerated within the statute were state entities," as the majority contends. Instead, the provision expressly limited liability to subdivisions "of the State," drawing the very state-local distinction the majority imports into the bond-action statute. So for *Meyer*'s analysis to map onto this case, the bond-action provision—paralleling the STCA—would have to narrow liability to "other officers of the county." It does not.

In more applicable cases, however, this Court has flagged *ejusdem generis* as a particularly poor tool for reading public-officer statutes. In *Ross*, for instance, we considered whether the phrase "any other fiduciary" enlarged the "scope of the embezzlement statute." *State v. Ross*, 272 N.C. 67, 71 (1967) (emphasis omitted). The defendant, a commissioner, urged us to narrow the provision via *ejusdem generis*. *Id.* The statute did not mention commissioners "by name," he noted. *Id.* And commissioners were "not in the same class" as the enumerated officers—officers like a "guardian, administrator, executor, [or] trustee." *Id.* That meant, he contended, that *ejusdem generis* excluded him from the statute's sweep. *See id.*

We rejected that narrow reading. By mentioning "any other fiduciary," we explained, the General Assembly broadened the statute's aperture. *Id.* That language "cannot be ignored." *Id.* And so to carry out the legislature's intent, we focused on the power an officer wielded rather than their job title. *See id.* at 71–72. Like a receiver, we explained, a commissioner functions as "an arm or hand of the court." *Id.* at 71 (cleaned up). Acting "under authority of and subject to the orders of the clerk of the superior court," a commissioner collects and distributes money. *Id.* Since a commissioner wields the authority of the law, "[s]pecial confidence and trust is imposed in him." *Id.* at 72. And so commissioners—like the other officers in the statute—were "fiduciaries whose duties are prescribed by law and who act under the supervision and orders" of a higher power. *Id.* at 71. We thus declined to narrow the statute through *ejusdem generis*. In view of the commissioner's official duties and the "special confidence" attached to his position, a functional analysis was more faithful to legislative intent. *See id.* at 71–72.

I would take the same approach with the statute here. In my view, the key metric is the power wielded by an officer rather than the label

attached to the office. A magistrate—like the other officers listed in the bond-action statute—is clothed with the state's authority. And because of that power, a magistrate—like the other officers—is entrusted with "[s]pecial confidence and trust." *Cf. id.* at 72. Recognizing that fact, the legislature required magistrates—like the other officers—to secure a bond conditioned on the "faithful performance" of their official duties. And because of their official power and the "[s]pecial confidence" placed in them, *cf. id.*, magistrates—like the other officers—should be liable on their bond for their misfeasance in office. Woodenly deploying *ejusdem generis* would yield an unduly narrow reading, converting a tool for discerning intent into one that defeats it.

According to the majority, however, interpreting "other officer[s]" to cover magistrates would nullify the statute's "specific references" to certain officials. If the General Assembly intended to give those "general words" their "unrestricted sense," the majority reasons, it would have deleted the statute's specific enumerations.

But the reverse is true, too. If the legislature wished to adopt the majority's narrow construction, it would have axed the broad reference to "other officer[s]." It could have also inserted the county-level limitation the majority adds to the text. Indeed, the legislature has done just that in neighboring provisions. And as the majority documents, the legislature has reshuffled and revised the bond-action statute, removing some officers from its scope and restructuring the provisions around it. But the phrase "other officer[s]" has weathered each round of revision. I think its retention is an important clue of legislative intent.

C. Statutory Context

Statutory context supports what the text says: That magistrates are "officer[s]" liable on their official bonds. In neighboring statutes, the legislature made clear its intent to guarantee citizens a remedy for official misconduct. To advance that goal, other provisions close loopholes to officers' liability on their bonds.

Section 58-72-1, for instance, prevents an officer from escaping suit based on a technical error in his bond or an "irregularity or invalidity in the conferring of the office or making of the appointment." N.C.G.S. § 58-72-1 (2021). The statute specifically applies to bonds issued by a county's board of commissioners—a restriction only relevant for county officials. But that provision—like the bond-action statute—then reaches further, covering "any person or persons acting under or in virtue of any public authority." *Id.* Even if an officer did not properly assume his role and even if the bond itself contains mistakes, those technicalities do

not defeat the officer's liability. So long as the bond "purport[ed] to be a bond executed to the State for the performance of any duty belonging to any office or appointment," it provides a "valid" right of action "for the benefit of the person injured by a breach of" its conditions. *Id.*; *accord* N.C.G.S. § 58-72-5 (2021) (imposing a $500 penalty for "[e]very person or officer of whom an official bond is required" who "presumes to discharge any duty of his office before" securing a required bond).

Against that backdrop, the omission of a county-officer limit from the bond-action statute is especially striking. For when the General Assembly wants to cabin bond provisions to a particular class of officials, it can—and will—do so.

Some provisions focus on state officers. *See*, *e.g.*, N.C.G.S. § 58-73-1 (2021) (permitting state officials to name an "indemnity or guaranty company" as surety for official bond); N.C.G.S. §§ 58-73-5, -15, -20, -25 (2021) (parsing how a surety company may secure a state officer's bond and the liability that a company may incur on that bond). Other provisions zero in on county officers. *See*, *e.g.*, N.C.G.S. § 20-114(a) (2021) (providing that the "lawful officers of any county" may be "liable on his official bond" for neglecting or refusing to perform statutory duties).

And most relevant to the bond-action statute, provisions in the same chapter contain the very county-officer limit that the majority adds. *See*, *e.g.*, N.C.G.S. § 58-72-10 (2021) ("Every treasurer, sheriff, coroner, register of deeds, surveyor, *and every other officer of the several counties* who is required by law to give a bond for the faithful performance of the duties of his office, shall give a bond for the term of the office to which such officer is chosen.") (emphasis added); N.C.G.S. § 58-72-15 (2021) (authorizing the commissioners "of the county in which said officer or officers are elected" to pay the premiums on the bonds of county officers as well as the "assistants, deputies or other persons regularly employed in the offices of *any such county officer or officers*") (emphasis added).

The legislature also provided county-specific enforcement mechanisms for county-specific bonds. Section 58-72-20 requires that county officers' bonds be "carefully examined on the first Monday in December of every year" to ensure sufficient collateralization. N.C.G.S. § 58-72-20 (2021). If a county officer fails to renew his bond, the county's board of commissioners must "declare his office vacant" and "appoint a successor." N.C.G.S. § 58-72-25 (2021). The citizens of a county also have statutory recourse. If they reasonably suspect that "the bond of any officer of such county" is inadequately secured, those citizens may request—and a judge may require—that the county officer appear in court and prove the validity of his bond. N.C.G.S. § 58-72-35 (2021).

Those examples underscore the same point: The General Assembly is well-versed in the legal regimes surrounding state and county officials. And when it intends to limit a bond provision to one strata of government, it can—and will—add that restriction in the text. But the bond-action statute—unlike the provisions surrounding it—contains no such limit. I would not insert a constraint where the legislature has not.

D. History

Though the majority offers a thoughtful survey of the statute's evolution, I think the history is less clear-cut than the majority suggests.

A century ago, North Carolina's bond statutes looked quite different. As the majority recounts, the chapter dealing with public officer bonds once contained separate provisions listing "State Officers" and "County Officers." N.C. Revised Code of 1905, ch. 9, §§ 287–306 (1905). In current form, the bond-action statute mentions some of the county-level positions it did a century ago. Per the majority, that continuity shows that the legislature has "historically categorized" those positions "as county officers." And that "historical classification," the majority contends, reflects the legislature's intent to limit suits to "only bonded county officers." By drawing that line, the majority concludes, the legislature "necessarily exclude[d]" state officers—like magistrates—from liability on their bonds.

I take different lessons from that history. While the 1905 code parceled out which state and county officers needed to secure bonds, it provided a single cause of action on those bonds. *See* N.C. Revised Code of 1905, ch. 9, § 281. And the bond-action statute of 1905 is nearly identical to the one we have today, including the catch-all phrase "or other officer[s]." *See id.* More tellingly, the legislature inserted that broadly phrased cause of action *before* the provisions listing state and county officers. In other words, though some portions of the code distinguished state officers from county ones, the bond-action statute then—like the bond-action statute now—did not draw the same lines. *See id.*

That was not an oversight. Like the statutory scheme we have today, the 1905 code prescribed specific rules for specific classes of public officers. Section 308, for example, required the officers "of the several counties" to examine their bonds on the first Monday of each December. *Id.* § 308. Even more, the code set separate rules for who could serve as sureties for the bonds of state officers versus officers in a "county, city, town or township in this state." *Compare id.* § 272 (addressing state officials), *with id.* § 273 (addressing local officials).

The point is that the 1905 code—like the regime we have today—is replete with examples of the legislature expressly distinguishing between and dictating separate rules for state and local officers. But that differential language never made its way into the bond-action statute. Then, as now, the legislature kept the broad reference to "other officer[s]." To now restrict that phrase to county officers would stray from history, not follow it.

In broader perspective, too, the statute's history suggests a shift towards inclusion. Though earlier laws split state officers from local ones, the General Assembly scrubbed that divide from the current statutory regime. *Compare* N.C. Revised Code of 1905, ch. 9, *with* N.C.G.S. §§ 58-73 to -76 (2021). By puncturing the wall between state and local officers, the modern bond-action statute emphasizes the common thread between public servants. Whether an official serves the state or a county, he is entrusted with power greater than his own. And with that power comes the potential to misuse it and cause harm. By retaining the broadly phrased cause of action while erasing the once-strict barriers between state and county officers, the legislature has signaled that an officer's public position—not their place in the government hierarchy—dictates the need for both a bond and a bond action.

While reasonable minds can extract different insights from history, one lesson is irrefutable: Throughout the life of the bond-action statute, the General Assembly has revised it when it saw fit. It has excised some positions, renamed the provision, and restructured the broader statutory scheme. The legislature does not need this Court to tinker with the language it has enacted and retained for well over a hundred years. If it wanted to restrict bond suits to county officials, it would have done so.

E. Purpose

Ultimately, statutory analysis must embrace "the spirit of the act" and what it "seeks to accomplish." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001) (cleaned up). And here, the legislature enacted the bond-action statute to secure citizens' rights, furnish a remedy for injuries, and hold public officers accountable to the people they serve. *See Kivett*, 106 N.C. at 569.

To that end, this Court has read the bond statute against the backdrop of contract law, specifically principles of third-party beneficiaries. A statute created for the public "must be considered as in contemplation of the parties in making a contract." *State ex rel. Dunn v. Swanson*, 217 N.C. 279, 281 (1940). And when the legislature addresses "the liability of the parties to the public," the provision "becomes an enforceable part of

the contract made for their benefit." *Id.*; *see also State ex rel. Williams v. Adams*, 288 N.C. 501, 504 (1975); *State ex rel. Cain v. Corbett*, 235 N.C. 33, 39 (1952) (construing bond-action statute by drawing on the principle "that where a contract between parties is made for the benefit of a third party, the latter is entitled to maintain an action for its breach").

On that view, official bonds provide both a sword and a shield. They shield citizens by incentivizing public officers to "du[ly] perform[]" their duties and responsibly wield their power. *See* N.C.G.S. § 58-76-5. And when an officer misuses his office, bonds provide a sword, allowing a person to recover for injuries flowing from that malfeasance. On both scores, bonds recognize that public officers are—and should remain—officers of the public. Because they wield the people's sovereign authority, those officers must act with awareness and accountability.

By allowing bond suits, the legislature also recognized a practical truth: That a private citizen and a public official are "not on equal terms." *State ex rel. Price v. Honeycutt*, 216 N.C. 270, 276 (1939). When an officer acts, he does so under "color of an authority which" a citizen is "bound to respect." *Id.* And practically speaking, citizens have little choice but "to accept the official services of such officers." *Kivett*, 106 N.C. at 569. Citizens must thus "rely on the restraint which the law throws around" a public officer while "at the same time it clothes him with power." *Price*, 216 N.C. at 276.

For that reason, courts may not turn a blind eye when an officer "begins to violate his duty and inflict injury under color of his office." *Id.* For a government official "possesses a far greater capacity for harm" than a citizen "exercising no authority other than his own." *Bivens*, 403 U.S. at 392. And at its most basic, the "guaranty provided by law" is that "official duty shall not be disregarded" nor "the delegated power abused." *Price*, 216 N.C. at 276. The bond-action statute realizes that principle. By converting an officer's bond into a cause of action to remedy official malfeasance, the statute leaves citizens "secure in their rights," furnishes an "adequate remedy for wrongs done," and holds public servants "to a faithful discharge of their duties as such." *Kivett*, 106 N.C. at 569.

More broadly, the bond-action statute taps into principles of legitimacy and justice. As this Court once recognized, the "law is never more definitely on trial" than "when it comes in contact with the public in its execution." *Price*, 216 N.C. at 276. Faced with that friction, courts should "preserve the respect the people have for [the law] as an instrument of justice" and forestall "the spirit of just resentment against oppression, which often flares into rebellion." *Id.* The bond-action statute prefigures

that problem and provides one solution: It grants citizens a mechanism to ensure that "official duty shall not be disregarded" nor "delegated power abused." *Id.* And so when a public official acts "under color of his office down to the point where he is remiss in his duties," courts may not bury their head in the sand. *Id.* In those cases, justice requires what the bond-action statute authorizes: When a public officer abuses his power, he may not shed "his official character" and escape "into the first person singular, to the relief of his surety." *Id.*

For these reasons, I would hold that magistrates are "officer[s]" covered by the bond-action statute. That reading aligns with the provision's text, structure, purpose, and context. Though I agree with the majority that judicial immunity applies to official capacity claims, I would decline to immunize Magistrate Frederick for his nonjudicial acts. On sovereign immunity grounds, I think that the state consented to suit on a magistrate's official bond. I would thus give Mr. Wynn his day in court and hold that the bond-action statute allows him to seek relief from Magistrate Frederick on the magistrate's bond.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

DEENA DIECKHAUS, GINA MCALLISTER, BRADY WAYNE ALLEN, JACORIA STANLEY, NICHOLAS SPOONEY, AND VIVIAN HOOD, EACH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

v.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA

From N.C. Court of Appeals
21-797

From Orange
20CVS564

No. 105P23

ORDER

This matter is before this Court on plaintiffs' petition for writ of certiorari to review a decision of the Court of Appeals affirming the trial court's dismissal of plaintiffs' claims on the basis of sovereign and statutory immunity. The petition is (1) allowed for review of whether N.C.G.S. § 116-311 violates the Contracts Clause of the United States Constitution; (2) allowed for review of whether N.C.G.S. § 116-311 violates the Takings Clause of the United States Constitution; (3) allowed for review of whether the legislature's enactment of N.C.G.S. § 116-311 violated the due process clauses of both the United States and North Carolina Constitutions; (4) allowed for review of whether defendants' breach was "reasonably related to protecting the public health, safety, and welfare" as required under N.C.G.S. § 116-311(a)(2); and (5) denied as to all remaining issues.

By order of the Court in Conference, this the 13th day of December 2023.

/s/ Riggs, J.
For the Court

Barringer, J., recused.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN RE ADOPTION OF B.M.T.

[385 N.C. 607 (2023)]

IN THE MATTER OF THE ADOPTION OF	From N.C. Court of Appeals 22-377
B.M.T., A MINOR	FROM GUILFORD 19SP1132

No. 32PA23

ORDER

Reversed for the reasons stated in *In re C.H.M.*, 371 N.C. 22 (2018), and remanded for consideration of any outstanding issues on appeal.

By order of the Court in Conference, this the 15th day of November 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of November 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

JANU INC v. MEGA HOSP., LLC

[385 N.C. 608 (2023)]

JANU INC D/B/A STONECRAFTERS,
AUM HOSPITALITY SERVICES

v.

MEGA HOSPITALITY, LLC,
MEGA-C HOSPITALITY, LLC,
MEGA-B HOSPITALITY, LLC,
MEGA-K HOSPITALITY, LLC,
G.R. BHAT, AND SUJATA BHAT

From N.C. Court of Appeals
22-194

From Wake
18CVS15437

No. 91P23

ORDER

This Court allows defendants' petition for discretionary review for the limited purpose of vacating sections V and VI of the Court of Appeals decision (COA22-194) and remanding to the Court of Appeals for further remand to the trial court for hearing upon proper notice on defendants' motion to dismiss for lack of personal jurisdiction, consistent with this Court's holding in *Lynch v. Lynch*, 302 N.C. 189, 1978-98 (1981), and on defendants' motion for attorneys' fees.

By order of the Court in Conference, this the 13th day of December 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

RAKE v. SDC K-L, LLC

[385 N.C. 609 (2023)]

ERIN RAKE, D.D.S., P.C.;
HEIDI PANTAZIS D.M.D. PLLC

F/K/A RDEST DDS PLLC III;
HEALTHCARE DELIVERED, LLC
D/B/A ARIA CARE PARTNERS;
ARIA CARE MANAGEMENT, LLC
F/K/A MOBILECARE 2U, LLC; AND
ARIA DENTAL MANAGEMENT, LLC
F/K/A DEST DENTAL
MANAGEMENT, LLC

v.

SDC K-L, LLC; EROL KANLI, D.D.S.;
KATINA CLOUD; LESLIE JERNIGAN;
AND ELIZABETH KALLMAN

From N.C. Court of Appeals
P23-648

From Wake
23CVS019838

No. 304P23

ORDER

Plaintiffs' Motion for Temporary Stay is allowed without prejudice to defendants' right to move the trial court, in its discretion, to suspend or modify the injunction upon such terms as to bond or otherwise as the court considers proper for the security of the rights of the adverse parties under N.C.G.S. § 1A-1, Rule 62(c).

By order of the Court in Conference, this the 15th day of November 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of November 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

SOUTHLAND NATIONAL INSURANCE CORPORATION IN REHABILITATION, BANKERS LIFE INSURANCE COMPANY IN REHABILITATION, COLORADO BANKERS LIFE INSURANCE COMPANY IN REHABILITATION, AND SOUTHLAND NATIONAL REINSURANCE CORPORATION IN REHABILITATION

v.

GREG E. LINDBERG, GLOBAL GROWTH HOLDINGS, INC. F/K/A ACADEMY ASSOCIATION, INC., EDWARDS MILL ASSET MANAGEMENT, LLC, NEW ENGLAND CAPITAL, LLC, AND PRIVATE BANKERS LIFE AND ANNUITY CO., LTD.

From N.C. Court of Appeals
22-1049

From Wake
19CVS13093

No. 173P23

ORDER

This matter is before this Court on defendants' petition for discretionary review of a decision of the Court of Appeals affirming the trial court's decision that defendants were liable for breach of contract and fraud but vacating and remanding the decision as it related to remedies available to plaintiffs for defendants' fraud. The petition is (1) allowed for the purpose of reviewing whether reliance is reasonable in a claim for fraud in the inducement when a party fails to exercise due diligence; and (2) denied as to all remaining arguments.

By order of the Court in Conference, this the 13th day of December 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

WARREN v. SNOWSHOE LTC GRP., LLC

[385 N.C. 611 (2023)]

THOMAS A. WARREN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF THOMAS E. WARREN, JR., EVELYN WARREN, AND ROSALIND REGINA PLATT

v.

SNOWSHOE LTC GROUP, LLC, MMDS OF NORTH CAROLINA, INC., DR. KARRAR HUSSAIN, M.D., EAGLE INTERNAL MEDICINE AT TANNENBAUM, AND DR. RICHARD LYNCH, D.O.

From N.C. Court of Appeals
22-595

From Guilford
20CVS7857

No. 65P23

ORDER

Plaintiffs' petition for discretionary review is allowed for the following limited purpose. The 11 January 2023 order of the Court of Appeals dismissing plaintiffs' appeal is vacated, and this case is remanded to the Court of Appeals for consideration of whether a sanction other than dismissal is appropriate. *See Dogwood Development and Management Company v. White Oak Transportation Company*, 362 N.C. 191 (2008).

By order of the Court in Conference, this the 13th day of December 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

15 DECEMBER 2023

3P23-3	State of North Carolina v. Joseph Edwards Teague, III	Def's Pro Se Petition for Writ of Habeas Corpus (COA21-10)	Denied **10/30/2023**
3P23-4	State of North Carolina v. Joseph Edwards Teague, III	Def's Pro Se Motion to Vacate Conviction and Dismiss Charges and Declare a Mistrial with Prejudice (COA21-10)	Dismissed
18A14-3	State v. Paris Jujuan Todd	1. Def's Motion for Temporary Stay (COA22-680) 2. Def's Petition for Writ of Supersedeas 3. Def's Amended Motion for Temporary Stay 4. Def's Amended Petition for Writ of Supersedeas 5. Def's PDR Under N.C.G.S. § 7A-31 6. Def's Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed **10/10/2023** 2. Dismissed **10/10/2023** 3. Dismissed **10/19/2023** 4. Dismissed **10/19/2023** 5. Dismissed 6. Dismissed **Dietz, J., recused** **Riggs, J., recused**
24P23	SCGVIII-Lakepointe, LLC v. Vibha Men's Clothing, LLC; Kalishwar Das	1. Def's (Kalishwar Das) Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA21-740) 2. Def's (Kalishwar Das) Pro Se Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 3. Def's (Kalishwar Das) Pro Se Petition for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Denied 3. Denied **Dietz, J., recused**
25P23	Kalishwar Das v. SCGVIII Lakepointe, LLC in c/o Mr. John F. Morgan, Jr.	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COA21-806) 2. Plt's Pro Se Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	1. Denied 2. Denied **Dietz, J., recused**
32PA23	In the Matter of the Adoption of B.M.T., a Minor	The Court's *Ex Mero Motu* Motion to Reverse and Remand	Special Order **11/15/2023**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

15 DECEMBER 2023

54P23	C.G.C., a Minor, by and through her Guardian ad Litem, Sarah Homes; T.W.C., a Minor, by and through his Guardian ad Litem, Sarah Homes; and Patrick Joseph Campbell v. Regina Petteway (In her individual and official capacity); Katie Treadway (In her individual and official capacity); Heather Kane (In her individual and official capacity); Audrey Difilipo (In her individual and official capacity); Britney Keene (In her individual and official capacity); and Stephanie Pearson (In her individual and official capacity)	Plts' PDR Under N.C.G.S. § 7A-31 (COA22-56)	Denied
59P97-6	State v. Ardie DeFronso Nolon	1. Def's Pro Se Motion for PDR (COAP23-336) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Riggs, J., recused**
65P23	Thomas A. Warren, Individually and as Personal Representative of the Estate of Thomas E. Warren, Jr., Evelyn Warren, and Rosalind Regina Platt v. Snowshoe LTC Group, LLC, MMDS of North Carolina, Inc., Dr. Karrar Hussain, M.D., Eagle Internal Medicine at Tannenbaum, and Dr. Richard Lynch, D.O.	Plts' PDR Under N.C.G.S. § 7A-31 (COA22-595)	Special Order

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

15 DECEMBER 2023

73P23-2	State v. Tyrone Sequine Reynolds	Def's Pro Se Motion to Dismiss Without Prejudice	Dismissed
78P22-3	State v. Eric Antron Ingram	Def's Pro Se Motion for Notice of Appeal Based Upon a Dissent (COAP23-168)	Dismissed *ex mero motu*
79P17-2	State v. Jimmy Allen Roberts	Def's Pro Se Petition for Writ of Certiorari and/or Mandamus	Dismissed
88P23	State v. Ronald Matthews Speaks	Def's PDR Under N.C.G.S. § 7A-31 (COA22-499)	Denied
91P23	Janu Inc d/b/a Stonecrafters, AUM Hospitality Services v. Mega Hospitality, LLC, Mega-C Hospitality, LLC, Mega-B Hospitality, LLC, Mega-K Hospitality, LLC, G.R. Bhat, and Sujata Bhat	Defs' PDR Under N.C.G.S. § 7A-31 (COA22-194)	Special Order
105P23	Deena Dieckhaus, Gina McAllister, Brady Wayne Allen, Jacoria Stanley, Nicholas Spooney, and Vivian Hood, Each Individually and on behalf of all others similarly situated v. Board of Governors of the University of North Carolina	Plts' Petition for Writ of Certiorari to Review Decision of the COA (COA21-797)	Special Order **Barringer, J., recused**
127P22-2	State v. Jeffery Ray Acker	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Craven County	Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

15 DECEMBER 2023

130P23	Martin B. Sturdivant, Employee v. North Carolina Department of Public Safety, Employer, Self-Insured (CCMSI, Third-Party Administrator)	1. Def's PDR Under N.C.G.S. § 7A-31 (COA22-421) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Conditional Motion to Vacate Opinion of the COA 4. North Carolina Association of Self-Insurers, North Carolina Forestry Association, North Carolina Retail Merchants Association, North Carolina Home Builders Association, American Property Casualty Insurance Association, and North Carolina Chamber Legal Institute's Conditional Motion for Leave to File Amicus Brief	1. Allowed 2. Allowed 3. Dismissed as moot 4. Allowed
139P23	Robert Brewer, Employee v. Rent-A-Center, Employer, Travelers Insurance Co. (Sedgwick Claims Services, Third-Party Administrator), Carrier	1. Defs' Motion for Temporary Stay (COA22-296) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Plt's Motion for Reconsideration of Temporary Stay 5. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **06/08/2023** 2. Allowed 3. Allowed 4. Special Order **06/19/2023** 5. Allowed
140P23	Chad Gardner, Lisa Gardner, Lonnie Norton, Hope Norton, the Town of Dobbins Heights, and the City of Hamlet v. Richmond County	Plt's (Town of Dobbins Heights) PDR Under N.C.G.S. § 7A-31 (COA21-600)	Allowed
145P23	PennyMac Loan Services, LLC, Plaintiff/ Counterclaim Defendant v. Brad Johnson and Elci Wijayaningsih, Defendants/ Counterclaim Plaintiffs and Third-Party Plaintiffs v. Standard Guaranty Insurance Company, Erika L. Sanchez, Efren Saldivar, and Assurant, Inc., Third-Party Defendants	Def/Counterclaim Plt and Third-Party Plt's (Brad Johnson) Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-629)	Denied

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152P23	Estate of Timothy Leroy Bunce, and Heidi Bunce, Individually v. University of North Carolina Health Care Systems	Plts' PDR Under N.C.G.S. § 7A-31 (COA23-358)	Denied
157PA22	State v. Tevin Demetrius Vann	1. Def's Motion to Withdraw and Substitute Counsel 2. Def's Motion to Reschedule Pending Oral Argument	1. Allowed **10/20/2023** 2. Denied **10/20/2023**
160P23	State v. Justin Thomas Burns	State's Petition for Writ of Certiorari to Review Order of Superior Court, Pitt County (COAP23-157)	Denied
166P23-2	Colell Steele v. North Carolina Department of Public Safety	Plt's Pro Se Motion for Petition Requesting Order for Relief from Judgment (COA23-77)	Dismissed
167P23	State v. Jedidiah David Crabtree	Def's PDR Under N.C.G.S. § 7A-31 (COA22-936)	Denied **Riggs, J., recused**
171P23	State v. Michael Edward Hughes	Def's Pro Se Motion for PDR (COA22-721)	Dismissed
173P23	Southland National Insurance Corporation, et al. v. Lindberg, et al.	1. Defs' Motion for Temporary Stay (COA22-1049) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Universal Life Insurance Company's Conditional Motion for Leave to File Amicus Brief 5. Plts' Motion to Expedite Petition for Writ of Supersedeas and PDR 6. Universal Life Insurance Company's Motion to Withdraw Request to File Amicus Curiae Brief	1. Allowed **07/13/2023** 2. Allowed 3. Special Order 4. Dismissed as moot 5. Dismissed as moot 6. Allowed

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175P23	Nationstar Mortgage, LLC d/b/a Mr. Cooper v. Mark P. Melaragno a/k/a Mark Peter Melaragno, Wendy Kinkel Melaragno, Certusbank, N.A., s/b/m Myers Park Mortgage, Inc., The Building Center, Inc., and Substitute Trustee Services, Inc., Substitute Trustee	1. Defs' (Mark P. Melaragno a/k/a Mark Peter Melaragno and Wendy Kinkel Melaragno) PDR Under N.C.G.S. § 7A-31 (COA22-743) 2. Defs' (Mark P. Melaragno a/k/a Mark Peter Melaragno and Wendy Kinkel Melaragno) Motion to Withdraw PDR	1. --- **10/24/2023** 2. Allowed **10/24/2023**
176P23	:Lumin-Lucky: Lander. v. State Employees Credit Union, Rex Alan Spivey, CFO, Philip A. Glass, Attorney at Law	1. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 2. Defs' (NC State Employees Credit Union and Rex Alan Spivey) Motion to Dismiss PDR 3. Defs' (NC State Employees Credit Union and Rex Alan Spivey) Motion to Tax Plt Costs 4. Plt's Pro Se Motion for Default Judgment 5. Plt's Pro Se Motion to Tax Def Costs 6. Plt's Pro Se Motion for Injunctive Relief 7. Plt's Pro Se Motion for Default Judgment 8. Plt's Pro Se Motion for Default Judgment 9. Plt's Pro Se Motion for Injunctive Relief 10. Plt's Pro Se Motion to Strike 11. Plt's Pro Se Motion to Vacate	1. --- 2. Allowed 3. Allowed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed 9. Dismissed 10. Dismissed 11. Dismissed
183P23	Weijun Luo v. Ursula R. Neal, Adam C. Neal, Sr.	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-657) 2. Plt's Pro Se Motion for Extension of Time to File Brief 3. Plt's Pro Se Motion to Correct Docket Entry	1. Dismissed *ex mero motu* 2. Dismissed as moot 3. Dismissed as moot
208P14-3	State v. Colell Barion Steele	Def's Pro Se Motion for PDR (COAP21-115)	Dismissed **Riggs, J., recused**

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209P23-2	State v. Travis Baxter	Def's Pro Se Motion to Transfer	Dismissed
211P23-2	Kenneth E. French v. Highland Paving Co. LLC, John W. McCauley (CEO), Albert O. McCauley (Partner), and Brian Rayner (Manager)	Plt's Pro Se Motion for Appeal of Right for Writ of Certiorari	Denied
212P22-3	Andrew C. Davis (Geometrodynamics University Corporation, et al.) v. Central Regional Hospital, et al.	1. Plt's Pro Se Petition for Writ of Certiorari 2. Plt's Pro Se Petition for Writ of Habeas Corpus 3. Plt's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed 2. Denied **11/21/2023** 3. Denied **11/30/2023**
213P22-2	State v. Jamaal Gittens	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of District Court, Cabarrus County 2. Def's Pro Se Motion to Expedite	1. Dismissed 2. Dismissed
220P22	Kimberly Bossian v. Dennis Bossian	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-483) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of District Court, Wake County	1. Denied 2.
220P23	Adil Aziz and Gladys Aziz v. Heatherstone Homeowners Association, Inc.	1. Plts' Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-819) 2. Plts' Pro Se Motion to Strike Response	1. Denied 2. Dismissed as moot
222P23	The North Carolina State Bar v. Kenneth Frank Irek	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-667)	Denied
231P23	Sheila Fadia, T. Camille Fadia, Minor Child v. Magistrate Judge Joe L. Webster, Judge Norwood Carlton Tilley, Clerk John Brubaker, Case Manager Leah, et al.	Plt's (T. Camille Fadia) Pro Se Motion for Sanctions for Spoliation of Evidence	Dismissed

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235P23	Thurman Crofton Savage v. N.C. Department of Transportation	1. Petitioner's Motion for Temporary Stay (COA22-673) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/21/2023** 2. Allowed 3. Allowed
240P23	Langtree Development Company, LLC v. JRN Development, LLC, f/k/a JRN Investments, LLC	Def's PDR Under N.C.G.S. § 7A-31 (COA22-1016)	Denied
244P23	Guadalupe J. Galindo v. Judge A. Graham Shirley	Plt's Pro Se Motion for Notice of Appeal	Dismissed
245P23	Craige Jenkins Liipfert & Walker LLP and Bryan C. Thompson, Acting as Personal Representative of the Estate of Cleester C. Hickerson v. Carmelene Lynne Woods	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COA23-294)	Denied
246P23	State v. Jamaal Connelly	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-789)	Denied
249P23	State v. Mario Kennard Bennett	Def's Petition for Writ of Certiorari to Review Order of the COA (COAP23-402)	Dismissed
250PA21-2	Department of Transportation v. Bloomsbury Estates, LLC; et al.	Def's Motion to Amend Record on Appeal	Denied **10/27/2023**
253P23	State v. Antonio Daymonte Livingston	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA22-678)	Denied
254P23	In the Matter of A.E., A.E., B.E., C.E., K.E.	1. Respondents' Motion for Temporary Stay (COA23-28) 2. Respondents' PDR Under N.C.G.S. § 7A-31	1. Allowed **10/02/2023** Dissolved 2. Denied **Riggs, J., recused**

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256P23	State v. Tucker McKenzie Rector	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-803)	Denied
257P23	State v. Jessiah James Hubbard	Def's Pro Se Motion for Appeal (COAP23-471)	Denied
259P23	State v. Kevin Eugene Hinnant, Jr.	Def's Petition for Writ of Certiorari to Review Order of the COA (COA23-152)	Denied
262P23	State v. Dale Bernard Hairston	Def's PDR Under N.C.G.S. § 7A-31 (COA22-939)	Denied **Riggs, J., recused**
265P23	State v. John Henry Carver	Def's PDR Under N.C.G.S. § 7A-31 (COA22-1040)	Denied
266P23	State v. Aulden Matthew Whitcher, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA22-871)	Denied
267P23	Lynette Melvin v. Maggie E. Melvin	1. Plt's Pro Se Motion for Notice of Appeal Based Upon a Constitutional Question (COA23-112) 2. Def's Motion for Sanctions 3. Def's Motion for Extension of Time to File Brief	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
273P23	Donald Richard Bagwell v. Roy A. Cooper III, et al.	Petitioner's Pro Se Motion for Emergency Civil Action	Dismissed
275P23	Crescent Gardens Apartments and Crescent Gardens Apartments LP v. Jessica A. Humes and Shakein D. Applewhite	1. Defs' Pro Se Motion for Temporary Stay 2. Defs' Pro Se Petition for Writ of Supersedeas 3. Defs' Pro Se Motion for PDR 4. Defs' Pro Se Motion for Notice of Appeal	1. Denied **10/19/2023** 2. Denied **10/19/2023** 3. Dismissed **10/19/2023** 4. Dismissed **10/19/2023**

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277P23	In the Matter of Christine Amber Etheredge	1. Petitioner's Pro Se Emergency Petition for Writ of Mandamus 2. Petitioner's Pro Se Motion for Sanctions, Annulment, Custody, and Other Proper Relief 3. Petitioner's Pro Se Motion for Production of Documents and Discovery 4. Petitioner's Pro Se Motion to Review and Report Crimes 5. Petitioner's Pro Se Motion to Recuse Lower Court Judges 6. Petitioner's Pro Se Motion to Seal All Files and Hold Address as Confidential 7. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed **10/19/2023** 2. Dismissed **10/19/2023** 3. Dismissed **10/19/2023** 4. Dismissed **10/19/2023** 5. Dismissed **10/19/2023** 6. Allowed **10/19/2023** 7. Allowed **10/19/2023**
279P23	State v. Christopher Michael Johnson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA23-52) 2. Def's Motion to Supplement PDR with Additional Authority	1. Denied 2. Allowed
280P23	Brandon Williams v. State of North Carolina, Cabarrus County, et al.	1. Plt's Pro Se Motion for PDR 2. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **10/19/2023** 2. Allowed **10/19/2023**
280P23-2	Brandon Williams v. State of North Carolina, County of Cabarrus, et al.	1. Plt's Pro Se Motion for Appropriate Relief 2. Plt's Pro Se Motion for Petition to Withdraw Motion for Appropriate Relief	1. --- 2. Allowed
281A23	State v. Angela Benita Phillips	1. State's Motion for Temporary Stay (COA22-866) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **10/20/2023** 2. Allowed **11/07/2023** 3. ---
281P06-15	Joseph E. Teague, Jr., P.E., C.M. v. N.C. Department of Transportation, J.E. Boyette, Secretary	Plt's Pro Se Motion to Vacate the Final Decision of the NC State Personnel Commission, Dismiss All Underlying Charges, and Declare a Mistrial	Dismissed
282P23	State v. Linwood Duffie	Def's Pro Se Motion for Emergency Relief Demand	Denied **10/19/2023**

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283A22-2	In the Matter of Patricia Burnette Chastain	1. Respondent's Notice of Appeal Based Upon a Dissent (COA22-649) 2. Respondent's PDR as to Additional Issues 3. Petitioner's Motion to Certify Additional Issues for Review Under Appellate Rule 15	1. — 2. Allowed 3. Allowed **Allen, J., recused**
283P23	Willie James Byrd, Jr. v. Buncombe County	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **10/26/2023**
284P23	Stephanie Messick, Employee v. Walmart Stores, Inc., Employer, New Hampshire Insurance Company, Carrier (Claims Management Incorporated, Third-Party Administrator)	1. Defs' Motion for Temporary Stay (COA22-1069) 2. Defs' Petition for Writ of Supersedeas (COA22-1069) 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **10/24/2023** 2. 3.
286P23	State v. David K. Dixon	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/25/2023**
287P23	State v. Gerald Telphia Jacobs, II	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-997)	Denied
288P23	Onnipauper LLC v. Eugene Dunston	1. Def's Motion for Temporary Stay (COA23-151) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/25/2023** 2. 3.
291P23	State v. Darnell W. King	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	Dismissed
292P23	State v. Scott Anthony Putnam	Def's Pro Se Motion for Extension of Time to File PDR	Dismissed **Riggs, J., recused**
293P23	State v. Andre Eugene Lester	1. State's Motion for Temporary Stay (COA23-115) 2. State's Petition for Writ of Supersedeas 3. State's Motion to Withdraw Motion for Temporary Stay and Petition for Writ of Supersedeas	1. Dismissed as moot **11/01/2023** 2. Dismissed as moot **11/01/2023** 3. Allowed **11/01/2023**

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293P23-2	State v. Andre Eugene Lester	1. State's Motion for Temporary Stay (COA23-115) 2. State's Petition for Writ of Supersedeas	1. Allowed **12/13/2023** 2.
294P23	Pallie Irrevocable Business Trust, Daniel Watlington General Manager, Michael Battershell Beneficiary v. Michael Brian Watlington, Keith Blalock Known as Blalock Rentals, Ronald S. Bradsher, Jr. Attorney at Law, John M. Thomas Attorney at Law	Plt's (Daniel Watlington) Pro Se Motion for Notice of Appeal (COA23-771)	Denied
295P23	Michel Rabun-Fisher v. Mike Roberson (Sheriff of Chatham County)	Def's Pro Se Petition for Writ of Habeas Corpus (COAP23-683)	Denied **11/01/2023**
296P23	State v. Darron Omar Gill	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed **11/03/2023** 2. Dismissed **11/03/2023** 3. Dismissed **11/03/2023**
297P23	Shannon Steger/ Trinity Steger v. NCDHHS/State of NC/Robeson County DSS/County of Robeson	1. Petitioners' Pro Se Motion for Notice of Appeal (COAP23-662) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis* 3. Petitioners' Pro Se Motion for Extension of Time to File Brief	1. Dismissed *ex mero motu* 2. Allowed 3. Dismissed as moot
298P23	Charles Hodge v. David Coolidge	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed

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299P22	DeBerry v. DeBerry	1. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COAP22-465)	1. Dismissed
		2. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question	2. Dismissed
		3. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question in re: Judge Christine Walczyk	3. Dismissed
		4. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question in re: Judge Nancy E. Gordon	4. Dismissed
		5. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COAP22-465)	5. Dismissed
		6. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COAP22-974 and COAP22-998)	6. Dismissed
		7. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-872)	7. Dismissed
		8. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-974 and COA22-998)	8. Dismissed
		9. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-969)	9. Dismissed
		10. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question	10. Dismissed
		11. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-872)	11. Dismissed
		12. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question	12. Dismissed
		13. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-969)	13. Dismissed
		14. Petitioner's Pro Se Emergency Motion to Stay Judgment of All Invoices in the COA Pending Supreme Court Review of Multiple Pending Appeals in the Interest of the Public	14. Dismissed **Riggs, J., recused**
300P23	State v. James Kelly Moore, III	Def's Pro Se Motion for Extension of Time to File Petition for Writ of Certiorari (COA22-714)	Dismissed

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301P23	State v. Anton M. Lebedev	1. Def's Pro Se Motion for Temporary Stay (COA23-249) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Motion for Consideration of Attached Materials 4. Def's Pro Se Motion to Reconsider Denial of Temporary Stay 5. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Denied **11/09/2023** 2. 3. 4. Denied **11/14/2023** 5.
304P23	Erin Rake, D.D.S., P.C.; Heidi Pantazis D.M.D. PLLC f/k/a RDest DDS PLLC III; Healthcare Delivered, LLC d/b/a Aria Care Partners; Aria Care Management, LLC f/k/a Mobilecare 2u, LLC; and Aria Dental Management, LLC f/k/a Dest Dental Management, LLC v. SDC K-L, LLC; Erol Kanli, D.D.S.; Katina Cloud; Leslie Jernigan; and Elizabeth Kallman	1. Plts' Motion for Temporary Stay (COAP23-648) 2. Plts' Petition for Writ of Supersedeas 3. Plts' Petition for Writ of Certiorari to Review Order of the COA	1. Special Order **11/15/2023** 2. 3.
305P22	The North Carolina State Bar v. Lonnie P. Merritt, Attorney	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-191) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
306P23	Daniel Blaine Parsons v. T.A.R.C. Staff, et al.	1. Plt's Pro Se Motion to Compel Lower Courts to Stop Being Transphobic 2. Plt's Pro Se Motion to Compel N.C. Prison to Answer Grievance	1. Dismissed 2. Dismissed
307A23	State v. Mario Wilson	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's Petition for Writ of Certiorari to Review Decision of the COA	1. Allowed **11/14/2023** 2. 3. 4.

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311P23	Hesman Tall a/k/a James W. Hunter, Jr. v. Palmer Farm, LLC, et al. Ms. Elfreda Dawn Palmer, Resident Agent	Plt's Pro Se Motion to Remand Case for Further Proceedings	Dismissed
314P23	In re Kyule Covington	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **11/28/2023**
322A23	In the Matter of K.P.W.	1. Petitioner and Guardian ad Litem's Motion for Temporary Stay (COA23-205) 2. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad Litem's Notice of Appeal Based Upon a Dissent	1. Dismissed as moot **12/01/2023** 2. Allowed **12/01/2023** 3. --- **Riggs, J., recused**
323P23	Betty Lou Tebib v. Hamza Tebib	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Wake County	1. Dismissed as moot **12/05/2023** 2. Denied **12/05/2023** 3. Dismissed **12/05/2023**
324P23	Briggan Investment v. William Hurley, Jr.	1. Petitioner's (Carla Land) Pro Se Motion for Temporary Stay 2. Petitioner's (Carla Land) Pro Se Petition for Writ of Supersedeas	1. Denied **12/05/2023** 2. Denied **12/05/2023**
326P23	In the Matter of D.T.P. & B.M.P.	1. Respondent-Parents' PDR Under N.C.G.S. § 7A-31 (COA23-29) 2. Respondent-Parents' Motion for Temporary Stay 3. Respondent-Parents' Petition for Writ of Supersedeas	1. Denied **12/07/2023** 2. Dismissed as moot **12/07/2023** 3. Denied **12/07/2023**

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329A09-5	State v. Martinez Orlando Black	1. Def's Pro Se Motion to Amend Order (COA08-1180)	1. Dismissed
		2. Def's Pro Se Motion for Subject Matter Jurisdiction	2. Dismissed
		3. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	3. Dismissed
		4. Def's Pro Se Motion to Proceed *In Forma Pauperis*	4. Allowed
		5. Def's Pro Se Motion to Appoint Counsel	5. Dismissed
		6. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	6. Dismissed
		7. Def's Pro Se Motion to Amend Petition for Writ of Certiorari	7. Dismissed as moot
		8. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP23-109)	8. Dismissed **Riggs, J., recused**
331PA20-2	Edward G. Connette, as Guardian ad Litem for Amaya Gullatte, a Minor, and Andrea Hopper, individually and as parent of Amaya Gullatte, a Minor v. The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System, and/or The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center, and/or The Charlotte-Mecklenburg Hospital Authority d/b/a Levine Children's Hospital, and Gus C. Vansoestbergen, CRNA	Defs' PDR Prior to Determination by the COA (COA23-460)	Denied **Berger, J., recused** **Dietz, J., recused**
331P23	State v. Kajuan Dyshawn Hamilton	1. State's Motion for Temporary Stay (COA22-857)	1. Allowed **12/11/2023**
		2. State's Petition for Writ of Supersedeas	2.

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332A23	In the Matter of A.G.J.	1. State's Motion for Temporary Stay (COA23-323) 2. State's Petition for Writ of Supersedeas	1. Allowed **12/11/2023** 2.
333A22	Digital Realty Trust, Inc.; Digital Realty Trust, LP; and DLR, LLC v. Peter Sprygada	Def's Consent Motion to Withdraw and Dismiss Appeal	Allowed **10/20/2023**
333P23	In the Matter of L.L.	1. Petitioner's Motion for Temporary Stay (COA22-1045) 2. Petitioner's Motion for Writ of Supersedeas	1. Allowed **12/12/2023** 2.
361P22-2	State v. Trentair Bingham	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP22-612)	Dismissed
378P22	Amy Palacios v. Jay White, Brad Urban (Ex2) and Matthew Bledsoe (Ex1), Donna Johnson	1. Petitioner's Pro Se Motion for Completed Appeal (COAP22-295) 2. Petitioner's Pro Se Petition for Writ of Prohibition 3. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA 4. Petitioner's Motion to Unseal Docket for Moving Counsel 5. Respondents' Motion to Dismiss Petitioner's 21 December 2022 Pro Se Filings and to Remand for a Hearing to Determine Sanctions	1. Dismissed 2. Dismissed 3. Dismissed 4. Allowed **02/03/2023** 5. Dismissed as moot
381P22-3	Matthew Safrit v. Todd Ishee and Drew Stanley	Petitioner's Pro Se Motion for PDR (COAP23-314)	Dismissed **Riggs, J., recused**
412P13-7	Henry Clifford Byrd, Sr. v. Superintendent John Sapper	1. Petitioner's Pro Se Motion to Vacate Orders 2. Petitioner's Pro Se Motion for a Rehearing En Banc	1. Dismissed 2. Dismissed

BEAVERS v. McMICAN

[385 N.C. 629 (2024)]

DAVID BEAVERS
v.
JOHN McMICAN

No. 294A22

Filed 22 March 2024

Alienation of Affections—criminal conversation—unidentified lover—summary judgment—evidence of post-separation dating relationship—mere conjecture

The trial court properly granted summary judgment for defendant on plaintiff's claims for alienation of affection and criminal conversation, where plaintiff's wife began a romantic relationship with defendant about three months after separating from plaintiff and over a year after admitting to plaintiff that, while they were still married, she had had sexual intercourse with an unidentified coworker. Although evidence of post-separation conduct may be used at the summary judgment phase to corroborate evidence of pre-separation conduct, plaintiff's evidence regarding the pre-separation affair between his wife and the unidentified coworker did not give rise to anything more than "mere conjecture" that defendant was that same coworker; consequently, the evidence failed to support the malice prong of plaintiff's alienation of affection claim and the sexual intercourse element of his criminal conversation claim.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 285 N.C. App. 31 (2022), reversing an order of summary judgment entered on 14 October 2020 by Judge Keith O. Gregory in Superior Court, Wake County, and remanding the case for further proceedings. Heard in the Supreme Court on 13 September 2023.

Matheson & Associates, PLLC, by John R. Szymankiewicz and Jammie L. Wacenske, for plaintiff-appellee.

Batch, Poore & Williams, PC, by J. Patrick Williams, for defendant-appellant.

EARLS, Justice.

This appeal raises a narrow legal issue of statutory interpretation involving the controversial heartbalm torts recognized in North Carolina.

Plaintiff David Beavers brought civil claims for alienation of affection and criminal conversation against his ex-wife's alleged paramour, defendant John McMican. The first question before this Court is whether the holding in *Rodriguez v. Lemus*, 257 N.C. App. 493 (2018)[1], concerning which evidence is relevant to prove pre-separation conduct, is inconsistent with the enacted language and legislative intent of N.C.G.S. § 52-13, which specifies that post-separation conduct cannot give rise to liability in these circumstances. The second related issue for this Court is whether the trial court improperly granted summary judgment in favor of Mr. McMican. After reviewing the text of section 52-13 and finding it unambiguous, we hold that the Court of Appeals' opinion in *Rodriguez* is consistent with legislative intent. Accordingly, evidence of post-separation conduct may be used to corroborate pre-separation conduct, so long as the evidence of pre-separation conduct gives rise to more than mere conjecture. *Rodriguez*, 257 N.C. App. at 498. Nonetheless, because we find the evidence of pre-separation conduct in this case does not give rise to more than mere conjecture regarding the identity of Mrs. Beavers' paramour, we reverse the decision of the Court of Appeals and hold that the trial court properly granted summary judgment in favor of Mr. McMican.

I. Procedural History

On 13 December 2018, Mr. Beavers sued Mr. McMican on theories of alienation of affection and criminal conversation. On 14 January 2020, Mr. McMican filed a motion for summary judgment on both claims. On 17 August 2020, the trial court conducted a hearing on Mr. McMican's motion during which both parties referenced recent depositions of Mrs. Beavers and Mr. McMican's ex-wife, Jessica McMican; however, neither deposition was certified until 20 August 2020, three days later. On 14 October 2020, the trial court entered an order granting Mr. McMican's motion for summary judgment. Mr. Beavers timely appealed.

At the Court of Appeals, Mr. Beavers submitted a record supplement pursuant to Rule 11(c) of the Rules of Appellate Procedure containing, *inter alia*, the depositions of Mrs. Beavers and Mrs. McMican discussed by counsel during the summary judgment hearing. On 23 November 2021, the Court of Appeals entered an order remanding the matter to the trial court and inquiring which, if either, of the depositions the trial court considered in granting Mr. McMican's motion for summary judgment. *Beavers v. McMican*, 285 N.C. App. 31, 34 (2022). In response, on

1. This Court denied discretionary review and dismissed a petition for writ of certiorari to review the Court of Appeals' opinion in *Rodriguez*. *See* 371 N.C. 447 (2018).

24 February 2022, the trial court entered an amended order granting Mr. McMican's motion for summary judgment and confirming that it had not considered either of the depositions at the original hearing on the matter. *Id.* Accordingly, the Court of Appeals stated that neither deposition would inform its review of the trial court's order granting Mr. McMican's motion for summary judgment. *Id.* at 32, 35. We similarly do not consider any evidence not properly before the trial court when it decided Mr. McMican's motion for summary judgment.[2]

The Court of Appeals determined that Mr. Beavers presented sufficient evidence of post-separation conduct involving his former wife and defendant, and that under *Rodriguez*, such evidence is corroborative of pre-separation conduct even when the identity of a pre-separation extramarital sexual partner is unknown. *Id.* at 41. Thus, the Court of Appeals held that the trial court erred in granting Mr. McMican's motion for summary judgment. *Id.* Judge Jackson dissented, opining in relevant part that Mr. Beavers's allegations lacked evidentiary support, and thus, the trial court properly granted Mr. McMican's motion for summary judgment. *Id.* at 46, 63 (Jackson, J., dissenting). Based on Judge Jackson's dissent, Mr. McMican filed a notice of appeal with this Court on 21 September 2022, pursuant to N.C.G.S. § 7A-30(2).[3]

II. Background

David and Alison Beavers were married on 23 October 2004. Together they had three children. On 18 January 2016, Mr. Beavers discovered text messages on Mrs. Beavers's phone in which she had sent nude pictures of herself to a person identified only as "Bestie." Until this discovery, Mr. Beavers believed he and his wife had a loving marriage. In addition to the pictures, Mrs. Beavers and "Bestie" had exchanged messages referencing an instance of sexual intercourse that had occurred before the exchange of the messages and pictures. At the time of this discovery, Mr. Beavers did not look at the phone number associated with the contact labeled "Bestie" or take any steps to determine "Bestie's" identity.

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2. Our decision is based on the principle that "[i]nformation adduced from counsel during oral arguments cannot be used to support a motion for summary judgment under Rule 56(c)." *Huss v. Huss*, 31 N.C. App. 463, 466 (1976). Therefore, we limit our consideration to "evidence consisting of affidavits, depositions, answers to interrogatories, admissions, documentary materials, facts which are subject to judicial notice, and any other materials which would be admissible in evidence at trial." *Id.*, (citing *Koontz v. City of Winston-Salem*, 280 N.C. 513 (1972); *Singleton v. Stewart*, 280 N.C. 460 (1972)).

3. Judge Jackson's dissent also explained his rationale for eliminating heartbalm torts, but this issue was not raised or argued by either party in this appeal.

After confronting Mrs. Beavers, Mr. Beavers left the marital home to stay with his parents. When he returned several days later, he and Mrs. Beavers discussed the extramarital affair, and Mrs. Beavers admitted that she had engaged in sexual acts with the person identified as "Bestie." Nonetheless, she stated that she and "Bestie" had not engaged in sexual intercourse. Mrs. Beavers also told Mr. Beavers that her paramour was a coworker named "Dustin."

In the weeks that followed, Mr. Beavers, who was skeptical of the story Mrs. Beavers told during their first conversation, accused Mrs. Beavers of engaging in sexual intercourse with another man. In response, Mrs. Beavers ultimately admitted that she had engaged in sexual intercourse with someone from her workplace, but she did not specify if that person was "Dustin." Mr. Beavers was unable to discover Dustin's identity, and because Mrs. Beavers did not have anyone named "Dustin" in her contacts, Mr. Beavers guessed "Dustin" was a pseudonym. The Beaverses separated for the final time on 16 December 2016.

On 1 April 2017, three and a half months after she and her husband separated, and over a year after Mr. Beavers discovered the compromising text messages with "Bestie," Mrs. Beavers began openly dating her coworker, Mr. McMican. The two had known each other through work since the summer of 2011 and had attended work events together with other coworkers. The record shows that in October 2016, the two exchanged ninety-eight text messages. There is also evidence that Mrs. Beavers and Mr. McMican interacted via Facebook. After learning that Mrs. Beavers and Mr. McMican were dating, Mr. Beavers concluded that Mr. McMican was his then-estranged wife's alleged paramour. But while Mr. McMican admitted to becoming romantically and sexually involved with Mrs. Beavers in April 2017, there is no evidence the two were romantically involved before that time.

III. Standard of Review

We apply de novo review to both issues in this case. Issues of statutory interpretation are legal issues subject to de novo review. *E.g.*, *Saunders v. ADP TotalSource Fi Xi, Inc.*, 372 N.C. 29, 38 (2019). Moreover, "[t]his Court reviews decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review." *Cummings v. Carroll*, 379 N.C. 347, 358 (2021). Rule 56(c) of the North Carolina Rules of Civil Procedure states that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56 (2021). When evaluating a trial court's decision to "grant or deny a summary judgment motion in a particular case, 'we view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor.' " *Cummings*, 379 N.C. at 358 (quoting *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182 (2011)).

To prevail on summary judgment, the moving party must meet "the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369 (1982) (first citing *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467 (1979); and then citing *Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24 (1974)). "If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." *Id.* (first citing *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200 (1980); then citing *Moore*, 296 N.C. at 470; and then citing *Zimmerman*, 286 N.C. at 29).

IV. N.C.G.S. § 52-13 and the Court of Appeals' Decision in *Rodriguez v. Lemus*

Our Court and the Court of Appeals previously have held that sexual conduct which occurs after a married couple separates but before the couple divorces, can be used to support alienation of affection and criminal conversation claims. *See McCutchen v. McCutchen*, 360 N.C. 280, 284 (2006); *Jones v. Skelley*, 195 N.C. App. 500, 511–12 (2009).[4] But in 2009 the General Assembly enacted N.C.G.S. § 52-13, which supersedes these decisions. This statute applies to both alienation of affection and criminal conversation claims and states:

> No act of the defendant shall give rise to a cause of action for alienation of affection or criminal conversation that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent.

4. Both of these decisions were superseded by statute N.C.G.S. § 52-13(a), as enacted by An Act to Clarify Procedures in Civil Actions for Alienation of Affection and Criminal Conversation, S.L. 2009-400, § 1, 2009 N.C. Sess. Laws 780, 780, *as recognized in Rodriguez*, 257 N.C. App. 493.

N.C.G.S. § 52-13(a) (2021). In other words, a defendant may be liable only for conduct that occurs during the marriage and before physical separation. *Id.*; *see also Rodriguez*, 257 N.C. App. at 496–97.

The Court of Appeals interpreted subsection 52-13(a) in *Rodriguez v. Lemus*, and determined that, based on the language of the statute, alienation of affection and criminal conversation claims could not be sustained without evidence of pre-separation conduct that met the elements of each respective claim. 257 N.C. App. at 496–97. There the court also determined that evidence of post-separation conduct could be used to corroborate evidence of pre-separation conduct in either an alienation of affection or criminal conversation claim, as long as the evidence of pre-separation conduct was "sufficient to give rise to more than mere conjecture." *Id.* at 498.

Defendant argues that *Rodriguez*'s holding is inconsistent with the legislative intent behind N.C.G.S. § 52-13. While it is true that the "principal goal of statutory construction is to accomplish the legislative intent," the General Assembly's intent "may be found first from the plain language of the statute." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001). "It is well settled that, '[w]here 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.' " *In re Est. of Lunsford*, 359 N.C. 382, 391–392 (2005) (alteration in original) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990)).

Because the text of N.C.G.S. § 52-13 is unambiguous, there is no need for this Court to engage in statutory construction. Moreover, the Court of Appeals' holding in *Rodriguez* is consistent with our appellate precedent. In *In re Estate of Trogdon*, 330 N.C. 143 (1991), this Court in addressing an intestate succession claim and being tasked with determining how much evidence was necessary to show that sexual intercourse had occurred between the spouse and someone other than her now deceased husband, explained that "adultery is nearly always proved by circumstantial evidence . . . as misconduct of this sort is usually clandestine and secret." *Id.* at 148 (cleaned up). In that case the circumstantial evidence consisted of the spouse voluntarily moving from the marital home and then living with the suspected paramour, as well as the spouse's refusal to testify regarding the nature of her relationship with that person. *Id.* at 151.

Additionally, in *Pharr v. Beck*, 147 N.C. App. 268 (2001), *overruled by McCutchen*, 360 N.C. 280,[5] the Court of Appeals concluded that post-separation conduct, namely, sexual intercourse between the defendant and the plaintiff's spouse, could be used to corroborate the existence of a romantic pre-separation relationship between those parties. *Id*. at 274. Accordingly, the Court of Appeals' holding in *Rodriguez* is consistent with both the text of N.C.G.S. § 52-13(a), which requires that alienation of affection and criminal conversation claims arise from pre-separation conduct and our appellate precedent, which not only acknowledges the frequent need for circumstantial evidence to prove these types of claims but also expressly allows for evidence of post-separation conduct to corroborate pre-separation conduct. Essentially,

> N.C.G.S. § 52-13 prevents defendants in cases involving criminal conversation and alienation of affection from being held liable for acts taking place after two spouses have separated, and *Rodriguez* effectuates that policy by ensuring that, if a factfinder considers evidence of post-separation conduct, it does so only insofar as it contextualizes pre-separation conduct.

Beavers, 285 N.C. App. at 39. Thus, we hold that the Court of Appeals' opinion in *Rodriguez* is consistent with N.C.G.S. § 52-13's legislative intent, and evidence of post-separation conduct can be used to corroborate evidence of pre-separation conduct in alienation of affection and criminal conversation claims, if the pre-separation conduct gives rise to more than mere conjecture.

V. Mr. Beavers's Alienation of Affection and Criminal Conversation Claims

To establish an alienation of affection claim, a plaintiff must prove: (1) that the plaintiff and his or her spouse "were happily married, and that a genuine love and affection existed between them; (2) that the love and affection so existing was alienated and destroyed; and (3) that the wrongful and malicious acts of the defendant produced and brought about the loss and alienation of such love and affection." *McCutchen*, 360 N.C. at 283 (cleaned up). "A malicious act 'has been loosely defined to include any intentional conduct that would probably affect the marital relationship.' " *Rodriguez*, 257 N.C. App. at 495 (quoting *Pharr*, 147 N.C. App. at 272). In cases in which the defendant has engaged in sexual

5. *McCutchen* overruled *Pharr* "to the extent it requires an alienation of affection[] claim to be based on pre-separation conduct alone." 360 N.C. at 285.

intercourse with the plaintiff's spouse, "[m]alice is conclusively presumed." *Id.* at 495–96. To establish a claim for criminal conversation, a plaintiff must prove two elements: first, the plaintiff must show marriage between the spouses, and second, sexual intercourse between the defendant and the plaintiff's spouse during the marriage. *Id.* at 495 (citing *Coachman v. Gould*, 122 N.C. App. 443, 446 (1996)).

Moreover, "while a measure of certainty is required for guidance in deciding future cases," our Court has recognized that there is no "bright-line test for determining how much evidence is necessary to permit a jury or trial judge to infer adultery." *In re Est. of Trogdon*, 330 N.C. at 145. Instead, "each . . . case[ ] will demand a fact-specific inquiry." *Id.* Furthermore, "[a]dultery is nearly always proved by circumstantial evidence" because such evidence "is often the only kind of evidence available." *Id.* at 148 (cleaned up). Accordingly, "adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations." *Id.*

Importantly, and as noted above, if evidence of post-separation conduct is used to corroborate pre-separation conduct, the evidence of pre-separation conduct must "give rise to more than mere conjecture." *Rodriguez*, 257 N.C. App. at 498. Determining what constitutes more than "mere conjecture" is particularly important "[g]iven the highly emotional nature of the subject matter" in these types of cases. *Chappell v. Redding*, 67 N.C. App. 397, 401 (1984) (quoting *Horney v. Horney*, 56 N.C. App. 725, 727 (1982)). Thus, a "definite line must be drawn between permissible inference and mere conjecture." *Id.* (quoting *Horney*, 56 N.C. App. at 727).

In *In re Estate of Trogdon*, our Court addressed the issue of mere conjecture in the context of proving adultery. While this case did not involve an alienation of affection or criminal conversation claim, its analysis is instructive for both types of claims. There, this Court noted that the following evidence was sufficient to show adultery: (1) the wife, Mrs. Trogdon, began arriving home late at night, and began staying away from the marital home for days at a time until eventually moving out of the home to an apartment; (2) shortly thereafter, Mr. Winfrey, a man who lived in the same apartment complex as Mrs. Trogdon, moved into Mrs. Trogdon's apartment; (3) when asked about the two living together, Mrs. Trogdon noted that they "couldn't see paying rent for two different apartments"; (4) when asked to testify about their living arrangement, Mrs. Trogdon invoked her Fifth Amendment right against self-incrimination; (5) Mrs. Trogdon admitted to her son that she and Mr.

Winfrey were "living together"; (6) a private investigator testified that he saw Mrs. Trogdon and Mr. Winfrey stay in their apartment throughout the night and subsequently witnessed Mr. Winfrey leave the apartment to start Mrs. Trogdon's car before he returned to their shared apartment; and (7) a witness testified that one morning the two exited the apartment and left together. *Id.* at 145–46. Based on this evidence, this Court concluded that the conduct at issue amounted to more than conjecture. *Id.* at 151.

Regarding the opportunity and inclination prongs, this Court also noted that the above evidence amounted to "more than suspicion and conjecture." *Id.* In doing so, the Court explained that, while it would "not presume every male-female living together situation to be amorous," this living arrangement, when combined with the other factors present in *In re Estate of Trogdon*, permit[ted] a "reasonable inference of adultery." *Id.* Specifically, when taken together, the factors listed above supported an inference that Mrs. Trogdon had both an adulterous inclination and the opportunity to satisfy that inclination. *Id.* at 148.

Our Court of Appeals has also addressed the issue of mere conjecture in both alienation of affection and criminal conversation claims. In *Coachman v. Gould*, 122 N.C. App. 443 (1996), the court analyzed the following pre-separation conduct and determined that it did not rise above mere conjecture: (1) a car ride between the plaintiff's wife and the defendant; (2) phone calls between the plaintiff's wife and the defendant; and (3) a statement by the plaintiff's wife while she was in a "medicated stupor" that she had "been with" the defendant, which the court characterized as "ambiguous" and "subject to multiple interpretations." *Id.* at 446.

Regarding the criminal conversation claim, the court noted that, even after viewing the evidence in the light most favorable to the plaintiff, the interactions between the defendant and the plaintiff's wife amounted to no more than "mere conjecture" that the defendant and the plaintiff's wife had engaged in sexual intercourse. *Id.* at 447. To arrive at this conclusion, the court explained that telephone calls and a car ride were not the types of "opportunities" for sexual intercourse required under this Court's precedent in *In re Estate of Trogdon*. *Id.* Accordingly, "in this legal context," the defendant's conduct was "innocuous" and did not "amount to more than mere conjecture." *Id.* (cleaned up).

Regarding the plaintiff's alienation of affection claim, the court concluded that the only evidence that might support a finding that the defendant engaged in wrongful and malicious conduct was phone calls

the defendant made to the marital home. *Id.* at 447–48. But the defendant's phone calls could not support this element for two reasons. First, the defendant and the plaintiff's wife "had an ongoing business relationship" and the plaintiff had not met his burden of forecasting evidence that the phone calls were made for non-business purposes. *Id.* at 448. Second, even assuming the calls were of a non-business nature, the plaintiff's allegation that the phone calls were "only partially business" and the rest was just "talk, talk, talk, talk, talk" did not rise to the level of malicious conduct by the defendant designed to alienate the affections of the plaintiff's spouse. *Id.*

In contrast, in *Pharr v. Beck* the Court of Appeals addressed an alienation of affection claim and determined that the pre-separation conduct at issue rose above mere conjecture. That pre-separation evidence consisted of: (1) meetings between the defendant and the plaintiff's spouse; (2) the defendant holding the plaintiff's husband's hand in front of the plaintiff during the husband's hospitalization; (3) the defendant giving plaintiff's husband several gifts; (4) the defendant giving the plaintiff's husband flirtatious looks; (5) the defendant inviting the plaintiff's husband to her home and then offering to move out of the home when her husband found her there with the plaintiff's husband; (6) the defendant's husband observing the plaintiff's husband and the defendant coming out of the defendant's bedroom after the two consumed alcoholic beverages together; (7) the defendant giving the plaintiff's husband a calling card and instructions on how to call her while he was on vacation with the plaintiff; (8) the defendant allowing the plaintiff's husband to use her post office box; and (9) the defendant asking the plaintiff's husband to help her remodel the house that the two subsequently lived in together. *Id.* at 273–74. Based on this pre-separation conduct, which appears to give rise to more than mere conjecture, the court concluded that post separation sexual intercourse between the defendant and the plaintiff's husband could be used to corroborate the existence of a pre-separation relationship between the parties. *Id.* at 274. Thus, this evidence could be used to substantiate the malice element of the plaintiff's alienation of affection claim. *Id.* at 271–72, 274.

Moreover, in *Rodriguez* the Court of Appeals also concluded that the parties' pre-separation conduct gave rise to more than mere conjecture that they were engaged in an intimate relationship. 257 N.C. App. at 498–500. There the court addressed both alienation of affection and criminal conversation claims. *Id.* at 495–99. The pre-separation evidence in *Rodriguez* included: (1) 120 phone contacts, which took place over a one-month period, between the defendant and the plaintiff's husband

during times when the husband was away from the home; (2) two hotel charges on the plaintiff's husband's credit card; (3) a receipt from a third hotel stay and information from that hotel that the plaintiff's husband was there with a woman; (4) social media posts between the defendant and the plaintiff's husband, using their initials, which the plaintiff interpreted as a code used by the two to communicate. *Id.* at 498.

Because the pre-separation evidence in *Rodriguez* gave rise to more than mere conjecture, the Court of Appeals also reviewed post-separation evidence. *Id.* at 498–99. This evidence, as found by the trial court, consisted of: (1) the plaintiff's husband and the defendant living together; (2) the defendant giving birth to a child, which she named after the plaintiff's husband; (3) the plaintiff's husband having told the plaintiff that he loved the defendant; (4) the plaintiff's husband telling his wife they could not reconcile because the defendant was pregnant; and (5) the defendant admitting at trial that she and the plaintiff's husband had sexual intercourse after he had separated from the plaintiff. *Id.* Accordingly, the Court of Appeals held that the evidence of post-separation conduct in *Rodriguez* corroborated the evidence of pre-separation conduct and allowed for two "reasonable inference[s]" to be drawn: first, that the defendant was the woman who had accompanied the plaintiff's husband to the hotel on a specified occasion and, second, that the two engaged in sexual intercourse on that occasion, which preceded the plaintiff's separation from her husband. *Id.* at 499. Accordingly, this evidence could be used to meet the malice element of an alienation of affection claim and the sexual intercourse requirement of a criminal conversation claim. *Id.* at 495–96, 499.

In the present case the Court of Appeals determined, and the parties do not dispute, that whether a marriage existed, whether there was love and affection between the spouses, and whether that love and affection were alienated are not at issue here. *Beavers*, 285 N.C. App. at 36–37. Thus, evidence supports the first two elements of Mr. Beavers's alienation of affection claim and the first element of his criminal conversation claim. As for the alienation of affection claim, the issue is whether through "wrongful and malicious acts," Mr. McMican "produced and brought about the loss and alienation" of Mrs. Beavers's "love and affection" for her husband. *McCutchen*, 360 N.C. at 283. These circumstances can be shown through "any intentional conduct that would probably affect the marital relationship," *Rodriguez*, 257 N.C. App. at 495 (quoting *Pharr*, 147 N.C. App. at 272), or through sexual intercourse between Mr. McMican and Mrs. Beavers, *id.* at 495–96. Similarly, at issue for the criminal conversation claim is whether sexual intercourse occurred between Mr. McMican and Mrs. Beavers. *Id.* at 495.

It is also apparent that Mrs. Beavers admitted to having sexual relations with someone else before she and Mr. Beavers separated. The only question is whether there is any pre-separation evidence that Mr. McMican was that person. Mr. Beavers's complaint alleges that he first suspected Mr. McMican and his wife were having an affair in January 2016, and that he had "found detailed conversations" between his wife and Mr. McMican, which recounted sexual encounters between the two and included nude photos. Yet, the allegations in Mr. Beavers's complaint are refuted by his deposition testimony, which states that the communications at issue were between Mrs. Beavers and someone named "Bestie." Mr. Beavers also admitted that he did not know the phone number associated with "Bestie" nor did he have knowledge of "Bestie's" identity. In fact, the only information Mr. Beavers had about Mrs. Beavers's alleged paramour, was that the two worked together and that, according to Mrs. Beavers, his name was "Dustin." Moreover, Mr. Beavers did not suspect Mr. McMican was Mrs. Beavers's paramour until the two began openly dating in "the spring of 2017." Based on this information, Mr. Beavers states he "put two and two together."

But even taking this evidence in the light most favorable to Mr. Beavers, as is required under our summary judgment standard, *Cummings*, 379 N.C. at 358, this evidence is insufficient to survive summary judgment because there is no pre-separation evidence that Mr. John McMican is "Bestie," "Dustin," or any other iteration of the man with whom Mrs. Beavers had an affair before she and Mr. Beavers separated. *See* N.C.G.S. § 1A-1, Rule 56. The contact designated as "Bestie" in Mrs. Beavers's phone, as well as her description of her paramour as "Dustin," is "ambiguous" and "subject to multiple interpretations." *Coachman*, 122 N.C. App. at 446. Accordingly, the evidence does not give rise to more than mere conjecture that Mr. McMican is the man with whom Mrs. Beavers had an affair in January of 2016.

Mr. Beavers notes that, while there is no direct evidence showing that Mr. McMican is "Bestie" or "Dustin" such evidence is not required under *In re Estate of Trogdon*. Although it is true that *In re Estate of Trogdon* acknowledges that "[a]dultery is almost always proved by circumstantial evidence," in that case Mrs. Trogdon's paramour was conclusively identified. 330 N.C. at 148, 151. Thus, while circumstantial evidence may have been used to show that Mrs. Trogdon had an affair, there was no question as to whom Mrs. Trogdon had that affair with. *Id.* at 151. Without evidence of Mrs. Beavers's alleged paramour's identity, Mr. Beavers "cannot produce evidence to support an essential element of his . . . claim." *Lowe*, 305 N.C. at 369. Accordingly, the trial court was correct in granting summary judgment in Mr. McMican's favor.

Additionally, Mr. Beavers argues that Mr. McMican's malicious intent is evidenced by his phone and social media contacts with Mrs. Beavers; however, without evidence that Mr. McMican is "Bestie" or "Dustin," Mr. Beavers has not provided enough evidence to support the malice prong of his alienation of affection claim. Similar to the situation in *Coachman*, Mr. McMican and Mrs. Beavers worked together at Merck Durham. Thus, to meet the malice standard for an alienation of affection claim, Mr. Beavers needs to show that Mr. McMican's conversations with Mrs. Beavers "were marked by salacious whisperings, plans for clandestine meetings, or any other intonation of improper conduct by [the] defendant." *Coachman*, 122 N.C. App. at 448.

Mr. Beavers cannot meet this standard because he has produced only a wireless phone call record, which does not include any information regarding the content of Mrs. Beavers's and Mr. McMican's phone conversations. He also has produced no information regarding the content of Mr. McMican's and Mrs. Beavers's text messages. Moreover, the Facebook contacts between Mr. McMican and Mrs. Beavers are platonic in nature and consist of a "happy birthday" post from Mrs. Beavers to Mr. McMican, Mr. McMican's having added Mrs. Beavers to a Facebook group, and Mr. McMican "liking" Mrs. Beavers's posts. These Facebook contacts do not rise to the level of those present in *Rodriguez*, which included the parties' purported use of a secret communication code. *See* 257 N.C. App. at 498. Mrs. Beavers "had a right to speak" to Mr. McMican "if she chose to do so." *Coachman*, 122 N.C. App. at 448. Thus, without any verification of Mr. McMican as "Bestie" or "Dustin," the pre-separation conduct in this case does not give rise to more than mere conjecture that Mr. McMican was the person that Mrs. Beavers was seeing romantically in January of 2016.

While Mrs. Beavers admitted to having an adulterous relationship prior to her separation from Mr. Beavers, there is no pre-separation evidence sufficient to establish that Mr. McMican was the individual involved. Therefore, there is insufficient evidence to support either the sexual intercourse element of Mr. Beavers's criminal conversation claim against Mr. McMican, or an alienation of affection claim predicated on sexual intercourse with Mr. McMican. Moreover, the evidence presented is not sufficient to fulfill the inclination prong of *In re Estate of Trogdon*. While the evidence detailed above reflects communication between Mrs. Beavers and Mr. McMican, it does not reflect an "adulterous disposition[ ] or inclination." *In re Estate of Trogdon*, 330 N.C. at 148. Finally, under the opportunity prong in *In re Estate of Trogdon*, there is no evidence that Mrs. Beavers had the opportunity to commit

adultery with Mr. McMican because there is no evidence that she was ever alone with him in circumstances that reasonably could be inferred along with all the other evidence in the case to constitute an opportunity to engage in sexual intercourse. *See In re Estate of Trogdon*, 330 N.C. at 151; *Rodriguez*, 257 N.C. App. at 498-99; *Pharr*, 147 N.C. App. at 273.

Accordingly, because Mr. Beavers cannot show that Mr. McMican was Mrs. Beavers's paramour during the relevant period based on pre-separation evidence, nor can he show the malice prong of an alienation of affection claim or the sexual intercourse element of a criminal conversation claim, the trial court was correct to grant Mr. McMican's motion for summary judgment. *See Lowe*, 305 N.C. at 369 (stating that summary judgment is appropriate when the moving party shows "that the opposing party cannot produce evidence to support an essential element of his or her claim."). Thus, we reverse the decision of the Court of Appeals and instruct that court to reinstate the trial court's order granting summary judgment in favor of defendant.

REVERSED.

JAMES W. BRADSHAW; CARLA O. BRADSHAW; RESORT RETAIL ASSOCIATES, INC.; E.C. BROADFOOT; CHRISTINA DUNN CHANDRA; THOMAS F. EGAN; CHARLES EGGERT; MARK P. GARSIDE; DR. JAMES J. GREEN, JR.; ROBERT K. GRUNEWALD; RONALD HOLMES; DAVID LAUCK; CURT W. LEMKAU, JR.; EVAN MIDDLETON; JOSHUA M. NELSON; CHRISTIAN C. NUGENT; REGINA H. PAKRADOONI, AS EXECUTRIX OF THE ESTATE OF PETER B. PAKRADOONI, DECEASED; FORD PERRY; MARCELLO G. PORCELLI; ADAN RENDON; RICHARD H. STEVENSON; PAUL STOKES; LAWRENCE J. THEIL; R. MITCHELL WICKHAM; WILLIAM H. WILLIAMSON, III; WILLIAM K. WRIGHT, JR.; ALEX M. WOLF; CHAFFIN FAMILY LIMITED PARTNERSHIP; AND SOLARIS CAPITAL LLC

v.

STEPHEN E. MAIDEN; MAIDEN CAPITAL, LLC; AND SS&C TECHNOLOGIES, INC., SUCCESSOR BY MERGER TO SS&C FUND ADMINISTRATION SERVICES, LLC (A/K/A SS&C FUND SERVICES)

No. 52A23

Filed 22 March 2024

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 287 N.C. App. 393, 2022 WL 17985671 (2022), affirming orders and opinions dated 10 August 2015, 1 September 2020, and 15 September 2020, and entered on 20 August 2015, 4 September 2020, and 30 September 2020, respectively,

by Chief Business Court Judge Louis A. Bledsoe III in Superior Court, Mecklenburg County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 14 February 2024.

Lewis & Roberts, PLLC, by Matthew D. Quinn and James A. Roberts, III, and Mauney PLLC, by Gary V. Mauney, for plaintiff-appellants.

Alston & Bird LLP, by Ryan P. Ethridge and Michael A. Kaeding; and Paul, Weiss, Rifkind, Wharton, & Garrison LLP, by Rober A. Atkins, pro hac vice, and Jeffrey J. Recher, pro hac vice, for defendant-appellee SS&C Technologies, Inc.

PER CURIAM.

Justice DIETZ did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Batson v. Coastal Res. Comm'n*, 385 N.C. 328, 892 S.E.2d 589 (2023) (per curiam) (affirming by an equally divided vote a Court of Appeals decision without precedential value).

AFFIRMED.

ESTATE OF GREGORY GRAHAM
v.
ASHTON LAMBERT, INDIVIDUAL AND OFFICIAL CAPACITY,
FAYETTEVILLE POLICE DEPARTMENT, AND CITY OF FAYETTEVILLE

No. 113A22

Filed 22 March 2024

1. Immunity—governmental—waiver by insurance—standard for reviewing summary judgment denial

In a negligence and wrongful death action filed against a city and a police officer (defendants) by the estate of a pedestrian who was struck and killed while the officer was driving to the scene of a domestic violence incident, the Court of Appeals erred by applying the wrong legal standard when it reversed the trial court's order denying summary judgment to defendants. Rather than analyzing whether the evidence raised a genuine issue of material fact regarding whether the city had waived governmental immunity by purchasing liability insurance, the Court of Appeals instead erroneously employed the standard under Civil Procedure Rule 12(b)(6) (motion to dismiss for failure to state a claim) by focusing on the sufficiency of the complaint to raise the issue of waiver.

2. Immunity—governmental—speed limit exceeded by police officer—no statutory waiver of immunity

In a negligence and wrongful death action filed against a city and a police officer (defendants) by the estate of a pedestrian who was struck and killed while the officer was driving to the scene of a domestic violence incident, the speed limit exemption in N.C.G.S. § 20-145—under which speed limits do not apply to police officers while chasing or apprehending violators of the law or to other vehicle operators traveling in response to an emergency—did not operate as a statutory waiver of governmental immunity. Section 20-145, with its focus on individual drivers and individual actions and inclusion of non-governmental actors, contained no plain or clear legislative mandate withdrawing immunity from a discrete government body.

3. Immunity—governmental—speed limit exceeded by police officer—official capacity suit—same waiver analysis as for city

In a negligence and wrongful death action filed against a city and a police officer (defendants) by the estate of a pedestrian who

was struck and killed while the officer was driving to the scene of a domestic violence incident, where the Court of Appeals' decision was reversed because that court applied the wrong standard of review to the trial court's order denying summary judgment to defendants, the Court of Appeals was instructed on remand to treat the estate's claim against the officer in his official capacity as merged with the claim against the city.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 282 N.C. App. 269 (2022), reversing an order denying summary judgment entered on 16 July 2020 by Judge Mary Ann Tally in Superior Court, Cumberland County. Heard in the Supreme Court on 31 October 2023.

Law Offices of Antonio F. Gerald, by Kevin Vidunas; and O'Malley Tunstall, PLLC, by Joseph P. Tunstall III and Peter J. Tomasek, for plaintiff-appellants.

Cranfill Sumner LLP, Steven A. Bader and James C. Thornton, for defendants-appellees.

Roberts & Stevens, PA, by David C. Hawisher, for North Carolina Association of Defense Attorneys, amicus curiae.

Tin Fulton Walker & Owen, PLLC, by Abraham Rubert-Schewel, for North Carolina Advocates for Justice, amicus curiae.

EARLS, Justice.

Just before midnight on 24 July 2018, Officer Ashton Lambert struck Gregory Graham with his police cruiser while responding to a call. Mr. Graham died at the scene. After the collision, Mr. Graham's Estate sued Officer Lambert in his official and individual capacities, alleging negligence, gross negligence, and wrongful death. The Estate brought the same claims against the officer's employers—the City of Fayetteville (City) and the Fayetteville Police Department (Police Department). The Police Department was dismissed as an improper party. Before trial, the City and Officer Lambert moved for summary judgment, arguing that governmental and public officer immunity barred the Estate's claims. The trial court denied their motions; the Court of Appeals reversed. *Est. of Graham v. Lambert*, 282 N.C. App. 269, 271 (2022).

In reaching its conclusion, the Court of Appeals improperly analyzed the summary judgment order before it. To examine whether the City waived governmental immunity by buying liability insurance, the court focused on the sufficiency of the Estate's complaint, rather than the presence of a genuine factual dispute. *Id.* at 273–74. Put differently, the court imported the Rule 12(b)(6) standard into the realm of summary judgment. *See* N.C.G.S. § 1A-1, Rule 12(b)(6) (2023).

That misguided analysis yielded a misguided result as to immunity. By statute, the City's insurance coverage dictates whether it has waived governmental immunity on the Estate's claim. *See* N.C.G.S. § 160A-485 (2023). The same is true for the official capacity suit against Officer Lambert, as that claim is—in effect—one against the City. We thus reverse the Court of Appeals as to the City's waiver of immunity and remand for it to analyze "whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact" on that point. *See Summey v. Barker*, 357 N.C. 492, 496 (2003).

We also clarify the legal framework for suits to which N.C.G.S. § 20-145 (2023) applies. That statute exempts police officers from speed limits when chasing or apprehending criminal absconders. *Id.* But it does not shield officers for their gross negligence. *See Young v. Woodall*, 343 N.C. 459, 462 (1996). The Estate contends—and the Court of Appeals assumed—that section 20-145 exposes the City to liability for Officer Lambert's conduct. In other words, that the statute waived governmental immunity. But because section 20-145 focuses on individual drivers and individual responsibility, it sets "gross negligence" as the metric for personal liability in personal capacity claims. There is no basis in the statute's plain language, however, to conclude that it also waives the City's immunity.

The dissenting Court of Appeals judge would have denied defendants' motion for summary judgment on the gross negligence claim. Viewing the evidence in the light most favorable to the Estate, the dissenting judge found a genuine issue of material fact on the question of whether Officer Lambert was grossly negligent. *See Est. of Graham*, 282 N.C. App. at 278–83 (Jackson, J., concurring in part and dissenting in part). Neither the majority nor the dissent below clarify whether they were analyzing the gross negligence claim as it applied to the individual capacity claims or the official capacity claims or both. At oral argument in this Court, the Estate's Counsel represented that the only claim on appeal is the claim against the City based on its alleged waiver of governmental immunity by securing insurance. Because the Estate does not appeal it, we do not reach the question of whether the evidence taken in

the light most favorable to the Estate raises a genuine issue of material fact on Officer Lambert's gross negligence as it relates to the individual capacity claim.

I. Background

A. The Accident

On 24 July 2018, Officer Lambert was on-duty as an officer with the City of Fayetteville Police Department. It was his first night shift. In fact, it was his first solo shift since joining the force the October before.

At 11:53 PM, Officer Lambert was one of three officers dispatched to a domestic disturbance. Of the officers, Officer Lambert was the farthest away and was thus providing backup. In his own words, he was "responding to a call for service," not "an emergency."

When he received the call, Officer Lambert was driving his police cruiser on Raeford Road—a flat multi-lane straightaway with no curves. He was traveling west in the middle lane. That night, the traffic was light, the weather clear, and the road well-lit by streetlights and nearby businesses. After receiving the call, Officer Lambert used the laptop in the front seat of his cruiser to find the address. He continued touching the computer's track pad as he drove.

At the same time, Gregory Graham was crossing Raeford Road on foot. Earlier that day, Mr. Graham was admitted to Roxie Care Center for suicidal ideations. At one point, he voiced thoughts of "throwing himself into traffic." Mr. Graham received medical treatment and was released later that same day. As he traversed Raeford Road that evening, Mr. Graham's blood alcohol content was 0.31.

There was no pedestrian crosswalk on that portion of the street, but camera footage showed that it was well lit by the floodlights of a car dealership. The same footage captured Mr. Graham crossing three eastbound lanes and stopping on the median. He looked both ways, and then started across the westbound lanes.

Raeford Road has a speed limit of 45 miles per hour. Officer Lambert, however, drove faster, at one point reaching 58 miles per hour. His cruiser's blue lights were off and its emergency siren quiet. As he drove, Officer Lambert periodically looked at and touched his laptop. And in the moments before the crash, his cruiser twice strayed outside of its lane. Three seconds before impact, Officer Lambert shifted positions and leaned towards his laptop.

At 11:53 PM, Officer Lambert struck Mr. Graham head-on. He was driving 53 miles per hour, and his body camera footage did not capture any obvious efforts to brake or swerve. There were no skid marks on the road. After colliding with Mr. Graham, Officer Lambert pulled over, activated his blue lights, and alerted dispatch. Mr. Graham died at the scene.

B. The Lawsuit

On 13 June 2019, almost a year after Mr. Graham's death, his Estate sued the Police Department, the City, and Officer Lambert in his individual and official capacities. The Estate alleged wrongful death, negligence, and gross negligence. On the latter claim, the Estate invoked N.C.G.S. § 20-145, arguing that Officer Lambert's driving was grossly negligent and above the posted speed limits.

On 19 August 2019, defendants answered the Estate's complaint. They moved to dismiss the Police Department as an improper party. They raised defenses of governmental and public officer immunity. And they moved to dismiss the Estate's complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim. In defendants' view, the Estate did not specifically allege that the City waived governmental immunity by buying liability insurance.

In March 2020, defendants moved for summary judgment. Officer Lambert and the City reasserted their immunity defenses and argued that "no evidence" showed that the officer "acted in a . . . grossly negligent manner." The Police Department contended that, as a subunit of the City, it was not a proper party to the suit.

The trial court agreed with the Police Department and dismissed the Estate's claims against it with prejudice. But it denied summary judgment for Officer Lambert and the City, concluding that "genuine issues of material fact" remained. Officer Lambert and the City appealed the trial court's summary judgment ruling.

C. The Appeal

A divided panel of the Court of Appeals reversed the trial court's summary judgment ruling and granted summary judgment to the City and Officer Lambert. *Est. of Graham*, 282 N.C. App. at 278. The court first held that the Estate sufficiently plead a waiver of governmental immunity. *Id.* at 274. Under N.C.G.S. § 160A-485, cities may waive their immunity from tort claims by buying liability insurance. According to the Court of Appeals, the Estate's complaint was "sufficient to give notice to defendants that plaintiff is alleging a waiver of immunity because it states the action is brought and that defendants are liable

pursuant to § 160A-485." *Id.* Since the Estate adequately plead waiver, the court reasoned that "governmental immunity was waived." *Id.*

Next, the Court of Appeals examined the individual capacity suit against Officer Lambert. Though governmental immunity attaches to governments and their employees when sued in their official capacities, public officer immunity governs personal liability. *Id.* (citing *Smith v. State*, 289 N.C. 303, 331 (1976)). Under that doctrine, an officer is immune from suit for acts within the scope of his duties, so long as they are devoid of malice or corruption. *See id.* Applying that standard, the court determined that Officer Lambert "was responding to an incident within the scope of his duties at the time of the accident." *Id.* And in discharging his official responsibilities, the officer's "conduct was neither malicious nor corrupt." *Id.* For those reasons, the court concluded that public officer immunity protected Officer Lambert from the Estate's individual capacity suit. *Id.* at 275. It thus awarded summary judgment on that claim. *Id.*

Finally, the court considered whether Office Lambert was grossly negligent in violation of section 20-145. In the court's view, Officer Lambert's "acts of discretion . . . may have been negligent but were not grossly negligent." *Id.* at 277. Because he was responding to a domestic disturbance, the officer had a "valid and lawful" reason "for driving at a speed above the speed limit." *Id.* at 276. The court acknowledged that Officer Lambert "slightly deviated" from his lane twice before the collision, "look[ed] at his laptop" while driving, "touch[ed] the laptop's trackpad," and failed to activate his blue lights or emergency siren as required by Police Department policy. *Id.* at 277. But it emphasized that when courts have found a genuine dispute as to gross negligence, the officer's conduct was "more egregious" than Officer Lambert's. *See id.* (citing *Truhan v. Walston*, 235 N.C. App. 406, 413 (2014)). Relying on that precedent, the court discerned no "genuine issue of material fact as to gross negligence" and so granted summary judgment for Officer Lambert and the City. *Id.* at 278.

Judge Jackson dissented on the issue of gross negligence. In his view, the evidence—taken in the Estate's favor—"presents a genuine issue of material fact regarding whether Officer Lambert was grossly negligent when he struck and killed Mr. Graham." *Id.* at 280 (Jackson, J., concurring in part and dissenting in part). Judge Jackson noted that "the accident occurred on Officer Lambert's first night shift, and first day working alone." *Id.* at 282. Before the incident, Officer Lambert was "speeding, his blue lights and siren were not activated (in violation of Department policy), and the location of his collision with Mr. Graham

was well-lit despite the late hour." *Id.* In the seconds before the collision, Officer Lambert was "using his computer to find an address." *Id.* at 283. Further evidence suggested that his distraction seeped into his driving—he "committed two lane violations because he was looking at his computer instead of the road ahead of him" and "leaned distinctively towards his computer three seconds before" impact. *Id.* Officer Lambert "collided with Mr. Graham without attempting to avoid Mr. Graham by turning or applying the cruiser's brakes to slow his vehicle down." *Id.* Judge Jackson explained that the "evidence, if believed by a jury, tended to show a high probability of injury to the public despite the absence of significant countervailing law enforcement benefits." *Id.* at 282 (cleaned up). For that reason, Judge Jackson would let the Estate present its case for a jury "to determine whether Officer Lambert was grossly negligent on 24 July 2018—a task to which we are ill-suited as an appellate court." *Id.*

Before this Court, the Estate filed a notice of appeal based on Judge Jackson's dissent. The City and Officer Lambert also filed a petition for discretionary review, arguing that the Estate's complaint did not sufficiently allege waiver of governmental immunity. We allowed the petition for discretionary review.

II. Standard of Review

We review summary judgment orders de novo. *See Builders Mut. Ins. Co. v. N. Main Constr.*, 361 N.C. 85, 88 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470 (2004)). Under that standard, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. Of Educ.*, 363 N.C. 334, 337 (2009) (cleaned up).

Summary judgment is proper only if (1) "there is no genuine issue as to any material fact," and (2) "any party is entitled to a judgment as a matter of law." *Belmont Ass'n v. Farwig*, 381 N.C. 306, 310 (2022) (cleaned up). The movant's "papers are carefully scrutinized" while the other party's "are indulgently regarded." *Caldwell v. Deese*, 288 N.C. 375, 378 (1975) (cleaned up); *accord Singleton v. Stewart*, 280 N.C. 460 (1972). Put differently, a court must credit "[a]ll facts asserted by the adverse party" and draw any inferences in its favor. *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (cleaned up).

Still, summary judgment is strong medicine and "should be used with caution." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402 (1979); *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534 (1971). Courts must tread gingerly at summary judgment, reserving it for cases where "only questions of law are involved and a fatal weakness in the

claim of a party is exposed." *Bartley v. City of High Point*, 381 N.C. 287, 299 (2022) (cleaned up). In that vein, summary judgment is proper if an "affirmative defense" bars "an essential element of the opposing party's claim." *Craig*, 363 N.C. at 337 (cleaned up).

That principle applies to immunity. As this Court has explained, immunity is "more than a mere affirmative defense" to liability—it "shields a defendant entirely from having to answer for" its conduct "in a civil suit for damages." *See id.* (discussing governmental immunity); *see also Dawes v. Nash County*, 357 N.C. 442, 444–45 (2003) (sovereign immunity); *Bartley*, 381 N.C. at 294 (public officer immunity). Thus, a defendant entitled to immunity may seek summary judgment on a plaintiff's claims. *See Dobson*, 352 N.C. at 87 (awarding summary judgment to defendant and explaining that "plaintiff's claim against her for slander *per se* was barred" because the defendant's "compliance with the reporting statutes entitled her to immunity").

III. Immunity Doctrines

This case initially involved three claims against three defendants—the City, the Police Department, and Officer Lambert. Adding another layer, the Estate sued Officer Lambert in separate legal capacities, seeking relief from him as an individual and within his official role. Because this case presents interlocking immunities and overlapping claims, we start by clarifying the legal frameworks at play.

A. Suits Against Local Governments

The "common law doctrine of sovereign immunity" bars suits against the State unless it "has consented or waived its immunity." *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 570 (2021) (cleaned up). Cities, counties, and other localities are "recognizable units that collectively make up" the State and enjoy a slice of its sovereign power. *Dawes*, 357 N.C. at 445 (cleaned up). For that reason, a "portion of the State's sovereign immunity" trickles down "to local governments." *Wray v. City of Greensboro*, 370 N.C. 41, 47 (2017). That "more limited" protection—termed governmental immunity—shields "units of local government from suit for acts committed in their governmental capacity." *Providence Volunteer Fire Dep't, Inc. v. Town of Weddington*, 382 N.C. 199, 211–12 (2022) (cleaned up). By the same stroke, a local government is not liable "for the negligence of its employees in the exercise of governmental functions." *Meyer v. Walls*, 347 N.C. 97, 104 (1997).

Though conceptually similar, sovereign and governmental immunity differ importantly. For one, they attach to different entities. Sovereign

immunity embraces the State and its agencies—governmental immunity reaches local governments. *See id.* Likewise, the immunities "do not apply uniformly." *Evans v. Hous. Auth. of Raleigh*, 359 N.C. 50, 53 (2004). The State's sovereign immunity covers "both its governmental and proprietary functions." *Id.* But governmental immunity reaches "only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Id.* So when a local government reaches "beyond its governmental and police powers," it lacks "the full protections of sovereign immunity which the State and its agencies enjoy." *Kinston Charter*, 379 N.C. at 571 (cleaned up).

But sovereign and governmental immunity do share a key feature: Both are waivable by clear statutory language. *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38 (1983). The State Tort Claims Act, for instance, "partially waived [the State's] sovereign immunity by consenting to direct suits brought as a result of negligent acts committed by its employees in the course of their employment." *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 383 N.C. 31, 45 (2022) (cleaned up). In the same vein, the legislature has allowed cities to waive "immunity from civil liability in tort" by buying liability insurance. N.C.G.S. § 160A-485(a) ("Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance."). A similar regime applies to counties. N.C.G.S. § 153A-435 (2023).

To surmount a defense of governmental immunity, a plaintiff must first "state a cause of action" by alleging a waiver of that immunity. *See Wray*, 370 N.C. at 47 (cleaned up). To do so, the plaintiff must plead "facts that, if taken as true, are sufficient to establish a waiver of immunity." *Id.* at 48 (cleaned up). If the government seeks summary judgment on immunity grounds, it bears the "burden of clearly establishing the lack of any triable issue of fact by the record properly before the court." *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 469–70 (1979); *see also Craig*, 363 N.C. at 337. To prevail, the government must present a "forecast of evidence" showing that "an essential element" of the plaintiff's claim "would be barred by [the] affirmative defense" of governmental immunity. *Dobson*, 352 N.C. at 83. If the government carries its burden, the plaintiff in turn must "show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." *Lowe v. Bradford*, 305 N.C. 366, 369 (1982). To survive summary judgment, however, the plaintiff "need not *convince* the court that he would prevail on a triable issue of material fact but only that the issue *exists*." *Id.* at 370 (emphasis added); *accord Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 21 (1992) ("[I]t is not incumbent upon a plaintiff to present all

the evidence available in his favor, but only that necessary to rebut the defendant's showing." (cleaned up)).

B. Suits Against Government Officers

When a plaintiff sues a government employee, the "identity of the real party in interest dictates what immunities may be available." *Est. of Long v. Fowler*, 378 N.C. 138, 143 n.3 (2021) (quoting *Lewis v. Clarke*, 581 U.S. 155, 163 (2017)). In most cases, courts look to the pleadings and the "capacity in which a plaintiff intends to hold a defendant liable." *Mullis v. Sechrest*, 347 N.C. 548, 554 (1998). But when distinguishing official and individual capacity suits, a "crucial question" is "the nature of the relief sought, not the nature of the act or omission alleged." *Meyer*, 347 N.C. at 110 (cleaned up). If "the remedy sought is truly against the sovereign," the suit "in fact is against the official's office and thus the sovereign itself." *Lewis*, 581 U.S. at 162.

Thus, when a plaintiff sues a government employee in his official capacity, the "real party in interest" is "the governmental entity, not the named official." *Hafer v. Melo*, 502 U.S. 21, 26 (1991). That is because the suit seeks "recovery from the entity of which the public servant defendant is an agent." *Meyer*, 347 N.C. at 110. Because "the relief sought is only nominally against the official," official capacity suits "represent only another way of pleading an action against" the government. *Lewis*, 581 U.S. at 162 (cleaned up). On every meaningful metric, it "is basically a suit against the official office" rather than the person who holds it. *Corum v. Univ. of N.C.*, 330 N.C. 761, 772 (1992). For that reason, state officers sued in their official capacity "assume the identity of the government that employs them." *Hafer*, 502 U.S. at 27. And for the same reason, the "only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses." *Moore v. City of Creedmoor*, 345 N.C. 356, 367 (1996) (quoting *Hafer*, 502 U.S. at 25).

Thus in official capacity suits, a defendant acting within the scope of his duties and carrying out a government function enjoys "governmental immunity to the same extent as" his employer. *Mullis*, 347 N.C. at 551; *see also Harwood v. Johnson*, 326 N.C. 231, 238 (1990) ("A suit against defendants in their official capacities, as public officials or a public employee of the Parole Commission acting pursuant to its direction, is a suit against the State."). The same logic applies to waiver. Without its consent to suit, a government is immune, and so are its employees when sued in their official capacities for carrying out authorized, governmental functions. *See Harwood*, 326 N.C. at 238 (holding that plaintiff's "suit cannot be maintained against defendants in their official capacities"

because the government employer "has not consented to being sued in this forum" for defendants' actions). But when a government surrenders its immunity, so does an official capacity defendant—and to the same degree as the principal. *Mullis*, 347 N.C. at 555 (noting that school board's insurance coverage waived "governmental immunity from suit for the first $1,000,000 in damages which may be awarded," and thus concluding that "defendant[,] . . . in his official capacity, is entitled to governmental immunity to that same extent").

An individual capacity suit, by contrast, "seeks recovery from the defendant directly." *Meyer*, 347 N.C. at 110. In a personal capacity claim, officers are "sued as individuals," and held "personally liable for payment of any damages awarded." *Corum*, 330 N.C. at 772. For that reason, the "real party in interest is the individual, not the sovereign." *Lewis*, 581 U.S. at 163 (cleaned up). Thus, a defendant sued in his individual capacity does not enjoy sovereign or governmental immunity. *Est. of Long*, 376 N.C. at 139. That said, individual capacity defendants are not left unshielded—they may "assert personal immunity defenses." *Moore*, 345 N.C. at 368 (cleaned up).

Public officer immunity is one such personal defense. A "judicially created doctrine" steeped in prudential concerns, that immunity "shield[s] public officials from tort liability when those officials truly perform discretionary acts" within "the scope of their official duties." *Bartley*, 381 N.C. at 294. The doctrine has "two primary goals": promoting "fearless, vigorous, and effective administration of government policies," and dampening "trepidation about personal liability" that may deter competent people from taking office. *Id.* (cleaned up). And as the name suggests, public officer immunity is for public officers—i.e., people "charged with duties involving the exercise of some portion of the sovereign power." *Smith*, 289 N.C. at 333 (cleaned up). But the doctrine does not immunize conduct "at odds with the protections afforded by" it and that "underlie its utility." *Bartley*, 381 N.C. at 294. For that reason, an officer is immune only when he "lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption." *Smith*, 289 N.C. at 331.

IV. Application

We apply those immunity principles to the claims remaining in this case at this point, starting with the Estate's suit against the City.

A. The Estate's Suit Against the City

Governmental immunity shields the City "from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Meyer*, 347 N.C. at 104. Everyone agrees that Officer Lambert was acting within his official duties and performing a government function at the time of the collision. So the City is immune for its officer's torts, unless it waived that immunity.

The Estate raises two theories of waiver. It first contends that the City surrendered immunity by buying insurance. According to the Estate, the City is indemnified—and thus liable—for the injuries caused by Officer Lambert. The Estate also invokes section 20-145. That provision exempts a police officer from speed limits when "chas[ing] or apprehen[ding] . . . violators of the law," so long as he drives with "due regard for safety." N.C.G.S. § 20-145. But under the statute, an officer must answer for "the consequence[s] of a reckless disregard of the safety of others"—in other words, his gross negligence. *Id.*; *see also Young*, 343 N.C. at 462. Because Officer Lambert was speeding and arguably distracted by technology at the time of the accident, the Estate contends that he was grossly negligent. And since the officer violated section 20-145, the Estate maintains that the City—as his employer—is vicariously liable. In so many words, then, the Estate reads section 20-145 to waive the City's governmental immunity for its officers' grossly negligent driving.

The Estate's first theory was improperly resolved by the Court of Appeals. Its second theory fails as a matter of law.

1. Did the City waive governmental immunity by buying insurance?

[1] By statute, cities may waive governmental immunity by securing liability insurance. *See* N.C.G.S. § 160A-485. And in the same statute, the legislature detailed the scope and mechanics of waiver-by-insurance. *See id.* If a city buys insurance, it surrenders immunity from a tort claim "to the extent that the city is insured against such claim pursuant to this section." N.C.G.S. § 160A-485(c).

In its complaint, the Estate explained that its suit was "brought against the Defendant City pursuant to N.C.G.S. § 160A-485" and that "Defendant City shall be held liable pursuant to . . . N.C.G.S. § 160A-485." *Est. of Graham v. Lambert*, 282 N.C. App. at 273 (alteration in original). The City, however, moved to dismiss the Estate's suit under Rule 12(b)(6). Invoking our precedent, the City attacked the complaint for failing to "state a claim upon which relief can be granted under *some* legal

theory." *See Bridges v. Parrish*, 366 N.C. 539, 541 (2013) (quoting *Coley v. State*, 360 N.C. 493, 494–95 (2006)). More specifically, the motion faulted the Estate because it did not specifically allege that the City waived immunity by securing insurance. From the record, we cannot locate any ruling on the City's 12(b)(6) motion. We do know, however, that the trial court denied Officer Lambert and the City's later motion for summary judgment.

The parties contested—and the Court of Appeals considered—only the summary judgment order, not the 12(b)(6) motion. But the court conflated the issues before it and commingled the applicable law. It first recited the 12(b)(6) standard: "[t]o state a claim against the municipality a plaintiff must allege waiver of immunity by the purchase of insurance." *Est. of Graham*, 282 N.C. App. at 273 (cleaned up). The court then applied that 12(b)(6) rubric to the pleadings. In its view, the Estate stated a claim against the City because its "complaint [wa]s sufficient to give notice to defendants that plaintiff [wa]s alleging a waiver of immunity." *Id.* at 274. On that basis, the court concluded that "governmental immunity was waived." *Id.* The problem with that analysis: The court resolved a summary judgment order using the Rule 12(b)(6) framework. That was error—the court did not consider the right question or apply the right standard.

In purpose and practice, Rule 12(b)(6) and summary judgment travel in discrete lanes. At the pleading stage, a 12(b)(6) motion tests the "the law of a claim, not the facts which support it." *Snyder v. Freeman*, 300 N.C. 204, 209 (1980) (quoting *White v. White*, 296 N.C. 661, 667 (1979)). At the dawn of the case, courts should not discard a complaint "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 v. Duke*, 277 N.C. 94, 103 (1970) (cleaned up). But summary judgment is a different tool with a different scope. It furnishes a "device to bring litigation" to a head when it "can be readily demonstrated that no material facts are in issue." *Kessing*, 278 N.C. at 533. To that end, summary judgment "pierce[s] the pleadings," and gives courts "a preview or forecast of the proof of the parties in order to determine whether a jury trial is necessary." *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 149 (1976) (cleaned up). While a 12(b)(6) motion probes the "legal sufficiency" of the pleadings, *Blue v. Bhiro*, 381 N.C. 1, 5 (2022), summary judgment "eliminate[s] formal trials where *only* questions of law are involved," *Kessing*, 278 N.C. at 534 (emphasis added). And while a 12(b)(6) motion is "decided on the pleadings alone," *id.* at 533, summary judgment "embraces more than the pleadings," allowing courts to "consider affidavits, depositions,

and other information," *Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co.*, 42 N.C. App. 259, 262 (1979).

Because Rule 12(b)(6) and summary judgment pose different questions and draw from different sources, they require different standards. But here, the Court of Appeals misapprehend the issue before it and the framework at play. Because the parties only appealed the summary judgment order, the court should have asked whether the evidence raised a genuine factual dispute on the existence and extent of the City's waiver-by-insurance. But the court instead applied the Rule 12(b)(6) rubric, focusing on the sufficiency of the Estate's complaint. It held that the Estate adequately plead waiver, and so the City's "governmental immunity was waived." *Est. of Graham*, 282 N.C. App. at 274. But even if a complaint survives a 12(b)(6) motion, it is not guaranteed victory at summary judgment. After all, a plaintiff may state a claim for relief, but fail to show a "genuine factual controversy" for a jury to resolve. *See Nasco*, 291 N.C. at 149–50 (cleaned up). Significantly here, at summary judgment the City submitted affidavit testimony that it has not purchased liability insurance that covers this incident.

By asking whether the Estate sufficiently alleged waiver—the standard under Rule 12(b)(6)—the Court of Appeals improperly resolved the summary judgment order before it. We thus vacate its decision on the City's immunity and remand for the proper analysis. The court should ask whether—viewing the evidence in the light most favorable to the Estate and considering the City's offer of proof that no liability insurance exists—the Estate has offered sufficient evidence to raise a genuine factual dispute as to the City's waiver of immunity, including whether the terms of any existing insurance policy cover this incident.

2. Does section 20-145 waive the City's governmental immunity?

[2] Though the General Assembly may waive a city's governmental immunity, it must do so clearly. *Guthrie*, 307 N.C. at 537–38. Put differently, the legislature must make plain its intent to withdraw the "sovereign attributes of immunity." *Orange County v. Heath*, 282 N.C. 292, 296 (1972). For that reason, immunity statutes are "strictly construed" and waiver is not "lightly inferred." *Guthrie*, 307 N.C. at 537–38.

Under that approach, section 20-145 does not plainly waive the City's governmental immunity. By its terms, the statute contemplates personal liability: It holds "the *driver*" of a listed car responsible for "the consequence of a reckless disregard of the safety of others." *See* N.C.G.S. § 20-145 (emphasis added). Because the statute focuses on

individual drivers and their individual actions, it lacks a key ingredient for waiver: Clear language withdrawing immunity from a discrete government body. Under our precedent, statutes waiving immunity have specified what they were doing, how they were doing it, and to whom they applied. *See, e.g.*, *Evans*, 359 N.C. at 56–57 (holding that "a Chapter 157 housing authority has statutory authority to accept liability for its governmental functions by the purchase of insurance" because the legislature authorized it "to sue and be sued" and "to insure or provide for the insurance of the property or operations of the authority against such risks as the authority may deem advisable" (cleaned up)); *N.C. Ins. Guar. Ass'n v. Bd. of Trs.*, 364 N.C. 102, 112 (2010) (concluding that the General Assembly clearly waived the State's sovereign immunity by applying the Workers' Compensation Act to claims brought by governmental employees); *see also* N.C.G.S. § 160A-485 (allowing cities to waive tort immunity by buying insurance); N.C.G.S. § 153A-435 (same for counties).

But section 20-145, by contrast, says nothing about governmental immunity and still less about waiver. Also telling, the statute reaches beyond government employees, extending coverage to private ambulances "when traveling in emergencies." *See* N.C.G.S. § 20-145. We think it implausible that section 20-145 was intended to waive governmental immunity without saying so and while applying to non-governmental actors. Because section 20-145 is not a "direct," "positive," or "clear waiver by the lawmaking body," it does not expose municipalities to liability when their agents breach its terms. *Orange County*, 282 N.C. at 296. For that reason, the City's governmental immunity remains intact against the Estate's gross negligence claims unless otherwise waived by the purchase of liability insurance.

Section 20-145 fastens responsibility to individual drivers for their individual acts and therefore applies to individual capacity suits. *See Young*, 343 N.C. at 462. For those claims, gross negligence is the standard. *See Parish v. Hill*, 350 N.C. 231, 238 (1999) ("[A]s the law stands currently, in *any* civil action resulting from the vehicular pursuit of a law violator, the gross negligence standard applies in determining the officer's liability."). In those narrow circumstances, personal liability attaches to "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *See Bullins v. Schmidt*, 322 N.C. 580, 583 (1988) (explaining that section 20-145 "establishes as the public policy of North Carolina that if an officer's conduct" is "determined to be grossly negligent, then the statute does not protect him and he may be liable for damages proximately resulting from such gross negligence").

But without the plain legislative mandate needed to withdraw governmental immunity, section 20-145 does not provide a vehicle for the Estate's claim against the City.

B. The Estate's Official Capacity Suit Against Officer Lambert

[3] Sued in his official capacity, Officer Lambert is "entitled to governmental immunity to the same extent as" the City. *Mullis*, 347 N.C. at 551. Because the official capacity claim against Officer Lambert is "merely another way of bringing suit against the City," both claims entail the same analysis and the same result. *See Moore*, 345 N.C. at 367. Since the City's immunity hinges on its insurance coverage, the official capacity suit against Officer Lambert does as well. On remand, the court should treat the official capacity suit against Officer Lambert as merged with the claim against the City.

V. Conclusion

As to the City, we reverse the Court of Appeals' ruling on whether the City waived governmental immunity and remand to that court for application of the proper summary judgment standard. Because the official capacity suit against Officer Lambert in this case is simply another way of suing the City, the immunity analysis is the same. As noted above, the Estate has abandoned its individual capacity suit against Officer Lambert. The case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HALIKIERRA COMMUNITY SERVICES LLC
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH BENEFITS; MEDICAL REVIEW OF NORTH CAROLINA, INC. D/B/A THE CAROLINAS CENTER FOR MEDICAL EXCELLENCE; KAY COX, IN HER INDIVIDUAL CAPACITY; PATRICK PIGGOTT, IN HIS INDIVIDUAL CAPACITY

No. 59A23

Filed 22 March 2024

Administrative Law—Medicaid reimbursements—prepayment review—constitutional violations alleged—no genuine issue of material fact

In a complex business case arising from the decision of the N.C. Department of Health and Human Services (DHHS) to place a medical services company on Medicaid reimbursement prepayment review for alleged overbilling practices, the trial court correctly granted summary judgment to DHHS where the company's evidentiary forecast did not demonstrate any genuine issue of material fact with regard to its substantive due process and equal protection violation claims. The agency's decision was not arbitrary and capricious where its reasons for placing the company on prepayment review were rationally related to a legitimate government interest of combating Medicaid fraud and where there was no evidence that DHHS treated the company differently from other personal care providers similarly situated.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion entered on 27 September 2022 by Special Superior Court Judge for Complex Business Cases Michael L. Robinson in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 13 February 2024.

Ralph T. Bryant Jr.; and Q Byrd Law, by Quintin D. Byrd, for plaintiff-appellant.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, John H. Schaeffer, Assistant Attorney General, James W. Whalen, Solicitor General Fellow, and Mary Elizabeth D. Reed, Solicitor General Fellow, for defendant-appellee North Carolina Department of Health and Human Services, Division of Health Benefits.

No brief filed for defendant-appellees Medical Review of North Carolina, Inc. d/b/a The Carolinas Center for Medical Excellence, Kay Cox, and Patrick Piggott.

RIGGS, Justice.

This appeal requires us to determine whether summary judgment was properly entered against plaintiff Halikierra Community Services LLC (Halikierra) on its substantive due process and equal protection violation claims against defendant North Carolina Department of Health and Human Services (DHHS)[1] after DHHS placed Halikierra on Medicaid reimbursement prepayment review. We hold that the trial court properly granted summary judgment for DHHS because Halikierra's evidentiary forecast failed to disclose any genuine issues of material fact in support of its claims.

I. Factual and Procedural History

Beginning in 2009, Halikierra provided home personal care services to Medicaid beneficiaries through the North Carolina Medicaid Program. DHHS, which administers the Medicaid program, received reimbursement requests from Halikierra in connection with the provision of personal care services; once received, DHHS would ordinarily remit the Medicaid reimbursement to Halikierra.

DHHS received several Medicaid overbilling complaints relating to Halikierra's services between 2015 and 2017, leading DHHS to conduct several post-payment audits. In carrying out these audits, DHHS inspected Halikierra's supporting documentation, determined that Halikierra had erroneously received excess Medicaid reimbursement funds on at least three occasions, and recovered those excess sums from Halikierra. DHHS also compared Halikierra's billing patterns to comparable personal care providers, which showed an outsized volume of billing compared to its peers. Independent of these investigations into Halikierra's billing practices, DHHS received a complaint that Halikierra was operating out of unlicensed locations.

In October 2017, DHHS resolved to place Halikierra on prepayment review. Under this statutory auditing regime, DHHS held any reimbursements to Halikierra pending investigation. DHHS informed Halikierra of its decision by letter dated 4 June 2018, which stated that "[i]dentification

1. Halikierra's appeal only concerns claims against DHHS, and discussion of the other named defendants is therefore omitted from this opinion.

of aberrant billing practices as a result of investigations" and "[d]ata analysis performed by [DHHS]" merited prepayment review. These stated bases conformed with the statute governing prepayment claims review, N.C.G.S. § 108C-7(a) (2023), which authorizes such action on those precise grounds.

By August 2018, DHHS had referred Halikierra to the North Carolina Attorney General's Office for investigation into potential fraud. DHHS suspended Halikierra's Medicaid participation that same month on suspicion that it was billing for services not rendered, hiring and providing services through unauthorized personnel, and operating out of unlicensed facilities. DHHS's own audit through an independent investigator, completed in September 2018, revealed $530,579 in suspicious reimbursement claims; DHHS ultimately denied $982,789.50 of the $1,129,733.27 in Medicaid reimbursement claims submitted by Halikierra during the prepayment review period. Halikierra's participation in Medicaid was subsequently terminated on 2 October 2018.

Halikierra filed a petition with the Office of Administrative Hearings on 13 December 2018, challenging DHHS's denial of its Medicaid reimbursement claims. The Office of Administrative Hearings subsequently upheld DHHS's actions in its Final Decision.

Outside the administrative petition, Halikierra filed suit in the Superior Court, Wake County against DHHS alleging, *inter alia*, that DHHS's decision to place Halikierra on prepayment review violated its substantive due process and equal protection rights under the North Carolina Constitution. The matter was subsequently designated a mandatory complex business case. On 27 September 2022, the trial court granted summary judgment for DHHS on all pending claims. Halikierra subsequently filed timely notice of appeal, asserting error as to the dismissal of its substantive due process and equal protection claims against DHHS.

II. Analysis

Halikierra's argument on appeal is straightforward: DHHS acted arbitrarily and capriciously in placing Halikierra on prepayment review because DHHS had no established policies or procedures for doing so. Moreover, Halikierra contends, the evidence reveals inconsistent and contradictory bases behind DHHS's prepayment review decision. We hold the trial court did not err in granting summary judgment to DHHS on these claims.

A. Standard of Review

Summary judgment is proper where "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 the moving party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2023). These materials are considered in the light most favorable to the nonmovant. *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018). Material issues are those that "constitute a legal defense, or would affect the result of the action[,]" while genuine issues are those that "may be maintained by substantial evidence." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972). The movant "bears the initial burden of demonstrating the absence of a genuine issue of material fact. If the movant successfully makes such a showing, the burden then shifts to the nonmovant to come forward with specific facts establishing the presence of a genuine factual dispute for trial." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579 (2002) (citation omitted). We review a trial court's summary judgment ruling de novo. *N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 376 N.C. 280, 285 (2020).

B. Substantive Due Process

The Law of the Land Clause in Article 1, Section 19 of the North Carolina Constitution—like its federal analogue found in the Fourteenth Amendment to the United States Constitution—serves "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Gunter v. Sanford*, 186 N.C. 452, 456 (1923) (cleaned up). "When reviewing an alleged violation of [these] substantive due process rights, a court's first duty is to carefully describe the liberty interest the complainant seeks to have protected." *Standley v. Town of Woodfin*, 362 N.C. 328, 331 (2008). Restrictions on fundamental rights—those rights that are "a part of every individual's liberty," *State v. Dobbins*, 277 N.C. 484, 497 (1971)—are subject to strict scrutiny, *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180 (2004). When the right involved is not fundamental, we apply the rational basis test and ask "whether the [government action] in question is rationally related to a legitimate government purpose." *Standley*, 362 N.C. at 332 (cleaned up). Under this test, "any conceivable legitimate purpose is sufficient," *id.* (cleaned up), and the act is not arbitrary so long as it bears a "rational . . . relation to the public health, morals, order, or safety, or the general welfare," *G I Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 210 (1962) (cleaned up).

Neither party asserts that a fundamental right is implicated by DHHS's action in this case. And Halikierra does not argue that the prepayment review program violates substantive due process; instead, it argues only that the selection of Halikierra was unconstitutionally arbitrary under the Law of the Land Clause. Because any or all of the reasons for which Halikierra was placed on prepayment review are rationally related to a legitimate governmental interest, we hold that Halikierra has failed to establish a constitutional substantive due process violation.

The forecast of evidence produced below shows that Halikierra was selected for prepayment review on several grounds. One DHHS investigator, Kay Cox, testified that the adverse post-payment audits, consumer complaints, and data analysis showing comparatively outsized billing volumes were submitted to Patrick Piggott, the final decisionmaker at DHHS, for consideration of prepayment review. Mr. Piggott's testimony was largely consistent with Ms. Cox's,[2] as he identified both the prior investigation and DHHS's data analytics analysis as the bases for his decision. These unfavorable inquiries into Halikierra's billing practices provided a rational basis for placing Halikierra on prepayment review, which purpose is to combat Medicaid fraud and "ensure that claims presented by a provider for payment by [DHHS] meet the requirements of federal and State laws and regulations" through investigation of "credible allegations of fraud, identification of aberrant billing practices as a result of investigations, [and] data analysis performed by [DHHS]." N.C.G.S. § 108C-7(a) (2023).[3]

To be sure, an agency may act arbitrarily and capriciously for substantive due process purposes when it is granted unfettered discretion over a decision and fails to promulgate and adhere to policies governing that process. *See In re Ellis*, 277 N.C. 419, 425–26 (1970) (observing that government action violates the substantive due process clauses of the state and federal constitutions when decisionmakers, "in the absence of standards, . . . could [render their decision] for a good reason, for a bad reason, or for no reason" (cleaned up)). And agencies may insulate themselves from prospective substantive due process challenges

2. Mr. Piggott testified that Ms. Cox would have only been assigned to review Halikierra *after* it was placed on prepayment review. This contradiction in the testimony is ultimately immaterial to the question of *why* Halikierra was selected for prepayment review, as Mr. Piggott's stated bases for doing so were consistent with those offered by Ms. Cox. Moreover, rational basis review is satisfied "[a]s long as there could be *some* rational basis." *Lowe v. Tarble*, 313 N.C. 460, 462 (1985) (emphasis added).

3. Halikierra does not contend in its principal brief that this statute is ambiguous or that these statutory criteria were not met based on the evidence presented.

by creating and faithfully implementing such policies. While Halikierra may make sound policy arguments for why more detailed policies and procedures are desirable or even necessary, this Court cannot, on these facts, find error in the trial court's ruling. The prepayment review statute in this case identifies the public purposes for which prepayment review may be exercised, and the rationales presented by the evidence for placing Halikierra on prepayment review fall within those enumerated therein. Because this case does not implicate fundamental rights and the evidence shows that DHHS's prepayment review placement decision was rationally related to a legitimate governmental interest, Halikierra has failed to demonstrate a genuine issue of material fact in support of its substantive due process claim.[4]

C. Equal Protection

Like substantive due process, equal protection claims under the North Carolina Constitution are subject to either strict scrutiny or rational basis review, with the former standard applicable to restrictions of fundamental rights or members of a suspect class. *Rhyne*, 358 N.C. at 180. For example, government action treating persons differently or more harshly than a similarly situated person or entity on the basis of race mandates the exacting standards of strict scrutiny review. *Miller v. Johnson*, 515 U.S. 900, 904 (1995). Other claims unrelated to disparate treatment of suspect classes or restrictions of fundamental rights, however, are subject to less stringent rational basis review. Under this standard, a claimant must establish that "he received treatment different from others similarly situated," *Maines v. City of Greensboro*, 300 N.C. 126, 132 (1980), and that such disparate treatment did not "bear some rational relationship to a conceivable legitimate governmental interest," *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11 (1980).

Here, Halikierra does not directly allege that it was treated differently or more harshly on any basis that would trigger strict scrutiny review. Nor has it introduced any evidence that would support such allegations. Without allegations or evidence disclosing that strict scrutiny applies, we proceed under rational basis review.

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4. Halikierra asserts that our ruling would permit an official to "make [prepayment review] decisions to benefit[ ] [a] criminally minded individual[,] . . . to feed [a] personal vice[,] . . . [or out of] personal ill will." We do not so hold, and nothing in the record remotely suggests that any of these events occurred here. There are limits to the deference of rational basis review, but we do not find the facts in this case require us to probe the contours of those limits.

The parties' evidentiary proffers do not demonstrate disparate treatment of Halikierra from those similarly situated; none of the evidence produced below demonstrates that other personal care providers with outsized billing volumes, prior adverse post-payment audits, and a record of consumer complaints were not placed on prepayment review like Halikierra was. Nor has Halikierra identified evidence showing that DHHS utilized a different decision-making process than that used to place other Medicaid providers on prepayment review. The burden fell to Halikierra to produce such evidence once DHHS made its initial showing that there were no genuine issues of material fact on this claim. *See Liberty Mut. Ins. Co.*, 356 N.C. at 579. Halikierra has not done so here, and on the record before us, we affirm the trial court's order granting summary judgment on this claim.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order granting summary judgment in favor of DHHS and dismissing Halikierra's claims.

AFFIRMED.

IN THE MATTER OF A.H.

No. 194A23

Filed 22 March 2024

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 289 N.C. App. 501 (2023), reversing orders entered on 20 and 24 May 2022 by Judge Thomas B. Langan in District Court, Stokes County. Heard in the Supreme Court on 20 February 2024.

Anné C. Wright for petitioner-appellant Stokes County Department of Social Services.

James N. Freeman Jr. for appellant Guardian ad Litem.

Mercedes O. Chut for respondent-appellee father.

PER CURIAM.

Justice RIGGS did not participate in the consideration or decision of this case. As to the trial court's adjudication of neglect, the decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion.

As to the trial court's adjudication of dependency, the remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals as to dependency is left undisturbed and stands without precedential value. *See Batson v. Coastal Res. Comm'n*, 385 N.C. 328 (2023) (per curiam) (affirming by an equally divided vote a Court of Appeals decision without precedential value). This matter is remanded to the Court of Appeals for further remand to the trial court for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Justice EARLS dissenting.

North Carolina's general statutes set out seven criteria for determining that a child is a neglected juvenile. N.C.G.S. § 7B-101(15) (2023). This Court's cases establish that there must be "clear, cogent, and convincing evidence" of neglect to support an adjudication that a child is neglected. *See In re K.N.*, 373 N.C. 274, 278 (2020). The criteria for determining neglect are intended by the General Assembly "[t]o provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents." N.C.G.S. § 7B-100(4) (2023). But those criteria are not intended to empower trial courts to punish a parent they consider uncooperative or to remove a child from a home based on the court's own views of good parenting.

Several of the trial court's findings of fact in this case were not supported by clear, cogent, and convincing evidence. The remaining factual findings centered on a single incident and the interactions of the juvenile's parent and her caregiver with social workers. Those remaining findings do not support the adjudication that the child in this case was neglected by her father. I would affirm the decision of the Court of Appeals reversing the trial court's adjudication order and resulting disposition order.

I. Factual Background

This is respondent-father's appeal from an adjudication order dated 20 May 2022 and a disposition order dated 24 May 2022 adjudicating his daughter A.H. (Aerin)[1] neglected and dependent and placing Aerin in the custody of petitioner, Stokes County Department of Social Services (DSS). Aerin was born on 12 April 2012 and was nine years old at the time of the 4 October 2021 incident that led to the orders appealed here. Aerin's biological mother relinquished her parental rights on 15 December 2021 and is not a party to this appeal.

The record indicates that on 27 May 2021, a temporary custody order giving custody of Aerin to respondent-father was entered by the Forsyth County District Court when Aerin was residing with her mother in Forsyth County. The findings supporting that order detail unfit living conditions that Aerin was subjected to in her mother's home. The trial court on that date found

> that with [respondent-father] the minor child has her own room, a quiet and safe living environment; that to provide the same for the minor child, [her father] rented and moved into a second apartment across the street from [his wife/Aerin's stepmother] and his six other children; that the minor child's home, hygiene, clothing are all suitable and safe and [DSS caseworker] has seen and has no concerns with the same; that the minor child is presently remote learning in third grade, has an IEP and is doing well; that [her father and stepmother] are aware of and taking care of the minor child's medical and dental care and the minor child does not have any significant health issues.

The Forsyth County order also provided that respondent-father, who was the plaintiff in that case, "shall have legal and primary physical custody of the minor child, pending review of this matter before the undersigned on December 15, 2021." At the time this order was entered, respondent-father was living in Mt. Airy, North Carolina. However, before the Forsyth County court could review the temporary custody order, DSS became involved with the family due to an incident on 4 October 2021.

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1. A pseudonym used to protect the privacy and identity of the minor child and for ease of reading. *See* N.C. R. App. P. 42(b).

On 4 October 2021, Aerin was living with her father, stepmother, and her stepmother's four other children in Stokes County and attending King Elementary School. That day Aerin rode the school bus home with two of the other children in the home, and all three of them were met at the bus stop by respondent-father driving a truck with a work trailer attached. While still in the truck, respondent-father received a telephone call from Aerin's teacher, who mentioned that the family was now all living together in their new house.[2] When the call ended, respondent-father "told [Aerin] he was tired of her telling other people their business. He stated to [Aerin] that he was going to whoop her."

At this point Aerin got out of the truck and started walking away. Respondent-father told her to get back into the truck but she refused. He followed her in the truck but could not keep up with her because he could not maneuver the truck in the neighborhood's cul-de-sacs. Respondent-father then got out of his truck, again ordered Aerin to get in the truck, and started chasing her. Aerin began running and darted into the road, where she was nearly hit by a dump truck that honked at her. There was conflicting testimony about what respondent-father saw and why he turned around and got back into his truck. The trial court's uncontested finding was that "[t]he black man turned and walked away before the child was directly in front of the dump truck."

A neighbor, also returning home from picking up children from school, was directly behind the dump truck and saw Aerin run into the road. He followed Aerin walking down the road for approximately 200–300 feet until he pulled off the road into the parking lot of a business. He found that Aerin was "hysterical, crying and screaming" and initially too upset to speak. Eventually when he calmed her down, she said she was afraid of her father and that he would beat her. The neighbor called law enforcement and waited with Aerin until they arrived.

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2. This account is taken from the trial court's findings of fact based on Aerin's testimony. In Finding of Fact 38 the trial court states that it finds Aerin's testimony credible and "adopts the events and chronology set out" in her testimony as the court's findings. Respondent-father gave a different account of the telephone call and the conversation with his daughter in his testimony, but, as the majority in the Court of Appeals noted, the trial court's findings appeared to credit respondent-father's testimony at some points despite also making a finding that "[t]he court does not find [respondent-father] to be credible." The challenge this creates for appellate review is why, as we recently explained, "the better practice always will be to make specific, express findings in the written order about what the trial court determined the facts to be, rather than referencing evidence in the record and stating that the referenced evidence is credible" or, as in this case, not credible. *In re H.B.*, 384 N.C. 484, 490–91 (2023).

It appears that the trial court credited respondent-father's testimony in finding that he drove from the scene of the incident and took the other two children in the truck to a convenience store. The trial court found that

> there was a substantial risk to the juvenile of serious physical injury, when the father turned around, walked away, and left the child on a busy roadway on 10/4/2021. [Respondent-father] did not provide proper care of his child, when he left her running into a busy roadway . . . .

Aerin's stepmother admitted in her testimony that she did not cooperate with the DSS caseworker who came to the home the afternoon of 4 October 2021. The trial court found that "[n]o respondent was able to make a proper plan for [Aerin] on 10/4/2021. Her father . . . left and did not return to the scene. [Her stepmother] did not offer to make a plan for the child . . . ." Less than 24 hours after the incident, DSS filed a juvenile petition alleging that Aerin was an abused, neglected, and dependent juvenile.

II. Proceedings Below

The DSS petition was heard at the 23 February 2022 session of Stokes County Juvenile Court at which time the trial court took evidence and heard arguments of counsel for all parties. The trial court ultimately concluded that Aerin was neglected and dependent and dismissed the allegation of abuse. Respondent-father appealed, challenging several of the trial court's findings as unsupported by the evidence and inadequate to support the conclusion that Aerin was neglected or dependent. *See In re A.H.*, 289 N.C. App. 501, 502, 505 (2023).

Both the majority and the dissenting judges in the Court of Appeals agreed that the trial court's Findings of Fact 33, 39 through 42, 44, and 45 are unsupported by the evidence. *Id.* at 505, 511. They further agreed that the remaining findings of fact are proper and supported by the evidence. *Id.* The dissenting judge disagreed with the majority on the question of whether the remaining findings of fact were sufficient to support the trial court's ultimate conclusions that Aerin was a neglected and dependent juvenile. *Id.* at 510, 524.

Because the decision of the Court of Appeals to reverse the finding of dependency is left undisturbed by this Court's decision, the only issue here is whether, disregarding the unsupported findings, the findings of fact by the trial court that were supported by competent evidence are adequate to support the finding of neglect. *See In re A.J.L.H.*, 384 N.C.

45, 53 (2023) (explaining that in an appeal from a neglect adjudication, a reviewing court examines "whether the trial court's conclusions of law are supported by adequate findings and whether those findings, in turn, are supported by clear, cogent, and convincing evidence") (citing *In re E.H.P.*, 372 N.C. 388, 392 (2019)); *see also In re A.C.*, 378 N.C. 377, 394 (2021) (discussing that when a finding lacks sufficient evidentiary support, it must be disregarded and the court must determine whether the remaining findings support the trial court's adjudication).

III. Findings of Fact Supporting the Conclusion of Neglect

The Court of Appeals majority applied the correct standard of review in this case. Findings supported by clear, cogent, and convincing evidence are conclusive and binding on appeal, even when there is contrary evidence in the record. *In re A.E.*, 379 N.C. 177, 184 (2021). Conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019). We therefore review de novo whether the trial court's legal conclusion that Aerin was a neglected juvenile is supported by the remaining findings of fact.

This is distinct from the contention in the Court of Appeals dissent that our task is to "consider the totality of the evidence to determine whether the trial court's findings sufficiently support its ultimate conclusion that [Aerin] is a neglected juvenile." *In re A.H.*, 289 N.C. App. at 519 (Flood, J., dissenting) (alteration in original) (*quoting In re F.S.*, 268 N.C. App. 34, 43 (2019)). This Court's precedents hold that appellate courts may not reweigh the underlying evidence to make factual assessments that are not made by the trial court. *See In re C.C.G.*, 380 N.C. 23, 33 (2022) (citing *In re J.A.M.*, 372 N.C. 1, 11 (2019)). The language in *In re F.S.* relied upon by the dissent below is not based on any applicable precedent from this Court and implies a "totality of the evidence" standard of review that we have not previously applied in these circumstances. *See, e.g.*, *In re H.B.*, 384 N.C. 484, 492–93 (2023) (stating that the trial court is "the sole judge of the credibility and weight to be given to the evidence" (quoting *In re N.P.*, 374 N.C. 61, 65 (2020))). We review the evidence to determine if the trial court's findings of fact are supported, but we do not make or rely on our own findings of fact.

Under the law of this state, a neglected juvenile is one:

> [W]hose parent, guardian, custodian, or caretaker does any of the following:
>
> a. Does not provide proper care, supervision, or discipline.

> b. Has abandoned the juvenile, except where that juvenile is a safely surrendered infant as defined in this Subchapter.
>
> c. Has not provided or arranged for the provision of necessary medical or remedial care.
>
> d. Or whose parent, guardian, or custodian has refused to follow the recommendations of the Juvenile and Family Team made pursuant to Article 27A of this Chapter.
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.
>
> f. Has participated or attempted to participate in the unlawful transfer of custody of the juvenile under G.S.14-321.2.
>
> g. Has placed the juvenile for care or adoption in violation of law.

N.C.G.S. § 7B-101(15).

Remembering that the purpose of this section is simultaneously to provide services to protect juveniles, to respect the right to family autonomy and to prevent the "unnecessary or inappropriate separation of juveniles from their parents," N.C.G.S. § 7B-100(3), (4), it is axiomatic that neglect is something more than a single act of bad judgment by a parent or caregiver that results in no significant harm to a child. *See In re Stumbo*, 357 N.C. 279, 283 (2003). Under our cases interpreting this statute, a finding that a juvenile is neglected requires that the "conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *Id*. That precedent remains good law. And for good reason. As this Court explained, to hold that every act of negligence constitutes neglect

> would subject every misstep by a care giver to the full impact of subchapter I of chapter 7B of the North Carolina General Statutes, resulting in mandatory investigations, and the potential for petitions for removal of the child or children from their family for custodial purposes, and/or ultimate termination of parental rights.

In re Stumbo, 357 N.C. at 283 (cleaned up).

While a single act of negligence severe enough to cause significant harm to a child and indicative of the likelihood that future harm would result can constitute neglect, it is not the case that any "treatment of a child which falls below the normative standards imposed upon parents by our society" is sufficient to justify a finding that the child is neglected. *See In re V.M.*, 273 N.C. App. 294, 297 (2020).

Both *In re Stumbo* and *In re V.M.* involve children who arguably were subjected to negligent parenting, just as Aerin arguably was on 4 October 2021, but who were not neglected juveniles within the meaning of the statute. In *In re Stumbo*, a two-year-old child was reportedly playing naked and unsupervised in the driveway of his home. *In re Stumbo*, 357 N.C. at 280. When social workers came to the home to investigate the report, the parents were uncooperative. *Id.* In interpreting the statutory definition of neglect, this Court explained that

> It is obvious from this definition and the cases applying it that the circumstances constituting neglect involve serious and substantial allegations. 'Neglect' is further linked with 'abuse' and 'dependency,' thereby reinforcing the legislative conclusion that these are conditions that pose a serious threat to a juvenile's welfare.

Id. at 287.

In *In re V.M.*, cited by the dissent below, the Court of Appeals reversed a trial court's finding of neglect where a four-month-old child suffered acute alcohol intoxication after being fed formula prepared with liquor that had been poured into water bottles after a funeral. 273 N.C. App. at 295. Upon de novo review, the Court of Appeals concluded that the trial court's findings of fact did not support the legal conclusion that the child was a neglected juvenile. *Id.*

These and other cases make clear that isolated incidents of neglect, even if the potential for serious injury is present, do not meet the statutory threshold for a finding of neglect. *See, e.g.*, *In re H.P.*, 278 N.C. App. 195 (2021) (holding that findings that a three-year-old child was running naked between parents' homes and was walking alone did not constitute a neglected juvenile).

As the majority below correctly concluded after reviewing all the trial court's competent and supported findings of fact, this case presents a single incident in which a nine-year-old child walked away from her father, refused to follow his directions to return, and ran from him as

he followed her in his truck with two other children. When he could not effectively navigate the neighborhood streets, he got out of the truck and pursued her on foot. Before Aerin crossed the busy road, he had already turned around to return to the other two children. *See In re A.H.*, 289 N.C. App. at 507. At this point he had a Sophie's choice—he could expose the nine-year-old to danger by allowing her to continue unsupervised as she ran away from him, or he could expose the children in the truck to danger by leaving them alone to pursue the nine-year-old. Perhaps in hindsight he made the wrong choice, but there is no evidence that it was a neglectful one.

The dissent below found support for the conclusion that Aerin was neglected based on the finding that respondent-father "left the scene of the incident and did not return nor inquire about his child." As the majority explained, the trial court's finding here is simply devoid of sufficient information to establish neglect. *Id.* at 508–09. There was no finding of fact regarding whether respondent-father knew who to contact or how. As the majority below recounted:

> What evidence was introduced shows that [the DSS caseworker] received a report at 3:15 p.m., arrived at Newsome Road around 4:00 p.m., began her home inspection between 5:30 and 5:45 p.m., executed her verified petition before a magistrate later that evening, and filed the petition the following day. Again, the absence of evidence is not evidence, and DSS failed to meet its burden of introducing evidence proving Father's failure to contact DSS after business hours on the 4th and on the morning of the 5th before the filing of the petition amounted to neglect, particularly when the only evidence that was introduced—credible or not—shows Father knew that his wife had already met with DSS and that Aerin was safe in DSS custody.

Id. at 509 (cleaned up).

It is not our role to make findings of fact from the evidence. Just as we are bound by the competent findings of fact that the trial court did make, we are forbidden to infer factual findings that it did not.

At the end of the day, the issue here is not whether we approve of respondent-father's parenting decisions on 4 October 2021. The question is whether the trial court's findings of fact that were supported by clear, cogent, and convincing evidence in the case are sufficient to meet the

statutory criteria to find that a child is a neglected juvenile. The findings of fact in this case do not rise to that level. This Court's failure to enforce the statute as written, and to follow our precedents, frustrates the purposes of the General Assembly to protect family integrity, to provide children with safety, continuity, and permanence, and to prevent the unnecessary separation of children from their parents. The decision of the Court of Appeals should be affirmed.

IN RE INQUIRY CONCERNING A JUDGE, NOS. 22-073 & 22-395

ANGELA C. FOSTER, RESPONDENT

No. 347A23

Filed 22 March 2024

Judges—discipline—improper phone call to magistrate—to demand bond reduction for her son—closing down administrative courtroom without permission—suspension

On the basis of two incidents, a district court judge was suspended without pay for 120 days for conduct in violation of Canons 1, 2A, 2B, 3A(3), 3A(5), 3B(1), and 3C of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute (N.C.G.S. § 7A-376(b)). In the first incident, the judge called a magistrate's office, used her judicial title to ask if a particular criminal defendant had been placed into custody without disclosing that that defendant was her son, and then yelled at the magistrate while demanding a bond reduction for her son based on inaccurate information. In the second incident, the judge—while on notice of the disciplinary charges filed against her based on the first incident—demanded, without first notifying her chief district court judge, that an assistant district attorney and a presiding magistrate close their administrative courtroom for her own use despite an active administrative order mandating that the courtroom remain open; notably, the judge's conduct caused more than one hundred cases to be continued.

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 on 21 December 2023. The Commission recommends that

respondent Angela C. Foster, a Judge of the General Court of Justice, District Court Division, Judicial District 18, be suspended for conduct in violation of Canons 1, 2A, 2B, 3A(3), 3A(5), 3B(1), and 3C 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 15 February 2024 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 2(c) of the Rules of Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or respondent.

PER CURIAM.

The issue before the Court is whether District Court Judge Angela C. Foster, respondent, should be suspended for violations of Canons 1, 2A, 2B, 3A(3), 3A(5), 3B(1), and 3C of the North Carolina Code of Judicial Conduct—violations which amounted 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 entered a stipulation pursuant to Rule 18 of the Rules of the Judicial Standards Commission (Stipulation) in which respondent stipulated to the facts surrounding her conduct and the disciplinary recommendation that she be suspended for 120 days without compensation.

On 7 July 2022, Commission Counsel filed a Statement of Charges against respondent in Inquiry No. 22-073. The charges alleged that respondent had engaged in conduct inappropriate to her office when she called the Wake County Magistrate's Office on 3 March 2022. During the call, respondent utilized her judicial title to inquire about the custody status of her son without disclosing the familial relationship. Further, respondent yelled at the magistrate and demanded a bond reduction based upon inaccurate and incomplete information.

Before Inquiry No. 22-073 was resolved, Commission Counsel filed another Statement of Charges against respondent in Inquiry No. 22-395 on 23 February 2023. The charges alleged that respondent had demanded, without notifying her chief district court judge, that an assistant district attorney (ADA) and a presiding magistrate close their administrative courtroom for her own use, despite an active administrative order

mandating that it stay open. The conduct resulted in over one hundred cases being continued.

Respondent filed her answer to Inquiry No. 22-073 on 8 August 2022 and her answer to Inquiry No. 22-395 on 29 March 2023. On 27 July 2023, Commission Counsel and respondent entered into the Stipulation containing joint evidentiary, factual, and disciplinary stipulations as permitted by Rule 18 of the Rules of Judicial Standards Commission that tend to support the decision to suspend respondent. The Commission heard the matter on 11 August 2023, and the Stipulation was entered into the record without objection. The Commission initially rejected the Stipulation on 11 August 2023, but the Commission later accepted the Stipulation on 12 October 2023.

I. Recommendation of the Judicial Standards Commission

A. Findings of Fact

The recommendation of the Commission contains the following stipulated findings of fact:

> 1. In Inquiry Number 22-073, the parties stipulate to the following facts:
>
>   a. On 3 March 2022, at 10:48pm, the Wake County Magistrates' Office received a phone call from an individual listed as "Foster, Angela" on the caller identification. At the time, Magistrate Lauren May was on duty along with three other magistrates.
>
>   b. Magistrate May answered this phone call. The person on the other end of the line identified herself as Respondent, indicated that she was a Guilford County District Court Judge, and inquired if a defendant named Alexander Pinnix was in Wake County custody. Respondent appeared annoyed but did not seem to be directing it at Magistrate May at the time. At no point during this introduction did Respondent identify her relationship with Mr. Pinnix.
>
>   c. After looking in their system, Magistrate May was able to confirm for Respondent that Mr. Pinnix was in Wake County custody on a

$1000 secured bond. In response, Respondent began speaking loudly at Magistrate May and requested that she change Mr. Pinnix's bond to a written promise to appear.

d. Magistrate May was confused by Respondent's response given that Respondent was not a Wake County judge but did not want to come across as rude, so she requested to put Respondent on a brief hold to look at Mr. Pinnix's file. After reviewing the file, Magistrate May found that Mr. Pinnix was being held on Wake County charges of resisting a public officer and misdemeanor breaking or entering that had been sworn out before a Wake County magistrate with a bond set by a different Wake County magistrate.

e. Before returning to the call, Magistrate May enlisted the assistance of her three colleagues who had been nearby her cubicle for an unrelated reason. All four magistrates concluded that based on their training and experience that Respondent had no reason to be involved with the case as an out of county judge and that the situation sounded strange.

f. When Magistrate May returned to the call, she asked Respondent to explain her involvement with Mr. Pinnix's case and provide a basis for changing the bond. As a result of Respondent's response, Magistrate May explained that since she had not issued the charges or set the bond, she did not feel comfortable altering the bond of another magistrate.

g. Respondent then requested the telephone numbers of the magistrates who had been involved with Mr. Pinnix's case so that she could call them at home and ask them to change the bond. Magistrate May declined to provide this information but suggested

that Respondent could call Wake County Chief District Court Judge Ned Mangum to discuss the situation. Respondent became extremely angry at this suggestion, indicated that she would never dream of calling a district court judge at that time of night, and again demanded Magistrate May alter the bond. Magistrate May suggested that Respondent could wait until morning to call Judge Mangum, however this suggestion caused Respondent to become even more upset. By this point, Magistrate May's three co-workers could hear Respondent yelling through the phone receiver at her.

h. Respondent continued requesting Magistrate May to change Mr. Pinnix's bond by saying that Mr. Pinnix had court in Guilford County the following morning on 4 March 2022, for a child custody case and that he needed to be present because the court was going to take away his children if he was not. She explained that Mr. Pinnix could not miss this court appearance, that calling Judge Mangum in the morning would already be too late, and stressed that the bond need to be changed that evening.

i. Magistrate May then muted the phone and again requested the assistance of the other magistrates. At their suggestion, Magistrate May offered Respondent her Chief Magistrate's phone number. The phone call ended shortly thereafter. Respondent never contacted the Chief Magistrate regarding Mr. Pinnix's bond that evening.

j. Due to the strange nature of the phone call, the amount of personal information Respondent had about Mr. Pinnix, and how upset Respondent had become, Magistrate May and her colleagues decided to look up Respondent on the internet. After a brief search, they learned that Respondent was

Mr. Pinnix's mother. At no point during the phone conversation did Respondent identify her familial relationship with Mr. Pinnix, but instead led Magistrate May to believe that Mr. Pinnix was a litigant in her courtroom. After making this discovery, Magistrate May wrote down her recollection of the phone call with Respondent and reported the incident to her Chief Magistrate.

k. After investigating these claims, court documents showed that Mr. Pinnix did not have a history of failures to appear, nor did he have a Guilford County child custody case (or any other case) pending.

l. The next morning, [4] March 2022, Magistrate Jordan Fly received a call from Respondent inquiring whether Mr. Pinnix was in the Wake County Detention Center. Magistrate Fly confirmed Mr. Pinnix was in the detention center under a $1000 secured bond, to which Respondent expressed surprise, stated she arranged for the bond to be posted, wondered why it was taking so long, and asked whether it was possible he was already released. Magistrate Fly again stated he was sure Mr. Pinnix was still in the Detention Center. During this call, Respondent did not identify herself as a judge or disclose the nature of her relationship to Mr. Pinnix.

2. In Inquiry Number 22-395, the parties stipulate to the following facts:

a. Chief District Court Judge Teresa H. Vincent issued an Administrative Order on 22 July 2022, stating, "In High Point, administrative traffic court and 3B waiver court will be combined into courtroom 3B. The Courtroom 3B shall be open Mondays and Fridays from 8:30am until 12:30pm." This Administrative Order was distributed to all High Point Courthouse employees, including judges, when it went into effect.

b. On 1 November 2022, Respondent alerted Judge Vincent by text that her assigned courtroom for 7 November 2022, would not meet the needs of her Abuse, Neglect, and Dependency Court session. Respondent was scheduled to address a case on this date where both parents were charged with the murder of their child. The parents, both in custody, could not be in the courtroom at the same time, which in turn required extra security and staff to conduct this hearing. Additionally, recording capability was required, which only some of the courtrooms in High Point were equipped with.

c. In response to Respondent's request, Judge Vincent provided the option for her to take over Courtroom 3B once Administrative Court concluded as this courtroom could meet the needs of the hearing in question. Respondent replied expressing her concern that the courtroom would not be run "with the goal of finishing in an efficient manner." Judge Vincent replied, "I am sure they will finish court as soon as they can in order to handle other tasks." No other contingency plans were discussed.

d. Before court began on 7 November 2022, at approximately 8:30am, Respondent came to Courtroom 3B and informed the assigned ADA that she might need his courtroom. In response, the ADA informed her of the number of cases on his docket and reminded her of Judge Vincent's Administrative Order. During this conversation, the courtroom bailiff was nearby. Once Respondent left, the ADA made the magistrate presiding aware of the conversation then conducted the business of Administrative Court as usual.

e. After this conversation, Respondent returned to her assigned courtroom, 201, and informed everyone there that they would be moving to

Courtroom 4C, a superior court courtroom. This was done by Respondent without first getting approval from Judge Vincent and the Senior Resident Superior Court Judge.

f. While Respondent was holding her district court session in Courtroom 4C, the Superior Court Trial Court Administrator ("the TCA") walked past and heard voices. When the TCA entered and realized what Respondent was doing, she asked why Respondent was there, to which Respondent replied, "Oh they didn't tell you either. . . I needed to use this courtroom." The TCA informed Respondent that she was not aware that anyone would be using the superior court courtroom then went to her office to call her supervisor, who in turn, informed Judge Vincent.

g. At 9:37am, Judge Vincent confronted Respondent via text about her use of the superior court courtroom without permission, how that was not the plan they discussed, and ordered Respondent to vacate. Respondent responded claiming the bailiffs gave her permission to use this courtroom. When Judge Vincent asked the Sheriff's Office about this, they denied providing Respondent with such permission.

h. Respondent left Courtroom 4C and returned to Courtroom 3B at approximately 10:00am to inform the ADA she needed his courtroom. The ADA told Respondent that he still had a full courtroom, but she told him to vacate. The courtroom bailiff was nearby during this conversation. As a result, the ADA informed the presiding magistrate of his conversation with Respondent and they proceeded to close down Administrative Court. This consisted of handling any case the ADA had already begun addressing and informing the remaining citizens that their cases would be continued, which the ADA

notated on his docket. This resulted in more than one hundred cases being continued without being addressed which caused frustration to many members of the public.

i. After Administrative Court closed, the presiding magistrate went directly to speak with Judge Vincent to advise her of the incident because he did not want to get in trouble for closing court early in violation of the Administrative Order.

j. After speaking with the presiding magistrate, Judge Vincent confronted Respondent via text at 10:57am about her directing Administrative Court to shut down without Judge Vincent's permission and in violation of her Administrative Order. Respondent denied this via text and stated that she only spoke to the clerk regarding the possibility of Administrative Court moving to Courtroom 4C, the superior court courtroom she did not have the authority to use, because they did not need the recording equipment. This allegation by Respondent could not be confirmed.

3. In mitigation, the Commission found Respondent is remorseful for her actions in these matters and has accepted responsibility for her Code violations.

4. In aggravation, the Commission found Respondent (1) was previously issued a censure by the North Carolina Supreme Court, *In re Foster*, 373 N.C. 29 . . . (2019), and (2) while on notice for Inquiry Number 22-073, Respondent engaged in the conduct outlined in Inquiry Number 22-395.

B. Conclusions of Law

Based upon the foregoing findings of fact, the Commission made the following conclusions of law:

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 2A of the Code of Judicial Conduct generally mandates that "[a] judge should respect and comply with the law and should conduct [herself] at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

3. Canon 2B of the Code of Judicial Conduct instructs that "[a] judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment. The judge should not lend the prestige of the judge's office to advance the private interest of others except as permitted by [the] Code; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge."

4. Canon 3 of the Code of Judicial Conduct governs a judge's discharge of his or her official duties.

5. Canon 3A relates to judges' adjudicative duties, with Canon 3A(3) requiring that a judge be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity. . ." and Canon 3A(5) requiring that a judge "dispose promptly of the business of the court."

6. Canon 3B pertains to judges' administrative duties, with Canon 3B(1) requiring 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."

7. Canon 3C concerns a judge's duty to "disqualify him or herself in a proceeding in which the judge's impartiality may reasonably be questioned[.]"

8. Upon the Commission's independent review of the stipulated facts in Inquiry Number 23-073 concerning Respondent's conduct towards Magistrate May relating to her son's bond, the Commission, by a unanimous 5-0 vote of the hearing panel concludes Respondent:

    a. failed [to] conduct herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canons 1 and 2A of the Code;

    b. allowed her family relationships to influence her judicial conduct or judgment in violation of Canon 2B of the Code;

    c. failed to remain patient, dignified, and courteous to all individuals she deals with in her judicial capacity in violation of Canon 3A(3) of the Code; and

    d. involved herself in a matter in which her impartiality could be reasonably questioned in violation of Canon 3C of the Code.

The Commission notes that Respondent conceded in the Stipulation these facts were sufficient to support the conclusions.

9. Upon the Commission's independent review of the stipulated facts in Inquiry Number 23-395 concerning Respondent's conduct towards the ADA and presiding magistrate in Administrative Court, forcing the continuances of over one-hundred cases before they were able to be addressed, the Commission, by a unanimous 5-0 vote of the hearing panel concludes Respondent:

    a. failed to conduct herself at all times in a manner that promotes public confidence in

the integrity of the judiciary and impartiality of the judiciary in violation of Canons 1 and 2A of the Code;

b. prevented another judicial official from disposing promptly of the business of the court in violation of Canon 3A(5) of the Code; and

c. failed to diligently discharge her administrative responsibilities, maintain her professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials in violation of Canon 3B(1) of the Code.

The Commission notes that Respondent conceded in the Stipulation these facts were sufficient to support the conclusions.

10. The Commission further concludes, and accepts Respondent's admission, that the facts establish Respondent engaged in willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.[G.S.] § 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.").

11. The North Carolina Supreme Court defined "willful misconduct in office" as "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally in bad faith. It is more than a mere error of judgment or an act of negligence." *In re Edens*[,] 290 N.C. 299, 305 (1976). The Supreme Court further held in *In re Nowell*, 293 N.C. 235 (1977), while willful misconduct in office necessarily encompasses "conduct involving moral turpitude, dishonesty, or corruption," it can also be found based upon "any knowing misuse of the office, whatever the motive." *Id.* at 248. . . . "[T]hese

elements are not necessary to a finding of bad faith. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith." *Id.*

12. In reaching this conclusion, the Commission weighed Respondent's pattern of abusing her power, the guidance provided by precedent set by the North Carolina Supreme Court, and Respondent's willingness to accept responsibility for her actions.

13. The Commission stressed that Respondent was censured for abusing her power in the courtroom in *In re Foster*, 373 N.C. 29 . . . (2019), then proceeded to abuse her power again by misleading and bullying a magistrate in an attempt to have her son released from custody notwithstanding her previous public discipline. Then, after being put on notice and charged by the Commission in that matter, Respondent again abused her power by disregarding instructions from her chief district court judge and a valid administrative order, forcing more than one hundred cases to be continued without being addressed so that she could use a courtroom for her own purposes.

14. The Commission compared the facts at hand with those in *In re Hartsfield*, 365 N.C. 418, [431–32] (2012), where the respondent judge was issued the longest suspension (75-days) in the Commission's history for engaging in a pattern of transferring traffic tickets onto her dockets with the understanding that the tickets (issued to individuals including her friends, church members, law students, etc.) would be resolved by her with favorable outcomes. Similarly to Respondent, the respondent judge in that matter was also charged with engaging in a pattern of misconduct, entered a factual stipulation . . . . *Id.* [at 426.] . . . In conducting this weighing, the Commission determined that although the facts

addressed in *In re Hartsfield* were arguably more severe than any of those in Respondent's current or former matters to be addressed by the Court, Respondent's repeated course of conduct over time called for a more severe sanction.

15. However, similar to the comparative analysis the Court conducted in *In re Hartsfield*, the Commission also compared Respondent's conduct to that addressed by cases resulting in judges' removals from office and found that Respondent's conduct did not seem to rise to that level. *See In re Peoples*, 296 N.C. 109 . . . (1978) (where the respondent judge (1) engaged in a pattern of addressing criminal cases without calendaring them, noticing the district attorney, or entering judgment in open court and (2) on several occasions, accepted money from defendants to "take care of" traffic citations); *In re Martin*[,] 302 N.C. 299 . . . (1981) (where the respondent judge (1) initiated ex parte communications with two twenty-one year old female defendants and attempted to force himself on them and (2) heard his own failure to stop at a stop sign case[ ]); *In re Kivett*, 309 N.C. 635 . . . (1983) (where the respondent judge allowed his relationship with a bail bondsman, who provided the respondent judge with gifts and the use of his home for illicit sexual relations, to influence multiple court decisions); *In re Badgett*, 362 N.C. 482 . . . (2008) (where, after being censured and suspended in a prior case, the respondent judge made a defendant proceed pro se in a juvenile court hearing and ordered that defendant to pay spousal support despite the complaint not seeking it and turn over the keys of his truck to the Sheriff's Office, after which the respondent judge lied to investigators and tried to suggest to a Sheriff's deputy that they also lie); and *In re Belk*, 364 N.C. 114 . . . (2010) (where the respondent judge continued to serve on the board of directors for two companies despite receiving contrary ethics advice and, after his request to

be relieved of his judicial duties to attend a board meeting was denied, confronted and yelled at his chief district court judge[ ]).

16. The Commission also acknowledged that prior to legislative changes in 2006, the Court only had the authority to censure or remove a judge. N.C.[G.S.] § 7A-377(b). Further, the Court has made it clear that the discipline imposed in any given case "will be decided upon its own facts." *In re Hardy*, 294 N.C. 90, 98 . . . (1978).

17. As a result, the Commission concludes, and Respondent agrees that a suspension of 120 days without compensation is appropriate balancing the aforementioned factors.

18. The North Carolina Supreme Court in *In re Crutchfield*, 289 N.C. 597 (1975)[,] first addressed sanctions under the Judicial Standards Act and stated that the purpose of judicial discipline proceedings "is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and in the honor and integrity of is judges." *Id.* at 602.

19. 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 recommendations from the Commission.

C. Recommendation

Based on the foregoing findings of fact and conclusions of law, the Commission, by unanimous vote of the five Commission members that comprised this matter's hearing panel, concurred in the recommendation to suspend respondent for a period of 120 days without compensation.

II. Analysis

The Court, upon recommendation of the Judicial Standards Commission, has the authority and responsibility to discipline judges by

issuing a public reprimand, censure, suspension, or removal of a judge "for willful misconduct in office, willful and persistent failure to perform the judges' duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." N.C.G.S. § 7A-376(b) (2023). The purpose of our judicial standards system is "to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of . . . judges." *In re Crutchfield*, 289 N.C. 597, 602 (1975).

To that end, conduct prejudicial to the administration of justice includes "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be, not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." *In re Edens*, 290 N.C. 299, 305 (1976) (quoting *Geiler v. Comm'n on Jud. Qualifications*, 10 Cal. 3d 270, 284 (1973)). Further, conduct is prejudicial and constitutes willful misconduct when a judge intentionally, improperly, or wrongfully uses the power of the office with gross unconcern for his or her conduct and in bad faith. *In re Martin*, 295 N.C. 291, 301–02 (1978).

In reviewing recommendations of the Commission, the Court "acts as a court of original jurisdiction" and exercises independent judgment as to the disciplinary measures imposed on a judge. *In re Badgett*, 362 N.C. 202, 207 (2008) (quoting *In re Daisy*, 359 N.C. 622, 623 (2005)). Each case is decided solely on its own facts, *In re Martin*, 302 N.C. 299, 315–16 (1981), and the recommendation of the Commission is not binding on this Court, *In re Hartsfield*, 365 N.C. 418, 428 (2012). This Court may adopt the Commission's findings of fact if they are supported by clear and convincing evidence or may make its own findings. *Id.* In the same vein, this Court may adopt the Commission's recommendation or exercise independent judgment as to the appropriate sanction. *In re Martin*, 295 N.C. at 301.

In this matter, we agree that the Commission's findings are supported by clear and convincing evidence, and we adopt them as our own. By extension, we agree with the Commission's conclusions that respondent's conduct violates Canons 1, 2A, 2B, 3A(3), 3A(5), 3B(1), and 3C of the North Carolina Code of Judicial Conduct, and is prejudicial to the administration of justice and brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b).

Our guidepost in determining the appropriate sanctions is the impact of the conduct on public confidence in our judicial system and

ensuring the honor and integrity of judges who serve the people of this state. *In re Crutchfield*, 289 N.C. at 602. The stipulations in this matter establish judicial conduct troubling enough to warrant suspension, and this Court has suspended judges where a pattern of problematic conduct has been identified. *See*, *e.g.*, *In re Hartsfield*, 365 N.C. at 426–27, 431–32 (suspending a judge engaged in a pattern of transferring traffic tickets of friends and family to her docket with the understanding the tickets would be resolved with a favorable outcome). Here, respondent was also previously sanctioned for her conduct. *In re Foster*, 373 N.C. 29, 31–33, 40 (2019) (censuring respondent for holding a hearing without notice, placing a mother in jail without cause and then lecturing the mother's fifteen-year-old children in an effort to convince them to exercise visitation with their father). Further, while on notice of Inquiry No. 22-073, she engaged in the conduct described in Inquiry No. 22-395. The stipulated conduct justifies the recommended discipline.

We appreciate respondent's cooperation with the Commission during the pendency of these proceedings, her candor, her acknowledgment of responsibility for her conduct, and her completion of additional training on ethics and professionalism. Respondent recognizes that her conduct warrants disciplinary consequences and agreed to accept the recommended disciplinary action. Weighing the severity and extent of respondent's misconduct against her acknowledgement and cooperation, we conclude that the Commission's recommendation of a 120-day suspension is appropriate and supported by the Commission's findings of fact and conclusions of law.

It is hereby ordered by the Supreme Court of North Carolina in conference that respondent Angela C. Foster be SUSPENDED for a term of 120 days without compensation for conduct in violation of Canons 1, 2A, 2B, 3A(3), 3A(5), 3B(1), and 3C of the North Carolina Code of Judicial Conduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b).

ROBIN KLUTTZ-ELLISON, EMPLOYEE
v.
NOAH'S PLAYLOFT PRESCHOOL, EMPLOYER, AND
ERIE INSURANCE GROUP, CARRIER

No. 173PA22

Filed 22 March 2024

Workers' Compensation—compensability—causal connection to workplace injury—"directly related" test—three independent criteria

In a workers' compensation case, the Supreme Court reversed the decision of the Full Commission awarding compensation to plaintiff for bariatric surgery—based on needing corrective knee surgery after two workplace accidents aggravated a preexisting knee condition, plaintiff was advised that she first needed to have bariatric surgery in order for the knee surgery to be safely performed—and remanded with instructions for the Industrial Commission to apply the proper legal standard regarding compensability for that treatment. The Supreme Court formally endorsed the "directly related" test, developed over the course of several Court of Appeals' cases, under which medical treatment is compensable only if it is directly related to the workplace injury. A sufficiently causal connection may be shown if (1) the workplace injury caused the condition for which treatment is sought, (2) the workplace injury aggravated the condition or caused new symptoms, or (3) the condition did not require treatment prior to the workplace injury but required treatment solely to remedy the workplace injury.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 283 N.C. App. 198 (2022), affirming an opinion and award entered on 11 March 2021 by the North Carolina Industrial Commission. Heard in the Supreme Court on 20 September 2023.

Shelby, Pethel and Hudson, P.A., by David A. Shelby, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Lindsay N. Wikle, for defendant-appellants.

DIETZ, Justice.

Under our workers' compensation statutes, an employee who suffers a compensable injury in a workplace accident may receive compensation for any medical treatment that "may reasonably be required to effect a cure or give relief." N.C.G.S. § 97-2(19) (2023); *see also id.* § 97-25(c).

Despite this broad language, the Court of Appeals has long held (quite understandably) that this provision does not apply to *every* medical treatment; it applies only to those treatments that are "directly related" to the workplace injury. Were it otherwise, workers' compensation would too easily transform into general health insurance, forcing employers to cover treatments for medical conditions with no connection to the workplace injury.

To assess whether a treatment is directly related, the Court of Appeals examines the strength of the "causal relationship" between the condition that requires treatment and the workplace injury. *See*, *e.g.*, *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 133 (2005). This approach, which this Court has favorably recognized but never formally endorsed, protects the need for causality in assessing workers' compensation—a need that is "the very sheet anchor" of the system. *Duncan v. City of Charlotte*, 234 N.C. 86, 91 (1951).

As explained in more detail below, we endorse the test as it has developed in the Court of Appeals. Under the "directly related" test, treatment for a medical condition is directly related to a workplace injury, and therefore compensable, if there is a sufficiently strong causal relationship between the condition that requires treatment and the workplace injury. *Perez*, 174 N.C. App. at 133. This requires a showing that the condition for which treatment is sought (1) was caused by the workplace injury; (2) was aggravated by the workplace injury; or (3) did not require medical treatment or intervention of any kind before the workplace injury but now requires treatment solely to remedy the workplace injury.

If any of these criteria are met, the treatment is directly related to the workplace injury and is compensable. If not, the treatment is, at most, indirectly related to the workplace injury and is not compensable under the workers' compensation system.

Our holding today is largely a restatement of longstanding Court of Appeals precedent. Nevertheless, we find it necessary to reverse the Court of Appeals' decision and remand with instructions to further remand this case to the Industrial Commission. As explained in more detail below, neither the Commission nor the Court of Appeals properly applied the test set out in this existing line of Court of Appeals cases, which we have now formally endorsed. We therefore reverse and remand this matter so that the Commission can apply the test set out in this opinion.

Facts and Procedural History

Plaintiff Robin Kluttz-Ellison worked at Noah's Playloft Preschool. Plaintiff brought two workers' compensation claims against defendants (her employer and workers' compensation carrier) for injuries sustained in two different workplace accidents. The first accident occurred when plaintiff fell several feet off a ladder while changing a lightbulb. The second incident occurred when plaintiff tripped on a child's sleeping cot and fell.

Defendants denied a number of plaintiff's claims, asserting that the alleged injuries were unrelated to the workplace accidents. The Commission ultimately consolidated plaintiff's claims for a single hearing.

Before these accidents, plaintiff had a medical procedure known as knee arthroplasty, which required a prosthetic secured with hardware to be placed in her right knee. In addition, plaintiff had struggled with body weight issues for many years. Her medical care providers previously diagnosed her with obesity and recommended treatments ranging from changes to her diet to prescription weight-loss medications.

After the workplace accidents, plaintiff's care providers determined that she needed additional knee surgery to address a loosening of the hardware in her right knee. They also recommended that plaintiff undergo a form of bariatric weight loss surgery known as gastric bypass. Plaintiff's care providers believed this weight loss surgery was necessary because they could not safely perform the required knee surgery until plaintiff's body mass index was lowered significantly. These care providers concluded that bariatric surgery was the only available treatment that would lead to a sufficiently rapid loss of body weight.

Following a hearing, the deputy commissioner denied plaintiff's claim with respect to the loosened hardware in her right knee. As a result, the deputy commissioner also denied the claim for bariatric

weight loss surgery, which was based on the compensability of plaintiff's knee surgery. Plaintiff then appealed the deputy commissioner's decision to the Full Commission.

In the interim, plaintiff successfully underwent bariatric surgery and lost a substantial amount of weight. Plaintiff then underwent the corrective surgery on her right knee. After the surgeries, plaintiff moved to submit additional evidence to the Full Commission to support her claim that her knee hardware loosened because of the workplace accidents. She also moved for permission to take additional depositions from her care providers. The Commission granted her motions.

The Commission later entered an opinion and award concluding that plaintiff's right knee surgery was related to her workplace injuries and was compensable. But the Commission concluded that plaintiff "failed to establish that weight loss treatment is medically necessary as a result of her compensable injuries" and denied compensation for plaintiff's bariatric surgery.

Two weeks later, plaintiff moved to reconsider the Commission's opinion and award and requested permission to introduce new evidence. The Commission denied plaintiff's request to introduce new evidence but entered an amended opinion and award that changed its decision with respect to the bariatric surgery.

The amended opinion and award found that the bariatric surgery "was medically necessary to achieve a BMI of less than 40, a prerequisite to allowing Plaintiff to undergo the revision right total knee arthroplasty." Based on this finding, the Commission concluded that the bariatric weight loss surgery was compensable.

Defendants appealed the Commission's opinion and award to the Court of Appeals, challenging a number of rulings, including the award of compensation for the bariatric surgery. *See Kluttz-Ellison v. Noah's Playloft Preschool*, 283 N.C. App. 198 (2022).

With respect to that surgery, the Court of Appeals examined whether the treatment was "directly related to the original compensable injury." *Id.* at 213. The court held that "while the existence of Plaintiff's weight problem was not directly related to the 5 August 2013 accident, the need for bariatric surgery is directly related" because plaintiff could not undergo her knee surgery until she lost sufficient body weight. *Id.* at 214.

We allowed defendants' petition for discretionary review with respect to this portion of the Court of Appeals' decision.

Analysis

In our workers' compensation system, an employee is entitled to compensation for injuries "by accident arising out of and in the course of the employment." N.C.G.S. § 97-2(6) (2023). For many decades, this Court has held that the phrase "arising out of employment" imposes a causal element on workers' compensation claims. *See*, *e.g.*, *Taylor v. Town of Wake Forest*, 228 N.C. 346, 350 (1947); *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557 (1960). Thus, to prove claims for workers' compensation benefits, employees must prove that the workplace accident caused their injuries. *Sprouse v. Mary B. Turner Trucking Co.*, 384 N.C. 635, 643 (2023).

We imposed this causal requirement because the Workers' Compensation Act "was never intended to be a general accident and health insurance policy." *Weaver v. Swedish Imps. Maint., Inc.*, 319 N.C. 243, 253 (1987). "This rule of causal relation is the very sheet anchor" of the Act. *Duncan*, 234 N.C. at 91. "It has kept the Act within the limits of its intended scope,—that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits." *Id.*

When employees meet this causal requirement, and all other elements of their claim, they are entitled to workers' compensation. This includes "medical compensation," which is defined as medical or rehabilitative treatment that "may reasonably be required to effect a cure or give relief." N.C.G.S. § 97-2(19); *see also id.* § 97-25(c).

But here, too, our appellate courts have imposed a causal requirement to safeguard the purpose of the workers' compensation system. This causal test originated in a Court of Appeals opinion several decades ago, which held it "[l]ogically implicit" that any compensable medical treatment "be directly related to the original compensable injury." *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130 (1996).

In *Pittman*, the employee suffered a compensable back injury at work that caused difficulty moving and walking. *Id.* at 126, 132. The employee underwent spinal surgery. *Id.* at 131. After the surgery, the employee continued to have trouble walking and sought additional treatment. *Id.* The Industrial Commission denied that treatment request after finding that the employee's symptoms stemmed from a congenital spine defect that was not "caused by" the workplace injury. *Id.* at 131–32.

Applying the "directly related" test, the Court of Appeals in *Pittman* affirmed the Industrial Commission's decision, holding that the

Commission's findings supported the "legal conclusion that *plaintiff's current condition* was not related to the original compensable injury." *Id.* at 133 (emphasis added). Importantly, it was "plaintiff's current condition," not the treatment plaintiff sought, that was the focus of the analysis. *Id.* In other words, the *Pittman* test examines causality between the workplace injury and the condition needing treatment.

Although *Pittman* did not expressly state *why* it was necessary to focus on the condition to be treated, it flows from the same "logically implicit" rationale that *Pittman* relied upon to create the test. Because the "rule of causal relation is the very sheet anchor" of workers' compensation, an award of medical compensation requires a showing that the condition being treated is causally tied to the workplace injury. *Duncan*, 234 N.C. at 91.

For example, suppose an employee who is being treated for a preexisting condition suffers an unrelated workplace injury. The employee's care providers might recommend changing the course of treatment because a new treatment would help the employee recover from the workplace injury more quickly or with less pain. That treatment would therefore "reasonably be required to effect a cure or give relief" from the workplace injury. N.C.G.S. § 97-2(19); *see also id.* § 97-25(c).

Although this new treatment concerns a *preexisting* condition, there are many scenarios where the condition nevertheless is causally related to the workplace injury. Perhaps that workplace injury aggravated the preexisting condition. Perhaps the injury triggered a need for medical treatment or intervention of the condition where none existed before. In these circumstances, awarding compensation for the treatment is consistent with the causal anchor that grounds our workers' compensation system.

By contrast, there are many scenarios where a preexisting condition has no causal connection to the workplace injury but that condition's treatment nevertheless is impacted by the workplace injury. Imagine an employee undergoing cancer treatment. After a workplace injury, the employee's care providers might recommend changes to that cancer treatment—for example, another round of chemotherapy rather than a surgery that would take place too soon after a surgery for the workplace injury.

In that circumstance, our workers' compensation system does not require the employer to take over the cancer treatment and pay for the chemotherapy. That cancer treatment is part of the employee's general health care and outside the scope of workers' compensation.

Simply put, if there is no causal connection between a workplace injury and a preexisting condition, forcing the employer to pay for treatment of that preexisting condition makes the employer responsible not for the consequences of a workplace accident but for an employee's general health and well-being. That is not workers' compensation; that is health insurance. *Weaver*, 319 N.C. at 253.

For this reason, the Court of Appeals has consistently applied the "directly related" test by examining whether there is "a causal relationship between the medical condition and the work-related injury." *Perez*, 174 N.C. App. at 133; *see also Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542 (1997); *Adams v. Frit Car, Inc.*, 185 N.C. App. 714, 720 (2007); *Brewer v. Rent-A-Ctr.*, 288 N.C. App. 491, 497 (2023), *vacated on other grounds*, No. 139PA23 (N.C. Feb. 2, 2024) (order). By focusing on that causal relationship between condition to be treated and workplace injury, the Court of Appeals ensured that medical compensation does not undermine the causal sheet anchor that grounds the workers' compensation system.

This Court has referenced the "directly related" test only once, in *Wilkes v. City of Greenville*, 369 N.C. 730 (2017). There, we favorably quoted the test established in *Pittman*, as well as *Pittman*'s conclusion that the test is "[l]ogically implicit" in the structure of the Workers' Compensation Act. *Id.* at 737. And, importantly, we also favorably discussed the focus on a causal connection between the condition for which treatment is sought and the workplace injury, citing *Parsons* and *Perez*. *Id.* at 740. We noted that, when assessing medical compensation, the analysis turns on whether the "injuries or symptoms," not the treatment, are "causally related to the admittedly compensable condition." *Id.* at 741.

Despite these references to the Court of Appeals test, the holding in *Wilkes* focused on separate issues, and the Court did not expressly adopt the *Pittman* line of cases. We therefore take this opportunity to formally endorse the test that developed in our lower appellate court and that we favorably recognized in *Wilkes*. This "directly related" test, with its focus on the causal connection between the condition to be treated and the workplace injury, safeguards the "rule of causal relation" that we have described as the anchor of the workers' compensation system. *Duncan*, 234 N.C. at 91.

Under this test, an employee may receive compensation for a medical treatment only if that treatment is directly related to the workplace injury, meaning there is a sufficiently strong causal relationship between

the condition that requires treatment and the workplace injury. *Wilkes*, 369 N.C. at 737; *Perez*, 174 N.C. App. at 133. Our case law examining causation in the workers' compensation context offers guidance on how this causal relationship can be established. When examining how one injury, condition, or symptom could be causally related to another, we consider whether the former "caused, aggravated, or accelerated" the latter. *Morrison v. Burlington Indus.*, 304 N.C. 1, 17 (1981).

In the context of a causal relationship between a condition to be treated and a workplace injury, these three factors can be articulated as three separate tests. First, a causal relationship exists when the workplace injury caused the condition for which treatment is sought. Second, a causal relationship exists when the workplace injury materially impacts the condition for which treatment is sought by aggravating that condition or causing new symptoms. Finally, a causal relationship exists if the condition was materially accelerated by the workplace injury—meaning the condition did not require medical treatment or intervention of any kind before the workplace injury but now requires treatment to aid in treatment of the workplace injury. *See id.* at 18.

If any of these criteria are met, the treatment is directly related to the workplace injury and is compensable. If not, the treatment is, at most, indirectly related to the workplace injury and is not compensable under the workers' compensation system. This causal standard ensures that, although the "employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses," medical compensation will be limited to conditions directly related to the workplace injury and will not "convert our compensation law into a system of compulsory general health insurance." *Id.*

In this case, neither the Industrial Commission nor the Court of Appeals applied the test set out above. The Commission's opinion and award examined only whether the bariatric surgery (the treatment) was "medically necessary" to achieve the requisite weight loss to undergo knee surgery. The Commission did not make any findings or conclusions concerning the causal relationship between plaintiff's body weight issues (the condition) and the workplace injury.

The same is true of the Court of Appeals. The court focused on the treatment, not the condition, holding that "there is a direct line connecting the dots between Plaintiff's original compensable injury and the Commission's award for bariatric surgery." *Kluttz-Ellison*, 283 N.C. App. at 214. Indeed, the Court of Appeals expressly held that plaintiff's body weight issues were *not* causally related to the workplace accident,

emphasizing that "while the existence of Plaintiff's weight problem was not directly related to the 5 August 2013 accident, the need for bariatric surgery is directly related." *Id.*

Because the lower courts did not apply the proper legal standard in this case, we reverse the decision of the Court of Appeals and remand with instructions to remand the matter to the Industrial Commission for further proceedings. *See Pine v. Wal-Mart Assocs.*, 371 N.C. 707, 716–17 (2018).

REVERSED AND REMANDED.

Justice RIGGS dissenting.

The Workers' Compensation Act (the Act) mandates that medical compensation include services that "may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the [Industrial] Commission, will tend to lessen the period of disability." N.C.G.S. § 97-2(19) (2023). As the majority recognizes, this paints a broad brush, and understandably so; the facts of workers' compensation claims are infinitely varied. No job is the same, no employee is the same, no accident is the same, no injury is the same, and no treatment is the same. And as the factfinders on the Industrial Commission can attest, even medical experts—to say nothing of judges—often disagree as to the cause, extent, and appropriate treatment of any given injury. While I understand the majority's desire to judicially craft a uniform tripartite test and impose a "directly related" condition on an otherwise silent statute out of a desire to "k[eep] the Act within the limits of its intended scope," *Duncan v. City of Charlotte*, 234 N.C. 86, 91 (1951), I am concerned that the means and end are at cross purposes. An unflinching and uniform test crafted by nonexpert appellate jurists seems all but guaranteed to end up excluding some unforeseen claims—whether due to lapses in our knowledge or imaginations—that fairly fall within the language and intent of the Act. Indeed, as discussed below, it will exclude some claims foreseen both in the majority and this dissent. A test that excludes claims that the legislature intended to cover based on the Act's text does not in any real sense "k[eep] the Act within the limits of its intended scope." *Id.* Because I do not believe the rigid test adopted by the majority is appropriate or necessary and because I believe the findings and conclusions of the Industrial Commission properly establish Ms. Kluttz-Ellison's bariatric surgery as a treatment

"reasonably . . . required to effect a cure or give relief" for a covered injury, N.C.G.S. § 97-2(19), I respectfully dissent.

The majority rightly notes that the Act is not, nor was it intended to be, a general health insurance policy. *Morrison v. Burlington Indus.*, 304 N.C. 1, 11 (1981). And the Act does require a causal relationship between the injury and the workplace accident; specifically, the injury must be "by accident aris[ing] out of and in the course of the employment." N.C.G.S. § 97-2(6) (2023); *see also Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402 (1977). It is this causal relationship between the *injury* and the workplace *accident* that is the "very sheet anchor" of the Act to which the majority refers. *Duncan*, 234 N.C. at 91.

As for compensable treatment, the relevant statute covers

> medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services *prescribed by a health care provider authorized by the employer or subsequently by the [Industrial] Commission*, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, *as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the [Industrial] Commission, will tend to lessen the period of disability*; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

N.C.G.S. § 97-2(19) (emphases added). In other words, treatment is compensable under the Act if, in the view of a prescribing authorized healthcare provider, it is reasonably required to effect a cure or give relief to a covered injury or, in the judgment of the Industrial Commission, will lessen the period of a covered disability. Or, stated even more simply, if an authorized doctor believes the treatment is necessary to effect a cure or give relief of a workplace injury, then that treatment is compensable under the statutory text. To graft additional strictures into the Act, or to second-guess factfinders' reliance on medical professionals' expert judgments in unique circumstances, is not our province. *See Lunsford v. Mills*, 367 N.C. 618, 623 (2014) ("[I]n effectuating legislative intent, 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."); *Sprouse v. Mary*

B. Turner Trucking Co., 384 N.C. 635, 642 (2023) ("The North Carolina Industrial Commission is the fact-finding body under the [Act].").

I acknowledge that we have imposed a "directly related" test in the context of *future* medical treatment for continued or additional symptoms. *Wilkes v. City of Greenville*, 369 N.C. 730, 737 (2017) (holding an employee seeking coverage for psychological symptoms after the employer had admitted compensability for physical injuries was entitled to a presumption that the psychological symptoms were related to his admittedly compensable conditions); *see also Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130 (1996) (holding an employee was not entitled to additional compensation for a new condition when the evidence supported the Industrial Commission's finding that the new condition was not related to a previously-covered injury); *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542 (1997) (holding an employee was entitled to a presumption that treatment of continuing headaches was causally related to prior covered headaches caused by a workplace injury); *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135 (2005) (holding a herniated disc discovered two years after last medical compensation for a covered workplace back injury was paid and four years since the covered accident occurred was causally related to that accident and injury). But that is not the circumstance we have here, this case involves a *preexisting* condition that must be treated in order to cure or relieve the covered workplace injury. Importantly, at least in the context of disability, this Court has acknowledged that if "pre-existing conditions such as an employee's age, education and work experience are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated." *Little v. Anson Cnty. Schs. Food Serv.*, 295 N.C. 527, 532 (1978). Not every employee that suffers a knee injury will require a total knee arthroplasty, and fewer still will require bariatric surgery prior to the arthroplasty. But the appropriate medical treatment for an injury is often unique to the employee, and if an authorized medical professional prescribes bariatric surgery as "required to effect [the] cure" of arthroplasty for that employee's covered workplace injury, then the bariatric surgery is compensable under N.C.G.S. § 97-2(19).

Though the majority's uniform test has an inherent attraction, I cannot say it will avoid results inconsistent with the coverage contemplated by N.C.G.S. § 97-2(19). The majority's own examples illustrate my concerns; in one abstract hypothetical, it suggests that an employee who changes treatment of a preexisting condition to help address pain from a new workplace injury would have those treatment changes for

the preexisting condition covered. But it is hard to square that example with the majority's distillation of its test into three circumstances: in the abstract hypothetical, (1) the workplace injury did not "cause[ ] the [pre-existing] condition for which treatment is sought"; (2) the workplace injury did not—at least at the level of abstraction offered by the majority—"aggravat[e] that [pre-existing] condition or caus[e] new symptoms"; and (3) it is not true that "the [pre-existing] condition did not require medical treatment or intervention of any kind before the workplace injury but now requires treatment to aid in treatment of the workplace injury." While there are some specific instances where I might agree that the change in treatment for the preexisting condition is not covered because the new treatment itself does not further the aid "reasonably . . . required to effect a cure or give relief" from the covered injury, there are others—including those where the preexisting condition is neither aggravated or altered by the workplace injury itself—that would be covered under the statutory text consistent with the overall intent of the Act. A holding focused more on crafting a uniform test rather than ensuring the purposes of the Act are carried out cannot—and the majority's test does not—account for these circumstances.

Imagine a scenario that is slightly different from this case. A worker falls on the job, injuring her knee and requiring surgery to repair the injury. As part of the pre-operative workup, the medical team may order an echocardiogram to ensure that the patient does not have decreased blood flow to the heart prior to attempting the surgery. Roscoe N. Gray & Louise J. Gordy, *Attorneys' Textbook of Medicine* § 30.42(1) (3d ed. 2010). If the test indicates a preexisting heart condition, previously diagnosed and controlled or mitigated in daily life by a low-dose aspirin regimen or similar noninvasive treatment, but which is too severe to allow for knee surgery without immediate invasive intervention, the health care provider may determine that it is medically necessary to immediately address the preexisting heart condition through more invasive means as a prerequisite to the required knee surgery. And if the factfinders on the Industrial Commission credited adequate expert testimony consistent with that medical determination to find and conclude the heart condition treatment was compensable, that treatment would not be covered under the Act because of its mere existence—the hallmark of general health insurance—but because it *had* to be addressed *in order to* "effect a cure or give relief" for the covered injury, as demanded by statute. And yet, the majority's three-part test would not cover that treatment because: (1) the heart condition had not been caused by the workplace injury; (2) the injury itself did not aggravate the heart condition or create

new symptoms; and (3) the heart condition had previously required some form of treatment.[1]

Stated differently, I would hold that whether a treatment is covered should turn on whether the particular facts of a case, as found by the Industrial Commission based on adequate competent evidence, demonstrate that the treatment was "reasonably . . . required to effect a cure or give relief and for such additional time as, in the judgment of the [Industrial] Commission, will tend to lessen the period of disability," N.C.G.S. § 97-2(19), not on an extra-textual test that, in a noble effort for uniformity and predictability, may still not—and perhaps cannot—account for all circumstances intended to be covered by the legislature.

In these scenarios, the patient may require treatment for the preexisting condition, itself unrelated to the workplace injury in isolation, prior to and as a prerequisite for treatment of the workplace injury. Treatment of these preexisting conditions for the purpose of effecting a cure, giving relief, or lessening the period of disability of a covered workplace injury would not convert the Act into a general health insurance policy. It simply ensures that, pursuant to the stated goals of the statute, a treatment that cures, effects relief, or reduces the period of disability of a covered injury is compensable. And compensability under N.C.G.S. § 97-2(19) in these circumstances would accord with our caselaw establishing that the Act should be liberally construed to effectuate its purpose to provide compensation for injured employees and avoid denying benefits under technical, narrow, or strict construction of its provisions. *See Hollman v. City of Raleigh*, *Pub. Util. Dep't*, 273 N.C. 240, 252 (1968); *Wilkes*, 369 N.C. at 736–37.

As for the majority's remand, Ms. Kluttz-Ellison sustained a compensable injury to her right knee due to a fall at work. The Industrial Commission found that the injury arose out of and during the course of employment. Both the health care provider and Industrial Commission agreed that Ms. Kluttz-Ellison required a "right total knee arthroplasty" to effect a cure, provide relief, and/or lessen the period of disability" for

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1. Similarly, imagine an employee who suffers from allergies that are safely controlled in daily life by a regular over-the-counter antihistamine regimen and allergen avoidance. Then imagine that the employee requires a medication containing those allergens to treat or diagnose a workplace injury, *e.g.*, intravenous contrast media for x-ray imaging; muscle relaxants; or aspirin. Roscoe N. Gray & Louise J. Gordy, *Attorneys' Textbook of Medicine* § 65.42 (3d ed. 2010). The majority's three-part test would not cover prophylactic epinephrine, steroids, or other treatments required to address those preexisting allergies' response to the workplace-injury related treatments or medications—allergies that must be safely controlled in order to effectuate a cure of the workplace injury.

this knee injury. After considering the testimony of several medical professionals as to the necessity of the prerequisite surgery to ensure the success of the arthroplasty, the Industrial Commission found that bariatric surgery was "medically necessary" as "a prerequisite to allowing [Ms. Kluttz-Ellison] to undergo the revision right total knee arthroplasty."

In sum, I cannot sign on to a uniform test that is not compelled by the statutory text and may result in the denial of intended coverage given workers' compensation claims' infinite permutations. The statute states that treatment prescribed by a medical provider as necessary to effectuate a cure of or relieve a workplace injury is compensable, and the Industrial Commission found that Ms. Kluttz-Ellison's bariatric surgery was medically necessary to effect a cure, provide relief and/or lessen the period of disability of the covered knee injury. I would therefore affirm the decision of the Industrial Commission without remanding the case.

Justice EARLS joins in this dissenting opinion.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.
v.
MATTHEW BRYAN HEBERT

No. 281A22

Filed 22 March 2024

Motor Vehicles—insurance—underinsured motorist coverage—qualification as underinsured highway vehicle—interpolicy stacking—not permitted

In a declaratory judgment action to determine the underinsured motorist (UIM) coverage available to defendant, who owned the at-fault vehicle in a fatal car crash but was not the tortfeasor (his friend was driving the car while defendant rode as a passenger), the trial court erred in granting judgment on the pleadings for defendant and thereby allowing him to recover under both his own policy and his parents' policy. Under the plain language of the Motor Vehicle Safety and Financial Responsibility Act, defendant could not "stack" the UIM coverage limits from his own policy and his parents' policy (which named defendant as an insured but did not cover his car) in order to qualify his car as an "underinsured highway vehicle" for purposes of activating his own policy's UIM coverage and bringing a

UIM claim under that policy. Further, because defendant could not "stack" multiple UIM limits, his car did not meet the alternate definition of "underinsured highway vehicle" under the "multiple claimant exception" of the Act (N.C.G.S. § 20-279.21(b)(4)).

Justice EARLS dissenting.

Justice RIGGS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 285 N.C. App. 159, 877 S.E.2d 400 (2022), affirming an order denying plaintiff's motion for judgment on the pleadings and granting judgment on the pleadings for defendant entered on 21 December 2021 by Judge Vince M. Rozier, Jr., in Superior Court, Wake County. On 1 March 2023, the Supreme Court allowed plaintiff's petition for discretionary review as to additional issues pursuant to N.C.G.S. § 7A-31. Heard in the Supreme Court on 21 February 2024.

Lipscomb Law Firm, by William F. Lipscomb, for plaintiff-appellant.

Law Offices of James Scott Farrin, by Preston W. Lesley, for defendant-appellee.

Pinto Coates Kyre & Bowers, PLLC, by Jon Ward and Paul D. Coates, and Law Offices of C. Douglas Maynard, Jr., PLLC, by C. Douglas Maynard, Jr., for North Carolina Advocates for Justice, amicus curiae.

NEWBY, Chief Justice.

Pursuant to subdivision 20-279.21(b)(4) of the Motor Vehicle Safety and Financial Responsibility Act of 1953 (FRA), a claimant's underinsured motorist (UIM) coverage must be "activated" for his UIM claim to proceed. At the "activation stage," the claimant must show that the tortfeasor's car satisfies one of the statutory definitions of an "underinsured highway vehicle." Generally, a tortfeasor's vehicle is an underinsured highway vehicle if the tortfeasor's liability limits are less than the claimant's "applicable limits of [UIM] coverage for the vehicle involved in the accident and insured under the owner's policy." N.C.G.S. § 20-279.21(b)(4) (2019). If an accident results in more than one

injured person, the tortfeasor's vehicle may also qualify as an underinsured highway vehicle if "the total amount [of liability coverage] actually paid to" a single claimant is less than that claimant's "applicable limits of [UIM] coverage for the vehicle involved in the accident and insured under the owner's policy." *Id.*[1]

In this case we must determine whether defendant, who owned the at-fault vehicle but was not the tortfeasor, may stack multiple UIM coverage limits inter-policy—including those that do not insure the vehicle involved in the accident—to qualify his vehicle as an underinsured highway vehicle for his UIM claim brought under his policy insuring his vehicle. Although the FRA is to be "liberally construed" to accomplish its remedial purpose, this Court may only employ that canon of construction if the FRA's plain language is ambiguous or susceptible to multiple reasonable interpretations. Here we conclude that subdivision 20-279.21(b)(4)'s plain language is clear and unambiguous: the only UIM limits that may be considered at the activation stage are those "for the vehicle involved in the accident and insured under the owner's policy." *Id.* Accordingly, we conclude that the Court of Appeals erred when it permitted defendant to "stack and compare" at the activation stage—that is, when it allowed defendant to aggregate inter-policy all of the UIM policies available to defendant, regardless of their connection to the car involved in the accident, before comparing his UIM limits to the at-fault vehicle's liability limits.

Without inter-policy stacking, defendant's vehicle, which was the at-fault vehicle, does not qualify as an underinsured highway vehicle for purposes of defendant's UIM claim brought under his own policy. Accordingly, we reverse the decision of the Court of Appeals and remand this case with instructions to remand the matter to the trial court for entry of judgment on the pleadings in plaintiff's favor.

In 2020, defendant owned a 2004 Chevrolet Malibu.[2] Plaintiff issued defendant a personal automobile policy covering defendant's car.

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1. In 2023, the General Assembly amended the definitions of "underinsured highway vehicle," which will take effect on 1 January 2025. An Act to Make Various Changes to the Insurance Laws of North Carolina, to Amend the Insurance Rate-Making Laws, and to Revise High School Interscholastic Athletics, S.L. 2023-133, § 12(d), (i), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-133.pdf. This opinion takes no position on the interpretation of the statute as amended.

2. This case comes to this Court following plaintiff's motion for judgment on the pleadings. Accordingly, "[a]ll well pleaded factual allegations in the nonmoving party's pleadings [i.e., defendant's answer] are taken as true[,] and all contravening assertions in the movant's pleadings [i.e., plaintiff's complaint] are taken as false." *Ragsdale v. Kennedy*,

Defendant's policy provided liability coverage with limits of $50,000.00 per person and $100,000.00 per accident. It also provided UIM coverage with limits of $50,000.00 per person and $100,000.00 per accident. Additionally, defendant was named as an insured on his parents' personal automobile policy, which was also issued by plaintiff. Defendant qualified for UIM coverage under his parents' personal auto policy, which provided UIM coverage with limits of $100,000.00 per person and $300,000.00 per accident. Defendant's parents' policy, however, did not insure defendant's car.[3]

On 21 October 2020, Sincere Terrell Corbett was driving defendant's car, and defendant, Chase Everette Hawley, and Jamar Direll Hicks, Jr., were passengers. Defendant's car collided with another vehicle, which was owned and operated by William Rayvoin Coats.[4] As a result of that collision, Corbett and Hicks died, and defendant and Hawley sustained significant injuries.[5] Coats was also injured. Neither party disputes that defendant's car was the at-fault vehicle and that Corbett, not defendant, was the tortfeasor.

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286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). Review is "limited to the facts properly pleaded in the pleadings . . . , inferences reasonably to be drawn from such facts[,] and matters of which the court may take judicial notice. An exhibit, attached to and made a part of the pleading, is so considered." *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 206, 171 S.E.2d 873, 878–79 (1970) (citations omitted). To the extent that defendant's answer admitted or did not deny the complaint's factual allegations, however, those facts are deemed established. *See* N.C.G.S. § 1A-1, Rule 8(d) (2021) ("Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."). The facts and permissible inferences therefrom are viewed in the light most favorable to the nonmoving party. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499.

3. Defendant denied plaintiff's allegation that defendant's car was not insured by his parents' policy. Defendant's parents' policy, however, was attached as an exhibit to plaintiff's complaint, and defendant admitted that the exhibit was a true and certified copy of his parents' policy. The declarations page of defendant's parents' policy does not list defendant's car as a covered vehicle. To the extent that defendant's characterization of his parents' policy conflicts with the terms of the policy, the policy controls. *See Wilson*, 276 N.C. at 206, 171 S.E.2d at 879 ("The terms of [an attached] exhibit control other allegations of the pleading attempting to paraphrase or construe the exhibit, insofar as these are inconsistent with its terms.").

4. Defendant denied that Coats was the owner and operator of the other car "due to lack of knowledge." He admitted in his answer, however, that plaintiff paid Coats as part of its payout of defendant's liability coverage. Thus, it is reasonable to infer from the admitted facts that Coats was the owner and operator of the other car.

5. Defendant also denied that Coats was injured "due to lack of knowledge." Because defendant admitted that plaintiff paid Coats as part of the liability payout, however, it is reasonable to infer from the admitted facts that Coats was injured.

After the accident, plaintiff tendered the $100,000.00 per accident limit of liability coverage under defendant's policy, and the four claimants agreed to divide the payout as follows: $49,500.00 to Hicks's estate, $49,500.00 to Hawley, $900.00 to Coats, and $100.00 to defendant. Plaintiff also paid defendant $99,900.00 in UIM coverage under defendant's parents' policy.[6]

On 29 July 2021, plaintiff filed a complaint seeking a judgment declaring that defendant's UIM coverage under his policy is unavailable because defendant's car, as the at-fault vehicle, does not qualify as an underinsured highway vehicle for his UIM claim brought under his own policy. On 15 September 2021, defendant filed his answer, requesting that he be paid the UIM coverage under his policy insuring his car. On 30 September 2021, plaintiff moved for judgment on the pleadings pursuant to North Carolina Rule of Civil Procedure 12(c). On 20 December 2021, the trial court denied plaintiff's motion for judgment on the pleadings, and it granted judgment on the pleadings for defendant. Plaintiff appealed.

The Court of Appeals affirmed in a divided decision. *N.C. Farm Bureau Mut. Ins. Co. v. Hebert*, 285 N.C. App. 159, 165, 877 S.E.2d 400, 404 (2022). "[G]uided by the 'avowed purpose' of the Financial Responsibility Act," the majority declined to construe subdivision 20-279.21(b)(4) "in a manner that would . . . limit the recovery of innocent occupants of a tortfeasor's vehicle." *Id.* at 163–64, 877 S.E.2d at 403–04. Applying the stack and compare rule, the majority permitted defendant to "stack" his own policy's UIM limits with his parents' policy's UIM limits before comparison to defendant's policy's liability limits. *Id.* at 163–65, 877 S.E.2d at 403–04 (first citing *N.C. Farm Bureau Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 50–51, 483 S.E.2d 452, 458 (1997), and then citing *Nationwide Affinity Ins. Co. of Am. v. Le Bei*, 259 N.C. App. 626, 630, 816 S.E.2d 251, 254 (2018)). After doing so, the majority concluded

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6. In its complaint, plaintiff conceded that defendant's car qualified as an underinsured motor vehicle for defendant's UIM claim brought under defendant's parents' policy. It further conceded that it "offered, and is in the process of paying, the $99,900[.00] UIM coverage from the parents' policy." Plaintiff calculated the $99,900.00 UIM payment by deducting the $100.00 payment from defendant's liability coverage from the $100,000.00 per person UIM limit under defendant's parents' policy.

Before this Court, the parties only dispute whether defendant activated his UIM coverage under his own policy such that he could bring a UIM claim under his own policy. Accordingly, we consider this case as it was presented, and the only question before us is whether defendant's car qualified as an underinsured highway vehicle for purposes of a UIM claim brought under defendant's own policy. *See* N.C. R. App. P. 28(a), (b)(6), (c).

that defendant's car satisfied subdivision 20-279.21(b)(4)'s general definition of an underinsured highway vehicle,[7] thus activating his policy's UIM coverage. *See id.* at 164–65, 877 S.E.2d at 403–04. Furthermore, the majority reasoned that subdivision 20-279.21(b)(4)'s "multiple claimant exception" did not apply to defendant's UIM claim simply because there were multiple injuries in the accident.[8] *Id.* at 164, 877 S.E.2d at 404 (citing *Integon Nat'l Ins. Co. v. Maurizzio*, 240 N.C. App. 38, 44, 769 S.E.2d 415, 420 (2015)). Because it concluded that the multiple claimant exception did not apply, the majority further stated that the multiple claimant exception's caveat sentence[9] did not prevent defendant's vehicle from qualifying as an underinsured motor vehicle for his claim under his policy insuring that car. *Id.* Accordingly, the majority affirmed the judgment on the pleadings in defendant's favor. *Id.* at 165, 877 S.E.2d at 404.

Conversely, the dissent first concluded that defendant's car did not qualify as an underinsured highway vehicle under subdivision 20-279.21(b)(4)'s general definition because the liability limits of defendant's policy covering his car were equal to its UIM limits. *Id.* at 165, 877 S.E.2d at 404–05 (Arrowood, J., dissenting). The dissent then considered the multiple claimant exception and similarly concluded that defendant's car did not qualify as an underinsured highway vehicle for purposes of his UIM claim brought under his own policy insuring his car because his policy's liability limits were the same as the UIM limits. *Id.* at 165–66, 877 S.E.2d at 405. Although the dissent recognized that "inter-policy stacking is generally permitted," *id.* at 167, 877 S.E.2d at 405, it believed that "in this particular type of claim"—namely, UIM

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7. Under the general definition, a vehicle is an underinsured highway vehicle if (1) it is "a highway vehicle with respect to [its] ownership, maintenance, or use," and (2) "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of [UIM] coverage for the vehicle involved in the accident and insured under the owner's policy." N.C.G.S. § 20-279.21(b)(4) (2019).

8. Under the multiple claimant exception, a vehicle is also an underinsured highway vehicle if (1) a "[UIM] claim [is] asserted by a person injured in an accident where more than one person is injured," and (2) "the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy." N.C.G.S. § 20-279.21(b)(4) (2019).

9. The caveat sentence to the multiple claimant exception provides that when a UIM claimant proceeding under the multiple claimant exception brings a UIM claim under an owner's policy insuring the at-fault and allegedly underinsured vehicle, the vehicle is not considered underinsured "unless the owner's policy insuring that vehicle provides [UIM] coverage with limits that are greater than that policy's bodily injury liability limits." N.C.G.S. § 20-279.21(b)(4) (2019).

claims under the owner's policy insuring the at-fault vehicle involved in the accident—"[t]he General Assembly . . . specifically confined the limit coverage comparison to the owner's policy," *id.* at 166–67, 877 S.E.2d at 405. Therefore, reasoning that "consider[ation of] multiple insurance policies in this particular type of claim is impermissible pursuant to [subdivision 20-279.21(b)(4)]," *id.* at 167, 877 S.E.2d at 405, the dissent would have reversed the trial court's order, *id.* at 167, 877 S.E.2d at 406.

Plaintiff appealed based on the dissent.[10] This Court also allowed plaintiff's petition for discretionary review, wherein plaintiff sought review of the application of the stack and compare rule.

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C.G.S. § 1A-1, Rule 12(c) (2021). "A Rule 12(c) movant must show that 'the [pleading] . . . fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar' to a cause of action." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (ellipsis in original) (quoting *Jones v. Warren*, 274 N.C. 166, 169, 161 S.E.2d 467, 470 (1968)). A trial court's grant of judgment on the pleadings is reviewed de novo. *Id.* Questions of statutory construction are also reviewed de novo. *City of Asheville v. Frost*, 370 N.C. 590, 591, 811 S.E.2d 560, 561 (2018).

The primary goal of statutory interpretation is to accomplish legislative intent, which, in the first instance, is discerned from the plain language of the enactment. *N.C. Farm Bureau Mut. Ins. Co. v. Lunsford*, 378 N.C. 181, 188, 861 S.E.2d 705, 712 (2021). If the statute's plain language is clear and unambiguous, this Court applies the statute as written and does not engage in further statutory construction. *See id.* at 189, 861 S.E.2d at 712. This Court may turn to other sources to determine legislative intent, including "the spirit of the act," only if the statute is ambiguous or susceptible to multiple interpretations. *Id.* at 188–89, 861 S.E.2d at 712.

"The avowed purpose of the [FRA], of which N.C.G.S. § 20-279.21(b)(4) is a part, is to compensate the innocent victims of financially irresponsible motorists. It is a remedial statute to be liberally construed so that

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10. *See* N.C.G.S. § 7A-30(2) (2021), *repealed by* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-134.pdf. The repeal of N.C.G.S. § 7A-30(2) only applies to cases filed with the Court of Appeals on or after 3 October 2023. *See* Current Operations Appropriations Act § 16.21(e).

the beneficial purpose intended by its enactment may be accomplished." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (citations omitted), *superseded on other grounds by statute*, An Act to Prohibit the Stacking of Uninsured and Underinsured Motorist Coverage, ch. 646, §§ 1–4, 1991 N.C. Sess. Laws 1550, 1550–59. "[T]h[is] fact," however, "does not inevitably require that one interpret the relevant statutory language to produce the maximum possible recovery for persons injured as a result of motor vehicle negligence regardless of any other consideration." *N.C. Farm Bureau Mut. Ins. Co. v. Dana*, 379 N.C. 502, 512, 866 S.E.2d 710, 717 (2021). Indeed, "*the usual rules of statutory construction govern* . . . subject to the caveat that the relevant statutory language should be construed to produce the greatest possible protection for the innocent victims of negligent conduct *permitted by a reasonable interpretation of the relevant statutory language*." *Id.* at 512, 866 S.E.2d at 717–18 (emphases added). Accordingly, the threshold question for this Court when interpreting the FRA is whether the Act's plain language is clear and unambiguous. If it is, we must dispassionately give effect to the plain language. If it is not, only then may this Court "liberally construe" its terms in favor of recovery.

Insurance companies doing business in North Carolina are required to offer UIM coverage. N.C.G.S. § 20-279.21(b)(4) (2019) ("[An] owner's policy of liability insurance . . . [s]hall . . . provide underinsured motorist coverage . . . ."). UIM coverage, which was developed out of uninsured motorist insurance, "provides a secondary source of recovery for an insured when the tortfeasor has insurance, but the tortfeasor's liability limits are insufficient to compensate the injured party." *Lunsford v. Mills*, 367 N.C. 618, 633, 766 S.E.2d 297, 307 (2014) (Newby, J., concurring in part and dissenting in part). In this way, UIM coverage acts "as a safeguard when [a] tortfeasor['s] liability polic[y] do[es] not provide sufficient recovery—that is, when the tortfeasor[ ] [is] 'under insured.' " *Id.* at 632, 766 S.E.2d at 306. Practically speaking, "[f]ollowing an automobile accident, a tortfeasor's liability coverage is called upon to compensate the injured [party], who then turns to *his own UIM coverage* when the tortfeasor's liability coverage is exhausted." *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 188, 420 S.E.2d 124, 127 (1992) (emphasis added), *superseded by statute*, An Act to Prohibit the Stacking of Uninsured and Underinsured Motorist Coverage, §§ 1–2, 1991 N.C. Sess. Laws at 1550–59, *as recognized in Mills*, 367 N.C. at 626, 766 S.E.2d at 303. Under our General Statutes, UIM coverage "augment[s] [the] inadequate recover[y] obtained from [an] underinsured tortfeasor[ ]" by "put[ting] the insured claimant . . . in the position he would have occupied had the tortfeasor been insured at limits equal to the claimant's UIM limits." *Mills*, 367 N.C.

at 633–34, 766 S.E.2d at 307 (Newby, J., concurring in part and dissenting in part). As a result, "[t]he insured's UIM limits, not the insured's total damages, provide the ceiling for recovery." *Id.* at 635, 766 S.E.2d at 308.

The FRA's UIM provision, subdivision 20-279.21(b)(4), is logically organized. In the first paragraph, it mandates that insurance companies provide UIM coverage and expounds upon the specific limits they must provide. N.C.G.S. § 20-279.21(b)(4) (2019). Then, subdivision 20-279.21(b)(4) moves to the "activation provision," which encompasses the definitions of underinsured highway vehicle at issue in this case. *Id.* As more fully explained below, for a claimant to "activate" his UIM coverage, he must show that the tortfeasor's vehicle meets one of the statute's definitions of underinsured highway vehicle. *Id.*; *cf. N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 376 N.C. 280, 285, 851 S.E.2d 891, 895 (2020) ("The party seeking coverage under an insurance policy bears the burden 'to allege and prove coverage.' " (quoting *Brevard v. State Farm Mut. Auto. Ins. Co.*, 262 N.C. 458, 461, 137 S.E.2d 837, 839 (1964))). After activation, however, an insurer is not necessarily obligated to pay on the UIM policy. Rather, subdivision 20-279.21(b)(4)'s "triggering provision" explains that the activated UIM coverage must be "triggered" for a claimant to collect his UIM coverage. *See* N.C.G.S. § 20-279.21(b)(4) (2019). A claimant's UIM protection is triggered "when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted." *Id.*

In summary, "[a] UIM carrier pays on its policy to an injured claimant when (1) the auto accident involves a tortfeasor [vehicle that] meets the statute's definition of an underinsured highway vehicle (the activation provision); and (2) the underinsured highway vehicle's liability coverage has been exhausted (triggering provision)." *Mills*, 367 N.C. at 636, 766 S.E.2d at 309 (Newby, J., concurring in part and dissenting in part). Then, assuming the claimant's UIM coverage is both activated and triggered, subdivision 20-279.21(b)(4)'s second paragraph explains how to calculate the amount of UIM benefits to be paid to the claimant.[11] N.C.G.S. § 20-279.21(b)(4) (2019).

As noted above, the threshold question in a UIM analysis is whether the tortfeasor's vehicle is an underinsured highway vehicle as defined by the activation provision in subdivision 20-279.21(b)(4). *Lunsford*, 378 N.C. at 186, 861 S.E.2d at 710. "[I]f no vehicle meets the definition[s]

11. Subdivision 20-279.21(b)(4)'s remaining paragraphs are irrelevant to the current dispute. *See* N.C.G.S. § 20-279.21(b)(4) (2019).

of an underinsured [highway] vehicle under [subdivision 20-279.21(b)(4)'s] activation provision, then consideration of the subsequent . . . provision[s] is unnecessary." *Mills*, 367 N.C. at 636, 766 S.E.2d at 308 (Newby, J., concurring in part and dissenting in part).

The activation provision has two definitions of underinsured highway vehicle. First, it announces the general definition:

> "[U]nderinsured highway vehicle[ ]" . . . means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is *less than* the applicable limits of underinsured motorist coverage *for the vehicle involved in the accident and insured under the owner's policy.*

N.C.G.S. § 20-279.21(b)(4) (2019) (emphases added). Stated differently, "UIM coverage is activated when the insured's UIM policy limits are greater than the liability limits of policies connected with the tortfeasor's ownership, maintenance, or use of a highway vehicle." *Mills*, 367 N.C. at 636, 766 S.E.2d at 309 (Newby, J., concurring in part and dissenting in part); *see also* 3 Alan I. Widiss & Jeffrey E. Thomas, *Uninsured and Underinsured Motorist Insurance* § 35.2 n.1 (3d ed. rev. 2005) (observing that subdivision 20-279.21(b)(4) "provide[s] that underinsured motorist insurance applies when the [claimant insured's UIM] coverage limit exceeds the tortfeasor's liability insurance coverage limit").

Subdivision 20-279.21(b)(4) then furnishes a second definition of underinsured highway vehicle, which is commonly known as the "multiple claimant exception" or the "2004 Amendment." *See Hebert*, 285 N.C. App. at 162, 877 S.E.2d at 403. The first sentence of the multiple claimant exception provides the second definition of underinsured highway vehicle:

> For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is *less than* the applicable limits of underinsured motorist coverage *for the vehicle involved in the accident and insured under the owner's policy.*

N.C.G.S. § 20-279(b)(4) (2019) (emphases added). In other words, if an accident results in multiple innocent parties sustaining injuries, the at-fault vehicle qualifies as an underinsured highway vehicle if the total amount of liability coverage paid to an injured claimant is less than that injured claimant's UIM limits for the vehicle involved in the accident and insured under the owner's policy.

The second sentence of the multiple claimant exception is a caveat to the second definition:

> *Notwithstanding the immediately preceding sentence*, a highway vehicle shall not be an "underinsured motor vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle *unless* the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than that policy's bodily injury liability limits.

Id. (emphases added). Put differently, for a claimant pursuing a UIM claim under the multiple claimant exception and proceeding under an owner's policy insuring the allegedly underinsured vehicle (i.e., the at-fault vehicle), that owner's policy's liability limits must be less than its UIM limits.

Since the 1990s, the Court of Appeals has permitted UIM claimants to "stack"—that is, add together—"all of the UIM limits available to" them "for purposes of determining whether [a] vehicle [is] an underinsured motor vehicle as defined under [N.C.]G.S. § 20-279.21(b)(4)." *Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458; *see also*, *e.g.*, *Onley v. Nationwide Mut. Ins. Co.*, 118 N.C. App. 686, 689, 456 S.E.2d 882, 884 (1995); *Benton v. Hanford*, 195 N.C. App. 88, 92–94, 671 S.E.2d 31, 34–35 (2009). Although this Court has considered cases relating to the stack and compare rule in the past,[12] in this case we must determine whether

12. In *North Carolina Farm Bureau Mutual Insurance Co. v. Lunsford*, this Court "affirm[ed] prior decisions of the Court of Appeals allowing inter[-]policy stacking when calculating the 'applicable' policy limits as required under . . . N.C.G.S. § 20-279.21(b)(4)." 378 N.C. at 183, 861 S.E.2d at 708. In that case, however, this Court repeatedly emphasized that the plaintiff "d[id] not challenge" the Court of Appeals' caselaw allowing inter-policy stacking when qualifying a vehicle as an underinsured highway vehicle. *Id.* at 187–89, 861 S.E.2d at 710–12. Rather, "[t]he crux of the parties' dispute [was] whether [the tortfeasor's policy's] UIM coverage limit [was] also an 'applicable limit of [UIM] coverage for the vehicle involved in the accident and insured under the owner's policy.' " *Id.* at 186–87, 861 S.E.2d at 710. This Court's opinion essentially presumed the validity of inter-policy stacking and approved of the practice without thoroughly considering whether it aligns with

defendant may stack and compare in order to activate his UIM coverage under his policy insuring the at-fault vehicle. Cognizant of our duty to dispassionately give effect to subdivision 20-279.21(b)(4)'s plain language, we conclude that defendant is not permitted to stack his parents' policy's UIM limits with his own policy's UIM limits in order to qualify his vehicle as an underinsured highway vehicle.

Looking first to the plain language of subdivision 20-279.21(b)(4), the statutory definitions of underinsured highway vehicle "appl[y] a comparison of limits approach." *Mills*, 367 N.C. at 636, 766 S.E.2d at 309 (Newby, J., concurring in part and dissenting in part); *see also* 3 Widiss & Thomas § 35.2 n.1 (observing that subdivision 20-279.21(b)(4)'s approach to the definition of underinsured highway vehicle is a "comparison[ ] between the tortfeasor's liability insurance and the claimant's underinsured motorist coverage limits" (emphasis omitted)). On one side of the scale, the definitions consider the liability limits applicable to *the tortfeasor's vehicle*. *See Mills*, 367 N.C. at 636, 766 S.E.2d at 309 (Newby, J., concurring in part and dissenting in part). Depending on which definition is applied, subdivision 20-279.21(b)(4) focuses on either "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident" or "the total amount actually paid to [a claimant] under all bodily injury liability bonds and insurance policies applicable at the time of the accident." N.C.G.S. § 20-279.21(b)(4) (2019). On the other side of the scale, and relevant here, the definitions consider "*the insured's* UIM policy limits." *Mills*, 367 N.C. at 636, 766 S.E.2d at 309 (Newby, J., concurring in part and dissenting in part) (emphasis added). More specifically, the scope of the inquiry is "the applicable limits of [the insured's] underinsured motorist coverage *for the vehicle involved in the accident and insured under the owner's policy*." N.C.G.S. § 20-279.21(b)(4) (2019) (emphasis added).

This language clearly and unambiguously means that subdivision 20-279.21(b)(4)'s activation provision is concerned with the claimant's UIM coverages that pertain to the vehicle involved in the accident, not all UIM policies for which the UIM claimant is personally eligible. In other words, if an insured's UIM policy is not "for" the vehicle involved in the accident and insured under the owner's policy, it is outside the scope of consideration when determining whether the at-fault vehicle

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subdivision 20-279.21(b)(4)'s plain language. To the extent that this Court did engage in statutory construction in *Lunsford*, it only did so to determine whether "applicable limits" also included "the UIM coverage limits contained within the insurance policy covering the tortfeasor's vehicle." *Id*. at 188–90, 861 S.E.2d at 711–13.

is an underinsured highway vehicle. Conversely, the stack and compare rule permits consideration of "all of the UIM limits available to [the claimant]" regardless of their connection to the vehicle involved in the accident, *Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458 (disavowing an interpretation that "confines [a claimant's] UIM coverage only to [the vehicle he or she occupied at the time of the accident]"), which contravenes the statute's plain language.

For thirty years, however, the Court of Appeals anchored its adherence to the stack and compare rule on the statute's use of the word "limits." *Id.* In the court's view, "the 'limits' referred to . . . [were] all of the UIM limits available to [the claimant]." *Id.* This interpretation, however, ignores the remainder of subdivision 20-279.21(b)(4)'s first paragraph. In the sentences immediately surrounding subdivision 20-279.21(b)(4)'s definitions of underinsured highway vehicle, "limits" appears thirteen times. In each of those instances, the statute refers to the per-person and per-accident limits under a singular policy, not limits from multiple policies. *See* N.C.G.S. § 20-279.21(b)(4) (2019); *cf. Dana*, 379 N.C. at 511, 866 S.E.2d at 717 ("[In N.C.G.S. § 20-279.21(b)(4),] references to 'limit,' stated in the singular, occur in instances in which the General Assembly is referring to a single limit rather than to a collection of limits, such as the per-person and per-accident limits of liability that appear to be standard in most automobile liability insurance policies."). Moreover, elsewhere in the statute, the General Assembly clearly indicated when it authorized the inter-policy stacking of multiple automobile insurance policies. *See* N.C.G.S. § 20-279.21(b)(4) (2019) ("the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident"); *id.* (permitting, under subdivision 20-279.21(b)(4)'s second paragraph, claimants to stack "separate or additional policies" when calculating the amount of UIM payments to be made). Without a clearer expression of intent from the General Assembly, the language it used does not support the broad interpretation of "limits" adopted by the Court of Appeals.

The Court of Appeals, however, defended its interpretation of "limits" by pointing to the second paragraph of subdivision 20-279.21(b)(4), which it called the "stacking subsection." *Bost*, 126 N.C. App. at 49–51, 483 S.E.2d at 457–58. That paragraph provides:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage

> applicable to the motor vehicle involved in the accident. *Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy* . . . . The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.

N.C.G.S. § 20-279.21(b)(4) (2019) (emphasis added). In our view, the Court of Appeals' approach placed more reliance on the stacking language than it can reasonably bear.

Indeed, although the second paragraph does permit inter-policy stacking of UIM limits, it only does so at the calculation stage of the UIM process. As explained above, subdivision 20-279.21(b)(4), although concededly "lengthy and complicated," *Dana*, 379 N.C. at 508, 866 S.E.2d at 715, is logically organized. Initially, it explains how to "activate" the UIM coverage, which is the relevant issue in this case. Assuming the UIM coverage is activated, subdivision 20-279.21(b)(4) next explains how to "trigger" UIM coverage. Then, subdivision 20-279.21(b)(4)'s second paragraph explains how to calculate the amount of UIM payments to be paid to the claimant. It is at this stage—and this stage only—that subdivision 20-279.21(b)(4) permits a claimant to stack "separate or additional" UIM policies. N.C.G.S. § 20-279.21(b)(4) (2019). The second paragraph does not reach back and modify the definitions of underinsured highway vehicle. To hold otherwise is to "inevitably require . . . [an] interpret[ation of] the relevant statutory language to produce the maximum possible recovery for persons injured . . . regardless of any other consideration." *Dana*, 379 N.C. at 512, 866 S.E.2d at 717. This we are not permitted to do.

For all these reasons, we conclude that subdivision 20-279.21(b)(4)'s plain language does not allow for defendant to stack his policy's UIM limits with his parents' policy's UIM limits to determine if his car was an underinsured highway vehicle for his claim under his policy insuring his car. Accordingly, the Court of Appeals erred when it allowed defendant to do so. Properly interpreted, subdivision 20-279.21(b)(4) only permits

comparison of "the limits of liability" of the at-fault vehicle in this case—defendant's car—with "the applicable limits of [UIM] coverage for the vehicle involved in the accident and insured under the owner's policy"—also defendant's car. N.C.G.S. § 20-279.21(b)(4) (2019).

In his answer, defendant admitted that the UIM limits for his car were identical to its liability limits. Defendant further admitted that his parents' policy did not insure defendant's vehicle. Thus, his parents' policy does not provide UIM coverage "for the vehicle involved in the accident." *Id.* Defendant's admissions bar defendant's claim for UIM payments under his own policy.

Indeed, on these facts, defendant's car does not qualify as an underinsured highway vehicle under the general definition. Unlike most UIM scenarios, defendant's car is both the at-fault vehicle and the vehicle through which defendant, as an innocent, injured party, seeks UIM recovery. Nevertheless, the sum of defendant's liability limits for his car is not "less than" its applicable UIM limits. Thus, defendant's car does not satisfy subdivision 20-279.21(b)(4)'s general definition of an underinsured highway vehicle.

Moreover, although defendant's car otherwise would qualify under the multiple claimant exception's definition because "the total amount actually paid to [defendant] under all bodily injury liability bonds and insurance policies . . . is less than the applicable [UIM] limits" for his car, *id.*, defendant's UIM claim is still barred. Defendant's claim also fails under the multiple claimant exception because it is a UIM claim brought under the owner's policy insuring the at-fault vehicle that is allegedly underinsured. Accordingly, the caveat sentence of the multiple claimant exception operates to bar defendant's claim because his policy insuring his car does not "provide[ ] [UIM] coverage with limits that are greater than that policy's bodily injury liability limits." *Id.* Therefore, defendant's car does not satisfy either definition of underinsured highway vehicle, meaning he is unable to activate his policy's UIM coverage.

The decision of the Court of Appeals is therefore reversed, and this case is remanded to that court with instructions to remand this matter to the trial court for entry of judgment on the pleadings in favor of plaintiff.

REVERSED AND REMANDED.

Justice DIETZ did not participate in the consideration or decision of this case.

Justice EARLS dissenting.

The Court's decision in this case has limited applicability because, as the majority notes, the North Carolina General Assembly has again amended the Motor Vehicle Safety and Financial Responsibility Act of 1953 (FRA) on this very point, to clarify that:

> If a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the total amount of underinsured motorist coverage applicable to the claimant is the sum of the limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy, and shall not be reduced by a setoff against any coverage, including liability insurance, except for workers' compensation coverage to the extent provided for in subsection (e) of this section.

An Act to Make Various Changes to the Insurance Laws of North Carolina, to Amend the Insurance Rate-Making Laws, and to Revise High School Interscholastic Athletics, S.L. 2023-133, § 12(d), (i), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-133.pdf (codified at N.C.G.S. § 20-279.21(b)(4) (effective Jan. 1, 2025)).

This case asks us to determine, under the statute in effect at the time of the accident and our applicable precedents, whether Mr. Hebert may stack his vehicle's UIM coverage along with the coverage under his parents' insurance policy on which he is an insured driver in order to determine whether his vehicle was an underinsured highway vehicle. This is an issue we resolved definitively in *North Carolina Farm Bureau Mutual Insurance Co. Inc. v. Lunsford*, 378 N.C. 181 (2021) (*Lunsford*). Blithely mischaracterizing the holding in *Lunsford* as a presumption rather than binding precedent, the new majority reverses course and adopts a position flatly inconsistent with that prior case. When overturning precedent, the Court should at a minimum acknowledge it, and, if the rule of law has any meaning, should justify doing so. *See State v. Elder*, 383 N.C. 578, 603 (2022) (factors to be considered when deciding to overturn precedent include "the quality of the prior decision's reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.") (quoting *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479-80

(2018)); *McGill v. Town of Lumberton*, 218 N.C. 586, 591 (1940) ("It is, then, an established rule to abide by former precedents . . . as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion . . .").

There is no dispute that on 21 October 2020, Matthew Hebert was a passenger in his 2004 Chevrolet car being driven by Sincere Terrell Corbett on Highway N.C. 42 in Johnston County, North Carolina, when they collided with another vehicle owned and driven by William Coats. Jamal Direll Hicks, Jr. and Chase Everette Hawley were passengers in Mr. Hebert's car. Mr. Corbett and Mr. Hicks were killed in the collision. Mr. Hebert, Mr. Hawley, and Mr. Coats sustained significant injuries. Mr. Hebert's vehicle was covered by a personal auto insurance policy issued by North Carolina Farm Bureau Mutual Insurance Co. Inc. (Farm Bureau) to Mr. Hebert (Mr. Hebert's policy). On 21 October 2020, Mr. Hebert qualified as an insured of the UIM coverage of a personal auto policy issued by Farm Bureau to Mr. Hebert's parents, which provides UIM coverage of $100,000 per person / $300,000 per accident and medical payments coverage of $2,000.

I. Governing Law

Most recently, in *Lunsford*, this Court held that the very statute as issue here, N.C.G.S. § 20-279.21(b)(4) (2019), provides for interpolicy stacking. *See Lunsford*, 378 N.C. at 188, 190 n.2, 191. This opinion was in no sense an "outlier" but instead affirmed multiple earlier rulings on this point by the Court of Appeals. Citing *Benton v. Hanford*, 195 N.C. App. 88 (2009), this Court explained that:

> Interpreting the ambiguous language contained in N.C.G.S. § 20-279.21(b)(4) to permit interpolicy stacking in this circumstance is "[i]n keeping with the purpose of the [FRA]" because it allows injured North Carolina insureds to access the UIM coverage they paid for in a greater number of circumstances, reducing the likelihood that the costs of the damage caused by an underinsured tortfeasor will be borne by the insured alone.

Lunsford, 378 N.C. at 191; *see also Tutterow v. Hall*, 283 N.C. App. 314, 319 (2022) ("[T]he statute provides an unambiguous method to calculate the applicable limit of combined UIM coverage: it is the difference between the total amount paid under all exhausted liability policies and the total limits of all applicable UIM policies."). This Court also noted in *Lunsford* that the North Carolina General Assembly "has not acted in a

way that evinces disagreement with *Benton* in the years since that case was decided" and that in any case, failure to allow interpolicy stacking would frustrate the bargain that the parties struck because *Benton* was the governing law at the time the insurance policy contract was entered into. *Lunsford*, 378 N.C. at 190 n.2. Both of those considerations apply with equal force in this case. At the time Mr. Hebert and his parents purchased their insurance policies, allowing interpolicy stacking to determine UIM coverage was the law in this State.

The unavoidable consequence of the majority's decision today is that the injured parties in *Lunsford* are able to stack UIM liability coverage from an out-of-state policy with the Farm Bureau policy covering the accident, while in this case, the injured parties cannot stack the coverages in two Farm Bureau policies purchased in North Carolina and will not be compensated to the full extent of the coverages they purchased. This not only contravenes the purpose of the North Carolina General Assembly in enacting the statute, it also frustrates the principle of equal justice under the law. The majority creates illogical distinctions in otherwise clear statutory language and ties itself in jurisprudential knots to arrive at the outcome-determined conclusion to favor insurers at the expense of their insured, contrary to the purpose of the FRA. *See*, *e.g.*, *Burgess v. Your House of Raleigh*, *Inc.*, 326 N.C. 205, 209 (1990) ("The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature."); *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 573–74 (2002) (cleaned up) ("The avowed purpose of the Financial Responsibility Act . . . is to compensate the innocent victims of financially irresponsible motorists.").

II. The FRA's Plain Language

The majority quotes the FRA's definitions of an underinsured vehicle and the provisions explaining what happens when more than one person is injured in an accident. *See* N.C.G.S. § 20-279.21(b)(4). Importantly, these definitions are then followed in the same subdivision with this explanation, which plainly establishes that if a person is an insured under another policy with UIM coverage, those limits also apply to determine the upper limit of coverage. The statute in effect at the time says:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage

> applicable to the motor vehicle involved in the accident. **Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy;** provided that this sentence shall apply only to insurance on nonfleet private passenger motor vehicles as described in G.S. 58-40-15(9) and (10). The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.

Id. (emphasis added). The plain language of the statute does allow Mr. Hebert to combine the underinsured motorist liability coverage on his own policy with that of the separate policy covering him that was issued to his parents. The majority's analysis that this section is applicable only at the "calculation" stage and not at the "activation" stage makes no sense. How could it be possible that underinsured motorist liability coverage would be "activated" or "triggered" by one lower set of coverage limits while the amount of coverage itself would be determined by a separate set of stacked coverage limits? This is especially illogical when the statute itself says nothing about activation, triggering, or calculation as being governed by separate standards.

The statute defines how an underinsured motorist claim is determined, and where a claimant, like Mr. Hebert, is an insured under another policy, "the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimants underinsured motorist coverages as determined by combining the highest limit available under each policy." *Id.* Nothing in the structure or language of the statute indicates that this sentence, in a paragraph which starts with "[i]n any event," is anything other than a clear intent to allow interpolicy stacking. Thirty years of Court of Appeals precedent on this question is not in error. *See*, *e.g.*, *N.C. Farm Bureau*, *Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 51 (1997) (citing *Onley v. Nationwide Mut. Inc. Co.*, 118 N.C. App. 686 (1995) ("The

1991 amendment expressly states that a claimant is not entitled to stack UIM coverage within policies, . . . but states that a claimant is entitled to stack between policies, upholding *Onley* . . . and therefore, defendant Carrie Bost is allowed to stack the UIM coverages of Farm Bureau and Allstate for purposes of determining whether Ezzelle's vehicle was an underinsured motor vehicle as defined under G.S. § 20-279.21(b)(4).").

III. Conclusion

Interpreting the statutory language of N.C.G.S. § 20-279.21(b)(4) to permit interpolicy stacking in this circumstance, as we held in *Lunsford*, is what the statute requires and also is consistent with the FRA's purpose "because it allows injured North Carolina insureds to access the UIM coverage they paid for in a greater number of circumstances, reducing the likelihood that the costs of the damage caused by an underinsured tortfeasor will be borne by the insured alone." *Lunsford*, 378 N.C. at 191 (first quoting *Benton*, 195 N.C. App. at 92; and then quoting *Proctor v. North Carolina Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 225 (1989) ("[T]he statute's general purpose, which has not been changed, is best served when the statute is interpreted to provide the innocent victim with the fullest possible protection.").

Mr. Hebert owned the car that was involved in the collision, which his policy insures. He also was a named insured on his parents' policy. Both policies were purchased when *Benton* was the controlling precedent on this question. The statutes and our precedents provide that Mr. Hebert may combine the coverages under both his and his parents' policies to determine the amount of underinsured motorist coverage he is entitled to. The majority's ruling to the contrary is a perversion of the intent of the General Assembly and contrary to basic principles of the rule of law. Therefore, I dissent.

Justice RIGGS joins in this dissenting opinion.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.
v.
LANIER LAW GROUP, P.A., AND LISA LANIER

No. 235PA21

Filed 22 March 2024

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 277 N.C. App. 605 (2021), affirming an order granting summary judgment on 28 June 2019 by Judge Susan E. Bray in Superior Court, Guilford County. Heard in the Supreme Court on 21 February 2024.

Goldberg Segalla LLP, by David L. Brown and Martha P. Brown, for plaintiff-appellee.

Pinto Coates Kyre & Bowers, PLLC, by Richard L. Pinto and Matthew J. Millisor, for defendant-appellants.

PER CURIAM.

Justice DIETZ did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g.*, *Batson v. Coastal Res. Comm'n*, 385 N.C. 328, 892 S.E.2d 589 (2023) (per curiam) (affirming by an equally divided vote a Court of Appeals decision leaving it as law of the case without further precedential value); *Templeton Props. LP v. Town of Boone*, 368 N.C. 82, 772 S.E.2d 239 (2015) (same); *Reese v. Barbee*, 350 N.C. 60, 510 S.E.2d 374 (1999) (same).

AFFIRMED.

JOHN SLATTERY
v.
APPY CITY, LLC; TIMOTHY S. FIELDS; MELISSA CRETE;
AND DAISY MAE FOWLER

No. 218A22

Filed 22 March 2024

Jurisdiction—personal—service of process—waiver—post-judgment motion to exempt property—general appearance

In a complex business case, in which defendant did not appear until after the trial court had already entered its judgment, at which point she filed a motion to claim exempt property pursuant to N.C.G.S. § 1C-1603, the Business Court properly denied defendant's subsequent motion to set aside both the entries of default against her and the order of summary judgment for plaintiff—pursuant to Civil Procedure Rule 60(b)—where defendant argued that the Business Court lacked personal jurisdiction over her because she had not been served with process. By moving to claim exempt property after judgment without also raising her objections to personal jurisdiction and the sufficiency of service of process, defendant made a general appearance in the action and therefore waived those objections.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion on a post -trial motion entered on 16 February 2022 by Judge Michael L. Robinson, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 19 September 2023.

Hamilton Stephens Steele Martin, PLLC, by M. Aaron Lay, for plaintiff-appellee/cross-appellant, John Slattery.

Wilson Ratledge, PLLC, by Reginald B. Gillespie, Jr., for defendant-appellant/cross-appellee, Daisy Mae Barber.

NEWBY, Chief Justice.

In this case we consider whether a person who files a motion to claim exempt property after a judgment is entered makes a general appearance in the action and thereby waives objections to the sufficiency of service of process and personal jurisdiction. When a defendant makes a general appearance in an action without contesting personal jurisdiction or the sufficiency of service of process, she waives those objections. We conclude that defendant made a general appearance in the action when she moved to claim exempt property. In so doing, she waived her objections to the sufficiency of service of process and lack of personal jurisdiction. Accordingly, the Business Court's order is affirmed.

On 11 September 2019, plaintiff commenced this action against Timothy Fields and Melissa Crete, and it was designated as a mandatory complex business case pursuant to N.C.G.S. § 7A-45.4(a). Plaintiff's complaint alleged that Fields and Crete induced him to invest $500,000 in a sham technology company called "Appy City." On 7 February 2020, plaintiff filed an amended complaint naming Daisy Mae Barber[1] and Pamela Bowman[2] as additional defendants, alleging they conspired with Fields and Crete to hide the invested funds by converting them into cryptocurrency.

On 10 February 2020, the Business Court issued a civil summons for defendant. Plaintiff's counsel submitted an affidavit stating he deposited the summons and amended complaint (i.e., the process) with Federal Express (FedEx) on 17 February 2020 to be delivered to defendant at "618 Mills Road" in Aberdeen, North Carolina.[3] Plaintiff provided a proof-of-delivery form from FedEx showing that the process was delivered on 19 February 2020 to a FedEx location at a Walgreens Pharmacy located at 1706 North Sandhills Boulevard in Aberdeen, North Carolina, which was near defendant's home. The proof of delivery showed the process was signed for by a "D. Barber" and that the signatory signed for the package using the initials "D.B." Defendant, however, did not file an answer or otherwise respond to the complaint.

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1. Although this case's caption refers to defendant as "Daisy Mae Fowler," she is referred to by several surnames throughout the record, including "Fowler," "Barber," "Johnson," "Linn," and "Fields." Throughout the opinion, we simply refer to her as "defendant."

2. Plaintiff voluntarily dismissed without prejudice his claims against Bowman on 20 November 2020.

3. According to an affidavit provided by defendant, her address during February of 2020 was "618 Rays Mill Road."

Based on the evidence presented by plaintiff, the Business Court concluded that plaintiff sufficiently served process on defendant. Because defendant neither answered nor otherwise responded, the Business Court entered default against her pursuant to Rule 55(a) of the North Carolina Rules of Civil Procedure on 28 July 2020.[4]

On 24 September 2020, plaintiff moved for summary judgment on all claims, including those levied against defendant. Defendants did not respond to plaintiff's motion for summary judgment, nor did they appear, personally or through counsel, at the summary judgment hearing on 17 November 2020. On 24 March 2021, the Business Court awarded plaintiff summary judgment against all defendants on all but three claims.

On 4 June 2021, to enforce the judgment, plaintiff served a notice of right to claim exemptions on defendant at a new address.[5] On 23 June 2021, defendant appeared for the first time and moved to claim exempt property pursuant to N.C.G.S. § 1C-1603. Her motion did not contest personal jurisdiction or the sufficiency of service of process.

More than three months later, on 4 October 2021, defendant moved the Business Court to set aside the entries of default and summary judgment pursuant to Rules 55 and 60 of the North Carolina Rules of Civil Procedure. She argued the Business Court's judgment was void for lack of personal jurisdiction because she had not been served with process nor appeared in the action before the entry of summary judgment. She also argued that good cause existed to set aside the judgment and that she had a meritorious defense.

On 9 February 2022, the Business Court held a hearing on defendant's motion to set aside the entries of default and summary judgment. After consideration of all the parties' filings, the Business Court entered an order denying defendant's motion on 16 February 2022. The Business Court first found "that [plaintiff] . . . failed to adequately demonstrate that [d]efendant . . . was served with the [s]ummons and [a]mended [c]omplaint in this action." Relying on the Court of Appeals' decision in *Faucette v. Dickerson*, 103 N.C. App. 620, 406 S.E.2d 602 (1991), and its progeny, however, the Business Court determined that defendant made a general appearance in the action when she moved to claim exempt property. It therefore concluded that defendant waived her objections

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4. Similarly, none of the other defendants responded, and default was entered against them as well.

5. According to defendant's affidavit, by the early spring of 2021, defendant's residence was 260 Stephanie Street in Southern Pines, North Carolina.

to personal jurisdiction and the sufficiency of service of process. To the extent that defendant relied on the insufficiency of service of process for her Rule 60(b)(4) and Rule 60(b)(6) arguments, the Business Court denied defendant's motion. The Business Court then, in its discretion, declined to "reach the substance" of any of defendant's remaining Rule 60(b) arguments. Defendant appealed directly to this Court. N.C.G.S. § 7A-27(a)(2) (2021). Plaintiff filed a notice of cross-appeal.

The question before us is whether making a general appearance after the entry of a judgment is a general appearance in the underlying action that waives objections to personal jurisdiction and the sufficiency of service of process. This question presents a matter of law, which we review de novo. *Da Silva v. WakeMed*, 375 N.C. 1, 5, 846 S.E.2d 634, 638 (2020). Regarding the Business Court's denial of defendant's Rule 60(b) motions, we review for abuse of discretion.[6] *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006). An error of law constitutes an abuse of discretion. *Da Silva*, 375 N.C. at 5 n.2, 846 S.E.2d at 638 n.2.

Rule 60(b)(4) of the North Carolina Rules of Civil Procedure permits a court to set aside a judgment upon a party's motion if the judgment is void. N.C.G.S. § 1A-1, Rule 60(b)(4) (2021) ("On motion and upon such terms as are just, the court *may* relieve a party . . . from a final judgment . . . [if] [t]he judgment is void . . . .") (emphasis added)). To render a valid judgment, a court must have jurisdiction over the subject matter of the case (subject matter jurisdiction) and jurisdiction over the parties to the case (personal jurisdiction).[7] N.C.G.S. § 1-75.3(b) (2021).

Subject matter jurisdiction is the "power to pass on the merits of [a] case." *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983). Without it, a court's actions are absolutely void. *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (characterizing subject matter jurisdiction as "the indispensable foundation upon which valid judicial decisions rest"). Subject matter jurisdiction is conferred upon courts by law and operates as a structural limitation on the power of courts. *See* N.C. Const. art. IV, §§ 1, 12. We have consequently held that "[t]he existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent." *In re K.J.L.*, 363 N.C. 343, 345–46, 677 S.E.2d 835, 837 (2009) (internal quotation marks omitted) (quoting *In re T.R.P.*,

6. Although defendant's briefs mention Rule 55(d) in passing, her arguments focus exclusively on Rule 60(b). As such, we conduct our analysis under that rule.

7. Defendant does not contend the Business Court lacked subject matter jurisdiction. Instead, her appeal turns on the sufficiency of service of process, which implicates personal jurisdiction. *See In re K.J.L.*, 363 N.C. 343, 346–47, 677 S.E.2d 835, 837–38 (2009).

360 N.C. at 595, 636 S.E.2d at 793). For this reason, "a court's lack of subject matter jurisdiction is not waivable and can be raised at *any* time." *Id.* at 346, 677 S.E.2d at 837 (emphasis added). And "[*w*]*henever* it appears . . . that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." N.C.G.S. § 1A-1, Rule 12(h)(3) (2021) (emphases added)).

Conversely, personal jurisdiction is "a court's authority to require an individual to appear in the forum and defend an action brought against the individual in that forum." *In re F.S.T.Y.*, 374 N.C. 532, 534, 843 S.E.2d 160, 162 (2020). Generally, a court asserts personal jurisdiction over a defendant through "service of process"—that is, the defendant being served with the summons and complaint. *In re K.J.L.*, 363 N.C. at 346–47, 677 S.E.2d at 837–38; *see also* N.C.G.S. § 1-75.6 (2021) ("A court of this State . . . may exercise personal jurisdiction over a defendant by service of process in accordance with . . . the Rules of Civil Procedure."). A court may also exercise personal jurisdiction through a defendant's general (or "voluntary") appearance or consent. *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996). Our General Statutes specifically permit a court to assert personal jurisdiction over a defendant "[w]ho makes a general appearance in an action" even "without serving a summons upon [her]." N.C.G.S. § 1-75.7(1) (2021).

A defendant makes a general appearance when she appears before a court and submits to its adjudicatory power without objecting to its jurisdiction over her. *See Lynch v. Lynch*, 302 N.C. 189, 197, 274 S.E.2d 212, 219 (1981). Stated differently, a general appearance is an appearance whereby the defendant "invokes the judgment of the court in any manner on any question other than that of [personal] jurisdiction," *id.* (quoting *In re Blalock*, 233 N.C. 493, 504, 64 S.E.2d 848, 856 (1951)), and "requests [the court's] affirmative intervention [o]n [her] behalf," *Simms v. Mason's Stores, Inc. (NC-1)*, 285 N.C. 145, 157, 203 S.E.2d 769, 777 (1974), *superseded on other grounds by statute*, An Act to Amend G.S. 1-75.7 and G.S. 1A-1, Rule 12, to Provide That Obtaining an Extension of Time Within Which to Answer or Otherwise Plead Shall Not Be Considered a General Appearance and Shall Not Constitute a Waiver of Any Defense Set Forth in Rule 12(b), ch. 76, 1975 N.C. Sess. Laws 48, 48–49 (codified as amended at N.C.G.S. § 1A-1, Rule 12(b)); *see also Faucette*, 103 N.C. App. at 623–24, 406 S.E.2d at 605 ("The concept of a general appearance should be given a liberal interpretation. Virtually any action other than a motion to dismiss for lack of jurisdiction constitutes a general appearance in a court having subject matter jurisdiction." (internal punctuation and alterations omitted) (citations omitted)).

Unlike subject matter jurisdiction, personal jurisdiction is a personal protection for a defendant. *In re K.J.L.*, 363 N.C. at 346–47, 677 S.E.2d at 837–38. Therefore, "[d]eficiencies regarding the manner in which a court obtains jurisdiction over a party, including those relating to a summons, are waivable and must be raised in a timely manner." *Id.* at 346, 677 S.E.2d at 837. Specifically, Rule 12 explains that "[a] defense of lack of jurisdiction over the person . . . or insufficiency of service of process is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof . . . ." N.C.G.S. § 1A-1, Rule 12(h)(1). In summary, to timely assert a claim of insufficient service of process or lack of personal jurisdiction under the North Carolina Rules of Civil Procedure, a defendant must assert those defenses at her first filing with the court, or she waives them. *See Simms*, 285 N.C. at 153, 203 S.E.2d at 775 (construing Rules 12(b)(2)–(5), (g), and (h)(1) together); *Lynch*, 302 N.C. at 197–98, 274 S.E.2d at 219.

Thus, if a defendant makes a general appearance without objecting to personal jurisdiction or the sufficiency of service of process, those defenses are waived, and the court may properly exercise personal jurisdiction. *Simms*, 285 N.C. at 157, 203 S.E.2d at 777 (harmonizing Rule 12 and N.C.G.S. § 1-75.7); *Lynch*, 302 N.C. at 197, 274 S.E.2d at 219 ("[A]ny act which constitutes a general appearance obviates the necessity of service of summons and waives the right to challenge the court's exercise of personal jurisdiction over the party making the general appearance."); *see also In re A.L.I.*, 380 N.C. 697, 701, 869 S.E.2d 704, 707 (2022) ("[P]articipat[ion] in . . . proceedings without raising an objection to the trial court exercising personal jurisdiction . . . waives any argument of insufficient service of process.").

In this way, lack of personal jurisdiction renders a court's actions voidable rather than void, and it is incumbent upon the defendant to preserve her objections by raising them at the first available opportunity. *See Voidable*, *Black's Law Dictionary* (11th ed. 2019) (defining "voidable" as "[v]alid until annulled" and "capable of being affirmed or rejected at the option of one of the parties"). Thus, if a defendant moves to invalidate the court's judgment for lack of personal jurisdiction at her first appearance in the action, the issue is preserved for review. And if the defendant's challenge prevails, the trial court may, in its discretion, set aside the void judgment. N.C.G.S. § 1A-1, Rule 60(b)(4).

In this case, however, we are confronted with a defendant whose first appearance was a motion to claim exempt property wherein she did not object to personal jurisdiction or the sufficiency of service of process. We must determine whether that appearance waived her

objections to personal jurisdiction and the sufficiency of service of process although it occurred *after* entry of the judgment. For our review, we assume, without deciding, that the Business Court correctly determined that plaintiff did not sufficiently serve process on defendant. Accordingly, we assume that, at the time it entered the judgment, the Business Court lacked personal jurisdiction over defendant and that, therefore, the defense was available to her.

The precise question we must answer is, by filing a motion to claim exempt property, did defendant make a general appearance in the underlying action? In other words, if defendant made a general appearance during the proceeding to enforce the judgment, is the general appearance "in [the] action"? N.C.G.S. § 1-75.7(1). Plaintiff argues that defendant made a general appearance in the action when she became aware of the judgment and appeared for the first time by moving to claim exempt property pursuant to N.C.G.S. § 1C-1603. We agree. By asking the Business Court to designate certain property as exempt from the judgment, defendant "invoke[d] the jurisdiction of the court and request[ed] its affirmative intervention [on her] behalf," submitting herself to the Business Court's adjudicatory power. *Simms*, 285 N.C. at 157, 203 S.E.2d at 777. She did not simultaneously object, however, to the Business Court's personal jurisdiction. She therefore made a general appearance. *See Lynch*, 302 N.C. at 197, 274 S.E.2d at 219; *see also Faucette*, 103 N.C. App. at 624, 406 S.E.2d at 605 (concluding a motion to claim exempt property was a general appearance). Moreover, defendant's general appearance was "in the action" because the judgment collection process is simply a continuation of the underlying action. *See* N.C.G.S. §§ 1-302 to -324.7, -352 (2021) (governing execution of judgments). Therefore, defendant made a general appearance in the action.

Our decision that defendant made a general appearance in the underlying action is informed by the Court of Appeals' thirty-three-year-old decision in *Faucette v. Dickerson*, which presented facts similar to the current case.[8] There the Court of Appeals held a general appearance made after the entry of a judgment waives objections to personal jurisdiction and the sufficiency of service of process such that the judgment may be enforced. *Faucette*, 103 N.C. App. at 624, 406 S.E.2d at 605. We agree.

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8. Notably, the Court of Appeals panel in *Faucette* included two future associate justices of this Court: Robert Orr and James Wynn. *Faucette*, 103 N.C. App. at 622, 624, 406 S.E.2d at 604–05.

In *Faucette*, the trial court entered default judgment against the defendant and issued her a notice of right to claim exemptions. 103 N.C. App. at 621, 406 S.E.2d at 603. The defendant submitted a motion to claim exempt property. *Id.* Sometime thereafter, she filed a motion to set aside the default judgment for insufficient service of process, which the trial court dismissed. *Id.* at 621, 623, 406 S.E.2d at 603–04. The Court of Appeals unanimously affirmed, reasoning that when "the defendant by motion or otherwise invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction, [s]he has made a general appearance and has submitted [her]self to the jurisdiction of the court whether [s]he intended to or not." *Id.* at 624, 406 S.E.2d at 605 (quoting *Swenson v. Thibaut*, 39 N.C. App. 77, 89, 250 S.E.2d 279, 288 (1978)). Relying on N.C.G.S. § 1-75.7, the Court of Appeals held that the defendant's motion to claim exempt property was a general appearance that waived her objections to personal jurisdiction and the sufficiency of service of process. *Id.* at 623–24, 406 S.E.2d at 605 (stating the defendant's "motion to claim exempt property . . . was inconsistent with her later motion for relief from judgment on the grounds of the invalidity of service of process").[9]

We adopt *Faucette*'s reasoning and hold that when a defendant makes a general appearance in an action after the entry of a judgment, she waives any objections to the lack of personal jurisdiction or the sufficiency of service of process if she does not raise those objections at that time. Under such circumstances, the judgment may be enforced notwithstanding subsequent attempts to invalidate the judgment for lack of personal jurisdiction.[10] When a defendant's first appearance is

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9. The *Faucette* decision has been relied upon by subsequent Court of Appeals opinions. *See MedStaff Carolinas, LLC v. Northwood Nursing Ctr., Inc.*, No. 04-1281, slip op. at 7 (N.C. Ct. App. Aug. 16, 2008) (unpublished) (observing that the defendant "appropriate[ly]" abandoned his personal jurisdiction defense when he had moved to claim exempt property before moving to vacate the judgment because *Faucette* had "conclusively answered the issue [of whether the trial court had personal jurisdiction] against [him]"); *State v. Williams*, No. 13-47, slip op. at 7–8 (N.C. Ct. App. Oct. 15, 2013) (unpublished) ("[A]lthough the filing of a proper complaint is required to vest the trial court with subject matter jurisdiction under the Rules of Civil Procedure, the defenses of insufficiency of process and insufficiency of service of process may be waived, and, therefore, do not impact subject matter jurisdiction." (first citing *Estate of Livesay v. Livesay*, 219 N.C. App. 183, 185–86, 723 S.E.2d 772, 774 (2019); then citing *City of Charlotte v. Noles*, 143 N.C. App. 181, 183, 544 S.E.2d 585, 586 (2001); and then citing *Faucette*, 103 N.C. App. at 623, 406 S.E.2d at 605)).

10. We pause to observe that, although the dissent cites several decisions of this Court and the Supreme Court of the United States to arrive at its conclusion that a post-judgment general appearance does not validate a judgment rendered when the court was without personal jurisdiction, *none* of the cases cited by the dissent confronted the

to move to claim exempt property, it is fair and not unduly burdensome to require a defendant to raise any objections to the judgment that she may have at that time.

Here, as we have said, defendant made a general appearance in the action when she moved to claim exempt property. She did not, however, object to personal jurisdiction or the sufficiency of service of process until over three months later. Because defendant did not raise her objections when she moved to claim exempt property, she waived them, and the Business Court's judgment may be enforced.

Defendant relies on a contrary line of Court of Appeals cases, specifically *Dowd v. Johnson*, 235 N.C. App. 6, 12, 760 S.E.2d 79, 84 (2014). She maintains that a general appearance made after the entry of a judgment by a court that lacked personal jurisdiction cannot retroactively

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procedural posture presented in this case. Rather, in the cases cited by the dissent, this Court (or the Supreme Court of the United States) faced either special appearances before the judgment, *Vick v. Flournoy*, 147 N.C. 209, 212, 60 S.E. 978, 979 (1908); collateral attacks on the validity of a judgment, *see Pennoyer v. Neff*, 95 U.S. 714, 719–20 (1877), *overruled on other grounds by Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569 (1977); *Card v. Finch*, 142 N.C. 140, 140–43, 54 S.E. 1009, 1009–10 (1906); *Stafford v. Gallops*, 123 N.C. 19, 20–21, 31 S.E. 265, 266 (1898); *Doyle v. Brown*, 72 N.C. 393, 393 (1875); *Burke v. Elliott*, 26 N.C. (4 Ired.) 355, 355–58 (1844); or cases where the defendant's *very first action* was to attack the validity of the judgment, *see Harris v. Hardeman*, 55 U.S. (14 How.) 334, 335–36 (1852); *Guthrie v. Ray*, 293 N.C. 67, 68, 235 S.E.2d 146, 147 (1977); *N. State Fin. Co. v. Leonard*, 263 N.C. 167, 168, 139 S.E.2d 356, 357 (1964); *Harrington v. Rice*, 245 N.C. 640, 641, 97 S.E.2d 239, 240 (1957); *Bd. of Comm'rs v. Bumpass*, 233 N.C. 190, 192, 63 S.E.2d 144, 145–46 (1951); *City of Monroe v. Niven*, 221 N.C. 362, 363, 20 S.E.2d 311, 311–12 (1942); *Guerin v. Guerin*, 208 N.C. 457, 458–59, 181 S.E. 274, 275 (1935); *Harrell v. Welstead*, 206 N.C. 817, 818, 175 S.E 283, 283 (1934); *Simmons v. Defiance Box Co.*, 148 N.C. 344, 344–45, 62 S.E. 435, 435 (1908); *Harrison v. Harrison*, 106 N.C. 282, 283, 11 S.E. 356, 357 (1890); *Stancill v. Gay*, 92 N.C. 455, 455–57, 463 (1885); *Armstrong v. Harshaw*, 12 N.C. (1 Dev.) 187, 187–88 (1827); *Macher v. Macher*, 188 N.C. App. 537, 539, 656 S.E.2d 282, 283 (2008), *aff'd*, 362 N.C. 505, 666 S.E.2d 750 (2008) (per curiam); *cf. In re K.J.L.*, 363 N.C. at 344–45, 677 S.E.2d at 836–37 (challenging subject matter jurisdiction in appeal from judgment). In the circumstances presented in these prior cases, a judgment obtained without service of process may be rightfully declared void, and as a result, the affected party can assert that the judgment has no force and effect. This case, by contrast, did not involve a collateral attack, and defendant's first action was not to attack the validity of the judgment. Rather, defendant first appeared in the same proceeding to claim exempt property, availing herself of our state's laws to resist enforcement of the judgment. As such, the defect to the judgment was waived.

Moreover, we note that nearly all of the cases cited by the dissent on this point predated the adoption of our modern North Carolina Rules of Civil Procedure, *see* An Act to Amend the Laws Relating to Civil Procedure, ch. 954, 1967 N.C. Sess. Laws 1274–1354 (codified at N.C.G.S. §§ 1-75.1 to -75.12; 1A-1, Rules 1–44, 45–65, 68–68.1, 70, 84), which we have explained recognizes the nuances of void versus voidable judgments.

render the judgment enforceable. Her argument is unavailing for several reasons.

At the outset, her reliance on *Dowd* is misplaced. In *Dowd*, the Court of Appeals stated that to waive objections to personal jurisdiction and the sufficiency of service of process, a general appearance must occur before the entry of a judgment. *Id*. For this proposition, the court in *Dowd* relied on an earlier decision of the Court of Appeals: *Barnes v. Wells*, 165 N.C. App. 575, 579–80, 599 S.E.2d 585, 589–90 (2004) (finding that the general-appearance cases cited by the petitioner were "inapplicable because [the] respondent never made a general appearance before entry of the final order"). Although decided after *Faucette*, both *Barnes* and *Dowd* failed to account for *Faucette*'s explicit holding that a general appearance after entry of a judgment waives objections to personal jurisdiction and the sufficiency of service of process. Therefore, the *Barnes-Dowd* line of cases misapplied the Court of Appeals' own precedent in contravention of *In re Appeal from Civil Penalty Assessed for Violations of the Sedimentary Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Insofar as *Barnes* and *Dowd* suggest that a general appearance must be made before the entry of the judgment to waive objections to personal jurisdiction and the sufficiency of service of process, they are hereby expressly overruled.

Additionally, our decision more appropriately adheres to the modern distinction between subject matter jurisdiction and personal jurisdiction. As we have explained, when a court lacks subject matter jurisdiction, its actions are void, and objections thereto cannot be waived. When the court lacks personal jurisdiction, however, its actions are merely voidable. The defendant must therefore attack the action's validity at the first available opportunity; otherwise, the objection is waived. *Compare In re K.J.L.*, 363 N.C. at 345–46, 677 S.E.2d at 837 ("The existence of subject matter jurisdiction is a matter of law[,] and . . . . a court's lack of subject matter jurisdiction is not waivable and can be raised at *any* time." (emphasis added) (citations omitted)), *with id.* at 346–47, 677 S.E.2d at 837–38 ("Deficiencies regarding the manner in which a court obtains jurisdiction over a party, including those relating to a summons, are waivable and must be raised in a timely manner. *Generally, such deficiencies can be cured.*" (emphasis added) (citation omitted)). Therefore, the power to contest the personal jurisdiction of the court and the sufficiency of service of process lies with the defendant, and

the defendant fails to exercise that power at her own peril. It would be incongruous for us to allow a defendant to waive those objections before the judgment but not afterward.[11] Therefore, whether pre- or post-judgment, a defendant must assert defenses concerning personal jurisdiction or the sufficiency of service of process at the first available opportunity, or they are waived.[12]

Moreover, our holding aligns with the practical considerations of post-judgment procedure. If we were to adopt a contrary rule, a defendant could appear before a court without contesting personal jurisdiction or the sufficiency of service of process and go through months—or even years—of post-judgment proceedings. All the while, the defendant would hold a trump card in her back pocket: if she received an unfavorable ruling, she could undo years of litigation by moving to vacate the judgment as void. A final judgment cannot rest upon such a flimsy foundation.

Because defendant moved to claim exempt property after judgment without raising her objection to the sufficiency of service of process, she made a general appearance in the action and waived her objections to the sufficiency of service of process and personal jurisdiction. We also

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11. *Cf. Swaim v. Moltan Co.*, 73 F.3d 711, 718 (7th Cir. 1996) ("A defense of lack of jurisdiction is forfeited if not asserted in a timely motion to dismiss under Rule 12 or a responsive pleading or amendment of such . . . [, and a] motion to vacate under Rule 60(b) for lack of jurisdiction is essentially equivalent to a Rule 12(b)(2) motion to dismiss for lack of jurisdiction.").

12. Consistent with our analysis, several Federal Circuit Courts of Appeals interpreting Rule 60(b) of the Federal Rules of Civil Procedure have held that a defendant waives objections to the validity of the judgment based on personal jurisdiction or the sufficiency of service of process if she fails to raise them at her first available opportunity after the judgment. *See*, *e.g.*, *Swaim*, 73 F.3d at 716–18; *In re Worldwide Web Sys., Inc.*, 328 F.2d 1291, 1298–1302 (11th Cir. 2003); *cf. State St. Bank & Tr. Co. v. Inversiones Errazuiz Limitada*, 374 F.3d 158, 178–79 (2d Cir. 2004); *Feldman Inv. Co. v. Conn. Gen. Life Ins. Co.*, 78 F.2d 838, 841 (10th Cir. 1935). As we have previously observed, "[t]he North Carolina Rules [of Civil Procedure] are modeled after the [F]ederal [R]ules [of Civil Procedure]," and "[i]n most instances, they are verbatim copies with the same enumerations." *Sutton v. Duke*, 277 N.C. 94, 99, 176 S.E.2d 161, 164 (1970). Indeed, except for a few minor differences in phraseology, Rule 60(b) of the North Carolina Rules of Civil Procedure is identical to Rule 60(b) of the Federal Rules of Civil Procedure. *Compare* N.C.G.S. § 1A-1, Rule 60(b), *with* Fed. R. Civ. P. 60(b). Accordingly, although we emphasize that federal cases construing the Federal Rules of Civil Procedure are not binding on this Court, *see Hart v. State*, 368 N.C. 122, 130, 774 S.E.2d 281, 287 (2015) ("As the court of last resort in this state, we answer with finality 'issues concerning the proper construction and application of North Carolina laws . . . .' " (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989)), we consider the aforementioned cases as "pertinent for guidance and enlightenment as we develop the philosophy of" our Rules of Civil Procedure, *Johnson v. Johnson*, 14 N.C. App. 40, 42, 187 S.E.2d 420, 421 (1972).

hold that with respect to the Business Court's decision to deny defendant's Rule 60(b)(6) motion, it did not abuse its discretion. *See State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (stating that a trial court abuses its discretion if its decision is manifestly unsupported by reason and could not have been the result of a reasoned decision). The decision of the Business Court is affirmed.

AFFIRMED.

Justice RIGGS dissenting.

Two centuries ago, this Court recognized "a principle never to be lost sight of, that no person should be deprived of his property or rights without notice and an opportunity of defending them. This right is guaranteed by the [state] Constitution. . . . A judgment entered up otherwise would be a mere nullity." *Hamilton v. Adams*, 6 N.C. (1 Mur.) 161, 162 (1812). The same is true under our federal constitution. *See, e.g.*, *Pennoyer v. Neff*, 95 U.S. 714 (1877) (holding that a judgment rendered against a person by a court without personal jurisdiction is void as violating federal due process). In vindication of this right, we have previously held that "[a] default judgment rendered against a defendant in an action where he has never been served with process returnable to the proper county, nor appeared in person or by attorney, *is not simply voidable, but void.*" *Harrell v. Welstead*, 206 N.C. 817, 819 (1934) (emphasis added). This is irrespective of any post-judgment appearance, as "[e]very court, *before it can enter a lawful judgment*, must have jurisdiction, (1) of the subject-matter, *and (2) of the person*." *Stafford v. Gallops*, 123 N.C. 19, 22 (1898) (emphases added); *see also Harrell*, 206 N.C. at 820 ("The one fatal circumstance [to the validity of the judgment], which is not to be overlooked, is that no appearance of any kind was made by the corporate defendant *before judgment* cutting off its right to be heard on the merits."). Because the majority's holding is contrary to these precedents and erodes the due process rights enshrined in our state and federal constitutions, I respectfully dissent.

I. Personal Jurisdiction as Fundamental Constitutional Protection

My objection to the majority's holding in this case stems in no small part from a solemn respect for and desire to fully vindicate the rights enshrined in our state and federal constitutions. A discussion of personal jurisdiction's constitutional character, missing from the majority, is warranted.

The requirement of personal jurisdiction is not merely a procedural safeguard—just as with subject-matter jurisdiction, the necessity of personal jurisdiction is "a basic, fundamental principle" of constitutional provenance. *Bryson v. McCoy*, 194 N.C. 91, 93 (1927). Early decisions of this Court recognize that "[t]he Constitution and laws of the country guarantee the principle that no freeman shall be divested of a right by the judgment of a court, unless he shall have been made party to the proceedings in which it shall have been obtained." *Armstrong v. Harshaw*, 12 N.C. (1 Dev.) 187, 188 (1827). The United States Supreme Court has likewise remarked that:

> it would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was party or privy; that no person can be in default with respect to that which it never was incumbent upon him to fulfil.

Harris v. Hardeman, 55 U.S. 334, 339 (1852).

Thus, entry of a judgment without personal jurisdiction over an affected party contravenes "the Bill of Rights, as well as . . . every conceivable principle of natural justice." *Harrison v. Harrison*, 106 N.C. 282, 283 (1890). Both subject-matter and personal jurisdiction have long been understood to be essential to the validity of a judgment. *Stafford*, 123 N.C. at 22. And our state and federal constitutions thus demand that a trial court have both subject-matter jurisdiction over the action *and* personal jurisdiction over the parties *before* judgment is entered. *Id.*; *Harrell*, 206 N.C. at 820; *see also Burke v. Elliott*, 26 N.C. (1 Ired.) 355, 358 (1844) ("[T]he court is forbidden to enter judgment until notice is served."); *Vick v. Flournoy*, 147 N.C. 209, 215 (1908) ("There is no doubt of the correctness of the position . . . that a valid judgment strictly *in personam cannot be had* unless there *has been* a voluntary appearance by defendant or there *has been* service of process upon him within the jurisdiction of the court . . . ." (emphases added)). In short, as a predicate constitutional concern, "[j]urisdiction of the party, obtained by the court in some way allowed by law, is essential to *enable* the court to give a valid judgment against him." *Stancill v. Gay*, 92 N.C. 462, 463 (1885) (emphasis added). No statute can diminish this constitutional guaranty. *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787).

The majority uniformly holds that entry of a judgment without personal jurisdiction renders the judgment voidable, not void. This is plainly contrary to the longstanding constitutional principles outlined

above and the overwhelming weight of authority enforcing them. *See Harris*, 55 U.S. at 339 ("[A] judgment depending upon proceedings *in personam* can have no force as to one on whom there has been no service of process . . . . That with respect to such a person, such a judgment is absolutely void . . . ."); *Doyle v. Brown*, 72 N.C. 393, 395 (1875) ("Where a defendant has never been served with process, nor appeared in person, or by attorney, a judgment against him is not simply voidable, but void . . . ."); *Card v. Finch*, 142 N.C. 140, 144 (1906) ("It is axiomatic, at least in American jurisprudence, that a judgment rendered by a court against a citizen affecting his vested rights in an action or proceeding to which he is not a party is absolutely void and may be treated as a nullity whenever it is brought to the attention of the Court.").

Nor can I agree that, in all cases, the judgment debtor must assert a personal jurisdiction argument at the earliest opportunity. *See Doyle*, 72 N.C. at 395 ("Where a defendant has never been served with process, nor appeared in person, or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated *whenever* and wherever offered . . . ." (emphasis added)); *Harrison*, 106 N.C. at 285 ("Something more than bare notice is necessary to estop one from setting aside a void proceeding. Neither can a delay in making this motion preclude them.").

II. Voidable Procedural Irregularities vs. Void Judgments

To be sure, this Court has held that when the face of the record suggests that service is valid but no such service actually occurred, the judgment may be enforced until challenged and vacated in the underlying action. *Doyle*, 72 N.C. at 395. And the majority is certainly correct to note that *some* defects in service are curable. *See In re K.J.L.*, 363 N.C. 343, 346 (2009) ("Deficiencies regarding the manner in which a court obtains jurisdiction over a party, including those relating to a summons, are waivable and must be raised in a timely manner. *Generally*, such deficiencies can be cured." (emphasis added) (citation omitted)). But, contrary to the holding of the majority in this case, we have previously distinguished void and voidable judgments in the context of service of process by explaining that "[d]efective service has given rise to many irregularities in the course of the courts, but it will be found that they do not render the final judgment void, but only irregular, *unless the defect is such as to amount to no service*." *Stafford*, 123 N.C. at 22–23 (emphasis added); *see also Guerin v. Guerin*, 208 N.C. 457, 458 (1935) ("Since the defendant, the movant, has never been given notice of any action pending against her in Alamance County, she has never been served with process, and for that reason the judgment entered against her was void and her motion to set the same aside was properly allowed."). *Defects*

in process or service of process may render a judgment voidable, but a *lack* of service of process renders it void. *Stafford*, 123 N.C. at 22–23.

Here, the trial court determined that no service was ever accomplished in this case *prior* to judgment—a ruling the majority sees fit to assume without disturbing, and with which I agree. The lack of personal jurisdiction pre-judgment is fatal to the judgment's validity, as "[n]otice and an opportunity to be heard are *prerequisites* of jurisdiction, and jurisdiction is a *prerequisite* of a valid judgment." *Bd. of Comm'rs of Roxboro v. Bumpass*, 233 N.C. 190, 195 (1951) (citations omitted) (emphases added). In such circumstances, a judgment is void and not merely voidable. *See*, *e.g.*, *Simmons v. Defiance Box Co.*, 148 N.C. 344, 345 (1908) (noting a judgment procured through fraud on a party is voidable, but a facially regular judgment entered when "in fact there was no service of summons nor appearance by the defendant . . . is void").

The proposition that a lack of service in fact and related absence of personal jurisdiction renders a judgment void has been reaffirmed many times by our Court. For example, in *City of Monroe v. Niven*, the plaintiff obtained a judgment and, while a summons was returned showing service on all defendants, only one defendant had been served. 221 N.C. 362, 363 (1942). The lower court held that this lack of service rendered the judgment voidable rather than void and denied the unserved defendants' motion to vacate. *Id.* at 364. We reversed, holding that the judgment was "void in fact" for lack of personal jurisdiction and that the defendant's post-judgment appearance did not serve to validate the void judgment, as "[a] nullity is a nullity, and out of nothing nothing comes. *Ex nihilo nihil fit* is one maxim that admits of no exception." *Id.* at 364–65 (quoting *Harrell*, 206 N.C. at 819).

This position is further reinforced in cases dealing directly with judgments entered following default. *See Simmons*, 148 N.C. at 345–46 ("Where the summons was not served on defendant and he did not enter an appearance nor have any knowledge of the action until *after* default judgment, the judgment is void . . . ." (quoting *Doyle*, 72 N.C. at 393 (emphasis added)). Decades after *Doyle*, we explicitly held in *Harrell* that such judgments entered without service are "not simply voidable, but void, and will be set aside on motion." 206 N.C. at 819. Subsequently, in *North State Finance Co. v. Leonard*, we held a default judgment—entered against a defendant the trial court later found was never served—was likewise entirely void as a nullity. 263 N.C. 167, 170–71 (1964). Even more plainly, we stated in *Harrington v. Rice* that "[i]f in fact the summons and complaint were not served on the . . . defendant

. . . , the default judgment . . . is void." 245 N.C. 640, 642 (1957). This legal maxim has survived the adoption of and remains in force under our Rules of Civil Procedure. *See*, *e.g.*, *Guthrie v. Ray*, 293 N.C. 67, 71 (1977) ("If, in fact, the summons and complaint were not served upon defendant as prescribed by G.S. 1A-1, Rule 4(j)(1)(a), the default judgment . . . and the judgment . . . assessing damages against him are void and must be set aside."). In short, I would adhere to precedents establishing that "[a] judgment against a defendant is void where the court *was* without personal jurisdiction." *Macher v. Macher*, 188 N.C. App. 537, 539 (emphasis added), *aff'd per curiam*, 362 N.C. 505 (2008).

III. General Appearance

Even if a judgment entered without personal jurisdiction is merely voidable, and thus waivable by a post-judgment general appearance, I would not hold that Ms. Barber's motion to claim exemptions was such an appearance, because the mere filing of her motion did not "invoke[ ] the *judgment* of the court in any manner on any question other than that of . . . jurisdiction." *Lynch v. Lynch*, 302 N.C. 189, 197 (1981) (emphasis added) (quoting *In re Blalock*, 233 N.C. 493, 504 (1951)).

The filing of a motion to claim exemptions does not, in and of itself, call upon the trial court to exercise its judgment or adjudicate a dispute in any meaningful sense; unless opposed by objection and motion from the judgment creditor, "the clerk *must* enter an order designating the property allowed by law and scheduled by the judgment debtor as exempt property." N.C.G.S. § 1C-1603(e)(6) (2021) (emphasis added). It is only when "the judgment creditor objects to the schedule filed or claimed by the judgment debtor [that] the clerk must place the motion for hearing by the district court judge, without a jury, at the next civil session." N.C.G.S. § 1C-1603(e)(7) (2021). The trial court therefore does not exercise any judgment unless and until it holds a hearing to resolve the judgment creditor's objections. Here, while Mr. Slattery did file an objection triggering such a hearing, Ms. Barber filed her motion to set aside the default and judgment prior to said hearing, and thus raised her personal jurisdiction objection prior to appearing in any adjudicatory proceeding.

IV. Remaining Arguments

In its remaining arguments, the majority reevaluates our state and federal constitutions' precondition of personal jurisdiction under a "modern" lens. I am not convinced by that approach. Many of our sister courts have not adopted the view espoused by the majority. *See*, *e.g.*, *McCulley v. Brooks & Co. General Contractors*, 816 S.E.2d 270, 273–74 n.4 (Va. 2018) (collecting cases holding a post-judgment appearance

cannot retroactively validate a judgment void for want of personal jurisdiction when entered). This Court's own "modern" jurisprudence confirms that judgments entered without personal jurisdiction are void and not merely voidable. *See Hazelwood v. Bailey*, 339 N.C. 578, 586 (1995) ("[W]e believe that this Court today would reach the same result[ ] as th[at] reached by this Court in *Harrell* in 1934 . . . .").

As for the practical considerations raised by the majority concerning finality and gamesmanship, other jurisdictions held decades ago that a judgment void for lack of personal jurisdiction cannot be saved by a post-judgment appearance, and those states do not appear to have suffered any of the ill-effects theorized by the majority. *Doyle v. Wilcockson*, 169 N.W. 241, 244 (Iowa 1918); *Gallagher v. Nat'l Nonpartisan League*, 205 N.W. 674, 675–76 (N.D. 1925); *Perry v. Edmonds*, 84 P.2d 711, 713 (Nev. 1938); *Irving Tr. Co. v. Seltzer*, 40 N.Y.S.2d 451, 456 (1943); *Jones v. Colescott*, 307 P.2d 464, 465 (Colo. 1957); *Bulik v. Arrow Realty, Inc. of Racine*, 434 N.W.2d 853, 855 (Wis. Ct. App. 1988). And regardless of the majority's holding today, civil judgments void for lack of personal jurisdiction generally remain subject to challenge years after entry under Rule 60(b). *See, e.g.*, *Freeman v. Freeman*, 155 N.C. App. 603, 608 (2002) (holding a divorce judgment was void and must be set aside under Rule 60(b) seventeen years after entry when the trial court's findings established the defendant had never been served despite her purported signature on an acceptance of service), *disc. rev. denied*, 357 N.C. 250 (2003).

The majority's invocation of a hypothetical bad actor is similarly unpersuasive. It is unclear what favorable ruling a judgment debtor might seek to receive while knowingly allowing a void civil judgment—in this case, in the enormous sum of $2,000,000—to hang over their affairs like a judicial Sword of Damocles.[1] The same risk of gamesmanship already exists where subject matter jurisdiction is concerned. Any attorney who purposefully counsels their client and knowingly assists in such a scheme would run the risk of violating our Rules of Professional Conduct in their obligations to the client, the court, and opposing parties. N.C. R. Pro. Conduct 3.1 ("Meritorious claims and contentions"), 3.3 ("Candor toward the tribunal"), 4.1 ("Truthfulness in statements to others"), and 8.4 ("Misconduct"). I do not believe the protections of our state and federal constitutions are subject to erosion because of remote hypotheticals involving imagined parties purposefully proceeding in bad faith.

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1. The negative impacts of an outstanding civil judgment extend beyond the legal realm. In addition to subjecting future real and personal property to ongoing claims in execution of the judgment, N.C.G.S. § 1-313, a civil judgment—viewable by anyone as a public record—may affect a person's ability to afford or obtain insurance, credit, or rental housing.

V. Conclusion

" 'Due process of law' requires that service of process shall always be made." *Bernhardt v. Brown*, 118 N.C. 700, 705 (1896). Here, the judgment was entered after default and without personal jurisdiction over the defendant, and thus was null and void on entry. *Stafford*, 123 N.C. at 22; *Guthrie*, 293 N.C. at 71; *Roxboro*, 233 N.C. at 195. Notwithstanding the constitutional command that no judgment is validly entered under such circumstances, the majority nonetheless holds that lack of personal jurisdiction renders a judgment merely voidable, and Ms. Barber retroactively supplied personal jurisdiction through a general appearance. At a minimum, our precedents and the facts of this case do not demand such a holding and, as detailed above, I believe they—along with our State and federal constitutions—compel the opposite result. As other courts have observed, "ruling otherwise . . . 'defies logic and common sense.' " *McCulley*, 816 S.E.2d at 274 (quoting *Abarca v. Henry L. Hanson, Inc.*, 738 P.2d 519, 520 (N.M. Ct. App. 1987)). Or, put more colorfully, "[j]ust as medicine may cure a sick man of a fatal disease but not revive him after his burial, a litigant can 'cure' the absence of personal jurisdiction by making a general appearance prior to final judgment but cannot resurrect a void judgment thereafter." *McCulley*, 816 S.E.2d at 273. I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

SOC'Y FOR THE HIST. PRES. OF THE TWENTY-SIXTH N.C. TROOPS, INC. v. CITY OF ASHEVILLE

[385 N.C. 744 (2024)]

THE SOCIETY FOR THE HISTORICAL PRESERVATION OF THE TWENTY-SIXTH NORTH CAROLINA TROOPS, INC.
v.
CITY OF ASHEVILLE, NORTH CAROLINA, AND BUNCOMBE COUNTY, NORTH CAROLINA

No. 123PA22

Filed 22 March 2024

Jurisdiction—standing—challenge to monument removal—breach of contract alleged—legal injury

In a dispute over a city's decision to remove a monument from public property, although the Court of Appeals properly upheld the trial court's order dismissing plaintiff historical society's claims (for breach of contract, a temporary restraining order, a preliminary injunction, and a declaratory judgment), its decision was modified and affirmed. The Court of Appeals erroneously concluded that plaintiff lacked standing under Rule 12(b)(1) to bring its breach of contract claim—which was a different basis for dismissal than that found by the trial court (failure to state a claim under Rule 12(b)(6)) —where plaintiff sufficiently alleged a legal injury to give rise to standing for that claim by alleging that a valid contract existed and that the contract had been breached. The Court of Appeals properly upheld the dismissal of plaintiff's remaining claims for lack of standing, and plaintiff abandoned any argument regarding the merits of its breach of contract claim.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 282 N.C. App. 700 (2022), affirming an order entered 30 April 2021 by Judge Alan Z. Thornburg in Superior Court, Buncombe County, holding that plaintiff lacked standing to bring claims and failed to state a claim of breach of contract upon which relief could be granted. Heard in the Supreme Court on 1 November 2023.

H. Edward Phillips III for plaintiff-appellant.

City of Asheville City Attorney's Office, by Eric P. Edgerton, Senior Assistant City Attorney, for defendant-appellee City of Asheville.

No brief for defendant-appellee Buncombe County.

Noel E. Nickle, pro se, amicus curiae.

BERGER, Justice.

More than a century ago, a monument was erected in Asheville dedicated to Zebulon Vance—former North Carolina Governor, United States Senator, and Confederate Colonel of the 26th North Carolina State Troops. This case arises from defendants' decision to remove the monument.[1]

The Court of Appeals determined that plaintiff lacked standing to pursue this action. We modify and affirm.

I. Factual and Procedural Background

In December 1897, the cornerstone was laid for the monument dedicated to Vance in Asheville's Pack Square Park. By 2008, the monument was in disrepair and at risk of structural instability due to mortar loss and water incursion. Plaintiff is a nonprofit historical preservation organization focused on preserving the history of the 26th North Carolina State Troops and is opposed to removal of the monument.

Plaintiff raised $138,447.38 for the purpose of restoring the monument, and on 30 March 2015, plaintiff executed an agreement with the City of Asheville (defendant City) pursuant to N.C.G.S. § 160A-353 whereby plaintiff agreed to "purchase and conduct the restoration of the Vance Monument . . . and donate said Restoration to [defendant City] upon completion of the work." Section 160A-353 provides that a municipality may "[a]ccept any gift, grant, lease, loan, or devise of real or personal property for parks and recreation programs." N.C.G.S. § 160A-353(6) (2023).

The agreement between plaintiff and defendant City included various logistical details governing the restoration and reconstruction of the monument, including a warranty provision for the work performed and materials utilized in the preservation effort. Plaintiff completed the restoration and donated the monument to defendant City in accordance with the donation agreement.

In December 2020, the Buncombe County Board of Commissioners and the Asheville City Council voted to remove the monument. According

1. As defendant Buncombe County has not filed a brief in this case, we will refer to the City of Asheville as a singular defendant.

to Asheville's City Council, the "Vance Monument ha[d] become a public safety threat in [the] community" because "the monument ha[d] been vandalized and the City ha[d] received significant threats that members of the public w[ould] attempt to topple the structure."

On 23 March 2021, plaintiff filed a complaint against Asheville and Buncombe County seeking to prevent removal of the monument. Specifically, plaintiff alleged that defendant City breached the 2015 agreement, and plaintiff was entitled to entry of a temporary restraining order, preliminary injunction, and a declaratory judgment that N.C.G.S. § 100-2.1, which governs the removal of State-owned monuments, memorials, or other works of art, applied to the monument.

Plaintiff alleged in its complaint that it and the City had entered into a contract because both had a "desire to restore and preserve the Vance Monument in perpetuity." Plaintiff asserted that it did not intend to raise money and expend significant amounts of time over the restoration period only for the monument to be torn down soon after completion. According to plaintiff's complaint, the agreement was the foundation of "a partnership with the City . . . to carry out this crucial and necessary work." Plaintiff also asserted in the complaint that both parties intended to preserve the monument so that it "is not only part of [our] past, but our future as well."[2]

On 29 March 2021, defendant City filed a motion to dismiss plaintiff's complaint. Defendant City moved to dismiss plaintiff's breach of contract claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and moved to dismiss the remainder of plaintiff's claims for relief under both Rules 12(b)(1) and 12(b)(6). Defendant City also moved for an award of attorney's fees under N.C.G.S. § 6-21.5.

On 31 March 2021, plaintiff filed a motion to stay proceedings in the trial court pending this Court's resolution of *United Daughters of the Confederacy, N.C. Div. v. City of Winston-Salem*, 383 N.C. 612 (2022). According to plaintiff's motion to stay, "[t]he issues raised in the present case related to standing and whether N.C.[G.S.] § 100-2.1 applies to objects of remembrance . . . owned by the political subdivisions of the state of North Carolina are identical to those presented in [*United Daughters*]."

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2. Plaintiff asserts that this language was used in the agreement which was attached to the complaint. However, we have scrutinized the text of the donation agreement and have been unable to locate the quoted language.

On 30 April 2021, the trial court entered an order denying plaintiff's motion to stay proceedings, denying defendant City's motion for attorney's fees, and granting defendant City's motion to dismiss. Regarding defendant City's motion to dismiss under Rule 12(b)(6), the trial court concluded that "in the event that [p]laintiff has properly alleged the existence of a valid contract, the obligations of any potential agreement have been fulfilled; therefore, [p]laintiff has failed to sufficiently allege a breach of contract claim." As to defendant City's motion to dismiss under Rule 12(b)(1), the trial court concluded that plaintiff "lacks standing to bring its remaining claims" because plaintiff "and its individual members are not injuriously affected in their persons, property or constitutional rights in a manner to create an actual controversy and standing in this matter." Plaintiff appealed.

At the Court of Appeals, plaintiff failed to meet procedural deadlines governing the filing of the record on appeal and the filing of its appellant brief. On 23 August 2021—more than three months after the appeal was docketed—plaintiff filed a "motion for stay of appellate proceedings," reiterating its argument that the matter should be stayed pending this Court's resolution of *United Daughters* because "[t]he issues raised in the present case are identical." Defendant City opposed the motion and moved to dismiss plaintiff's appeal based upon plaintiff's repeated violations of the Rules of Appellate Procedure. The Court of Appeals denied plaintiff's motion for stay and defendant City's motion to dismiss the appeal.

On 5 April 2022, the Court of Appeals issued an opinion affirming the trial court's order. However, in addition to determining that dismissal of plaintiff's breach of contract claim pursuant to Rule 12(b)(6) was proper, the Court of Appeals also concluded that plaintiff had no standing to bring its breach of contract claim—a conclusion the trial court never made. *Soc'y for the Hist. Pres. of the Twenty-sixth N.C. Troops, Inc. v. City of Asheville*, 282 N.C. App. 707, 708 (2022). In addition, the Court of Appeals determined that dismissal of plaintiff's claims for a temporary restraining order, preliminary injunction, and declaratory judgment under Rule 12(b)(1) was appropriate because plaintiff failed to sufficiently allege an ownership interest or other legal interest in the monument. *Id.* at 707. Plaintiff was, thus, "unable to establish a legal injury" and "therefore unable to establish standing for its claims." *Id.*

On 13 December 2022, this Court allowed plaintiff's petition for discretionary review to consider whether the Court of Appeals erred in affirming the trial court's dismissal of plaintiff's complaint.

II. Analysis

We review a lower court's decision on a motion to dismiss for lack of standing de novo. *United Daughters*, 383 N.C. at 624. In undertaking this review, the allegations contained in the complaint are presumed to be true, and these assertions along with

> the supporting record [are viewed] in the light most favorable to the non-moving party, with this being the applicable standard of review regardless of whether the complaint is dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6).

Id. (cleaned up).

This Court has "consistently recognized that standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction," *United Daughters*, 383 N.C. at 649 (cleaned up), and a motion to dismiss for lack of standing is properly made under Rule 12(b)(1). A party seeking to enjoin the removal of a monument owned by a political subdivision of this State through a private suit must, at minimum, allege a legal interest for their claims to survive a motion to dismiss under Rule 12(b)(1). *Id.*

As the parties have acknowledged, many of the issues addressed by this Court in *United Daughters* are "identical" to the issues presented here. There, the organizational plaintiff challenged a municipality's decision to remove a monument from the grounds of a Forsyth County courthouse. *Id.* at 614. The plaintiff alleged that it had funded the erection of the monument in 1905 but did not "claim to own the monument or to have any sort of contractual or property interest in it." *Id.* at 615.

After the defendants removed the monument in that case, the plaintiff filed a complaint seeking a temporary restraining order, a preliminary injunction, and a declaratory judgment. *Id.* at 619. The defendants moved to dismiss for lack of standing pursuant to Rule 12(b)(1) and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). *Id.* The trial court allowed the defendants' motion and dismissed the complaint with prejudice, and a divided panel of the Court of Appeals affirmed. *Id.* at 620–21. The plaintiff appealed to this Court based upon a dissent in the Court of Appeals. *Id.* at 624.

This Court affirmed in part, reversed in part, and remanded the case to the trial court to dismiss plaintiff's complaint without prejudice. *Id.* at 651. We held, in relevant part, that because the plaintiff did not allege any ownership or contractual interest in the monument, the plaintiff had "failed to identify any legal right conferred by the common law, state or federal statute, or the state or federal constitutions of which they have been deprived by [the] defendants' conduct." *Id.* at 629. Notably, the plaintiff in *United Daughters* alleged neither the existence of a valid contract between the parties nor the breach of any such contract. *Id.* at 630.

In addition, we reiterated in *United Daughters* that "[w]hen a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, . . . the legal injury itself gives rise to standing." *Id.* at 626 (alterations in original) (quoting *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 608 (2021)). This is so because our Constitution provides that "every person for an injury done to him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18, cl. 2.

It should be self-evident that our holding in *United Daughters* was limited to the facts of that case, rather than a blanket holding that individuals or organizations can never challenge the removal of historical monuments. If such parties, like the plaintiff in *United Daughters*, fail to allege the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, dismissal is appropriate. *See United Daughters*, 383 N.C. at 633. Conversely, if such parties establish standing by alleging an ownership, contractual, or other cognizable interest as described in our precedent, dismissal under Rule 12(b)(1) is error. *See id.* at 626.

This Court has "long held that a plaintiff can maintain an action for infringement of a common law interest irrespective of any 'actual' injury that may occur." *Comm. to Elect Dan Forest*, 376 N.C. at 596.

> For instance, we have not dismissed trespass actions where there is no allegation of harm beyond the infringement of the legal right. *See Keziah v. Seaboard Air Line R. Co.*, 272 N.C. 299, 311 (1968) ("Any unauthorized entry on land in the actual or constructive possession of another constitutes a trespass, *irrespective of degree of force used or whether actual damage is done*." (emphasis added)); *see also*

> *Hildebrand v. Southern Bell*, 219 N.C. 402, 408 (1941) (holding landowner "is entitled to be protected as to that which is his without regard to its monetary value"). Indeed, "[s]uch entry entitle[s] the aggrieved party to at least nominal damages." *Keziah*, 272 N.C. at 311. Actions for breach of contract can, in some circumstances, proceed on a theory of nominal damages. *See, e.g.*, *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 271 (1968) (explaining that in a contract action proof of breach alone is enough to avoid judgment of nonsuit). Even in a common law action where actual injury is a necessary element of the claim, such as negligence, the proper disposition for failure to allege actual injury or damages is not dismissal for lack of standing, but dismissal for failure to state a claim upon which relief can be granted. *See, e.g.*, *Hansley v. Jamesville & W.R. Co.*, 115 N.C. 602, 613 (1894) ("Neither negligence without damage nor damage without negligence will constitute any cause of action.").

Id. (alterations in original).

Here, the Court of Appeals held that plaintiff lacked standing to bring its claims for breach of contract, a temporary restraining order, a preliminary injunction, and a declaratory judgment. *See Soc'y for the Hist. Pres.*, 282 N.C. App. at 705–707. In so doing, the Court of Appeals purported to affirm the trial court's order granting defendant City's motion to dismiss these claims for lack of standing under Rule 12(b)(1). *Id.* at 706. However, contrary to the Court of Appeals' analysis, the trial court did not dismiss plaintiff's breach of contract claim for lack of standing under Rule 12(b)(1). Instead, the trial court ruled that because the donation agreement had been completed, plaintiff had "failed to sufficiently allege a breach of contract claim." Plaintiff's breach of contract claim was therefore dismissed under Rule 12(b)(6).

Thereafter, the trial court concluded that plaintiff "lack[ed] standing to bring its remaining claims," i.e., its claims for a temporary restraining order, a preliminary injunction, and a declaratory judgment. The trial court's proper distinction of dismissal under Rule 12(b)(1) and dismissal under Rule 12(b)(6) aligns with defendant City's motion to dismiss, which sought dismissal of plaintiff's breach of contract claim

only "pursuant to 12(b)(6)" and dismissal of the remaining claims "pursuant to Rule 12(b)(1) and 12(b)(6)."

The Court of Appeals' misapprehension of these issues would alone warrant reversal of its conclusion that plaintiff lacked standing to bring its breach of contract claim. Nevertheless, we take this opportunity to reiterate that "[w]hen a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, . . . the legal injury itself gives rise to standing." *Comm. to Elect Dan Forest*, 376 N.C. at 608.

Where a party alleges the existence of a valid contract and that such contract has been breached, that party has alleged a legal injury that gives rise to standing. Here, the Court of Appeals reasoned that plaintiff lacked standing because it failed to "sufficiently allege a breach of contract claim." *Soc'y for the Hist. Pres.*, 282 N.C. App. at 706. This failure goes to dismissal under Rule 12(b)(6) for failure to state a claim, not dismissal under Rule 12(b)(1) for lack of standing. *See Comm. to Elect Dan Forest*, 376 N.C. at 596 ("Even in a common law action where actual injury is a necessary element of the claim, such as negligence, the proper disposition for failure to allege actual injury or damages is not dismissal for lack of standing, but dismissal for failure to state a claim upon which relief can be granted.").

However, the end result is the same. The Court of Appeals alternatively affirmed the trial court's dismissal of plaintiff's breach of contract claim pursuant to Rule 12(b)(6), and plaintiff failed to argue the merits of its breach of contract claim in its brief to this Court. Our Rules of Appellate Procedure provide that "review in the Supreme Court is limited to consideration of the issues . . . properly presented in the new briefs." N.C. R. App. P. 16(a). As such, this issue has been abandoned by plaintiff, and we express no opinion as to this portion of the Court of Appeals' decision.

As to plaintiff's remaining claims, we agree that "[i]t is somewhat unclear what legal injury plaintiff asserts, in both the complaint and the present appeal, in seeking the [temporary restraining order], preliminary injunction, and declaratory judgment." *Soc'y for the Hist. Pres.*, 282 N.C. App. at 706. Although plaintiff's breach of contract claim prevents this Court from agreeing that this case is "identical" to *United Daughters*, plaintiff's failure to argue the merits of that claim requires us to hold that plaintiff's remaining claims suffer the same defect that was present in *United Daughters*.

Accordingly, we affirm the portion of the Court of Appeals' decision affirming the trial court's dismissal of plaintiff's claims for a temporary restraining order, a preliminary injunction, and a declaratory judgment for lack of standing under Rule 12(b)(1).

III. Conclusion

For the reasons stated herein, we reverse the Court of Appeals' determination that plaintiff's breach of contract claim should be dismissed for lack of standing. However, plaintiff abandoned the merits of its breach of contract claim in its appeal to this Court. Therefore, plaintiff has failed to assert any ground for which it has standing to contest removal of the monument, and we affirm the portion of the Court of Appeals' decision affirming the trial court's dismissal of plaintiff's claims for a temporary restraining order, a preliminary injunction, and a declaratory judgment.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA
v.
GLENN SPENCER BOYETTE JR.

No. 43PA23

Filed 22 March 2024

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous opinion of the Court of Appeals, 287 N.C. App. 270 (2022), finding no error in a judgment entered 24 May 2021 by Judge Daniel A. Kuehnert in Superior Court, Caldwell County and holding the trial court did not abuse its discretion by admitting evidence obtained during a search of defendant's truck at a probation revocation hearing. Heard in the Supreme Court on 22 February 2024.

Joshua H. Stein, Attorney General, by Kayla D. Britt, Assistant Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Jillian C. Franke, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

Having considered the opinion of the Court of Appeals, the record and briefs, and the oral arguments before us, we conclude that defendant's petition for discretionary review was improvidently allowed by order on 14 June 2023.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
RICHARD HENRY JORDAN, JR.

No. 124PA22

Filed 22 March 2024

Search and Seizure—warrantless search—standing to challenge—reasonable expectation of privacy—material fact questions—findings required

In a prosecution for multiple drug offenses, where the trial court denied defendant's pretrial motion to suppress evidence that was found during a warrantless entry into defendant's uncle's house, but where the ruling was made orally and was never memorialized in a written order with findings of fact, the matter was remanded for the trial court to make the necessary findings of fact regarding the central question of whether defendant had standing to challenge the search of the home. There were material conflicts in the evidence requiring resolution by the trial court, although the record contained evidence that could support a determination that defendant had a reasonable expectation of privacy in the home, despite defendant's statements to law enforcement that he did not live in the home and had no possessions there. Depending on the facts found, the court could either deny the motion to suppress again or grant a new trial.

Justice RIGGS dissenting.

Justice EARLS 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, 282 N.C. App. 651 (2022), reversing an order entered on 22 January 2020 by Judge Daniel Kuehnert in

Superior Court, Mecklenburg County, and remanding the case. Heard in the Supreme Court on 7 November 2023.

Joshua H. Stein, Attorney General, by Michael T. Henry, Special Deputy Attorney General, for the State-appellant.

Christopher A. Brook for defendant-appellee.

DIETZ, Justice.

While investigating reports of a stolen car, law enforcement officers observed a suspect retreat to a nearby home. The officers followed the suspect into the home and saw evidence of an illegal drug operation.

The issue presented in this case is whether defendant—one of the participants in that drug operation—has standing to challenge the officers' warrantless entry into the home. Defendant told the police he did not live there. Defendant's uncle, who was also present, told the officers that he lived there and consented to a search. The uncle also told the officers that one of the other men present—the original suspect that led officers to the home—was temporarily staying there and had some personal belongings in the home. The uncle did not indicate that defendant lived in the home or frequently visited.

After a suppression hearing, the trial court orally denied defendant's motion to suppress, referencing defendant's lack of any reasonable expectation of privacy in the home. The court's oral ruling did not include clearly identified findings of fact, with much of the court's discussion being mere recitation of the evidence. The court instructed the State to prepare a draft order, which the court would then enter to memorialize its ruling.

That never happened, and the case went to trial without the trial court memorializing its oral ruling in a written order with express fact findings. After the jury convicted defendant of a number of drug-related offenses, defendant appealed. The Court of Appeals reversed the trial court's denial of the motion to suppress, reasoning that the trial record would not support any finding that defendant lacked a reasonable expectation of privacy in the home.

As explained below, we reverse the decision of the Court of Appeals. The evidence presented at the suppression hearing *could* support findings that defendant lacked standing to challenge the search. But the

trial court never made those findings, despite being compelled to do so because the trial record contains materially conflicting evidence. *See State v. Bartlett*, 368 N.C. 309, 312 (2015).

We therefore reverse the decision of the Court of Appeals and remand with instructions to further remand this matter to the trial court to make findings of fact based on the trial record. The trial court, based on those new findings, may again deny the motion to suppress, leaving defendant's convictions intact, or it may grant the motion to suppress in whole or in part and order a new trial. *See State v. Hammonds*, 370 N.C. 158, 160–62 (2017).

Facts and Procedural History

In 2017, law enforcement officers arrived in a residential neighborhood to investigate reports of a stolen car. The officers located the stolen car in a parking lot. While observing the car, officers saw Marcel Thompson leave a nearby house and approach the car as if he planned to enter it. After Thompson saw the officers, he turned and hurried back towards the house.

Thompson knocked on the door of the house and said "it's the police" loudly enough for the officers to hear as they followed him. Defendant opened the door to let Thompson into the home. Thompson left the door open as he entered. One officer put his foot through the threshold of the door and told the occupants that he wanted to speak with them. After Thompson declined to step outside, the officer fully entered the home, while another officer moved into the doorway.

The second officer observed defendant close a safe that was sitting on a table in the center of the room. The officer saw defendant lock the safe and put a key in his pocket. That officer also saw baggies, razor blades, and white powder on the same table.

There were two other individuals in the house with Thompson and defendant. Officers asked the occupants who lived in the home. One of the occupants, James Deitz,[1] told the officers that he resided in the home. Officers later learned that Deitz is defendant's uncle.

The officers asked Deitz for permission to search the home, and Deitz consented. When the officers asked to search the safe, defendant claimed the safe was not his. Defendant then objected to the officers

1. The State uses the name "James Deitz." Defendant uses the name "James Deese." As explained below, because the trial court did not enter a written order, the record does not definitively resolve the correct spelling of this witness's surname.

searching the safe and refused to provide them with the key. When the officers asked defendant if he lived in the home, he stated, "I don't have anything to do with anything that's in here. I don't live here. This has nothing to do with me."

Defendant further explained, "I came to visit my uncle. I don't live in here period, there is nothing here in my name." When the officers again asked if defendant lived at the home, he responded, "No, I don't live here." The officers then pointed out that because defendant had the key to the safe, he must at least own what is in the safe, but defendant again responded, "No."

The officers discussed with Deitz who resided in the house. Deitz told the officers that Thompson had been staying in the house for a few days. Thompson confirmed that he had various belongings in the home. Neither Deitz nor Thompson indicated that defendant also stayed at the home, which was relatively small and had only one bedroom, and no one identified any of defendant's belongings inside the home.

The officers later obtained a warrant to search the safe and the home. Inside the safe, the officers found a firearm, cocaine in different baggies, and money. Throughout the home, the officers found baggies, syringes, razor blades, and scales.

The State charged defendant with trafficking cocaine, possession of a firearm by a felon, possession of drug paraphernalia, and attaining habitual felon status.

Before trial, defendant filed a motion to suppress the evidence, claiming that the officers unlawfully entered Deitz's home. At the hearing, both parties briefly addressed the issue of defendant's expectation of privacy in the home, but it was not a focus of either side's arguments.

At the end of the hearing, the trial court orally denied defendant's motion to suppress. As is common in these scenarios, the trial court's oral ruling did not include clearly defined findings of fact and conclusions of law. Instead, the trial court indicated that it would enter a written order memorializing the oral ruling. The court instructed the State to prepare a draft order. The parties acknowledge on appeal that the trial court never entered a written order as anticipated at the hearing.

A jury later found defendant guilty of trafficking cocaine, possession of a firearm by a felon, and possession of drug paraphernalia. Defendant then pleaded guilty to attaining habitual felon status. After entry of judgment, defendant appealed from the judgments, arguing that the trial court erred by denying his motion to suppress.

On appeal, the Court of Appeals reversed the trial court's order and remanded the case. *See State v. Jordan*, 282 N.C. App. 651 (2022). We allowed the State's petition for discretionary review.

Analysis

By statute, when a trial court rules on a motion to suppress, the court must "make findings of fact and conclusions of law which shall be included in the record." N.C.G.S. § 15A-974(b) (2023); *see also id.* § 15A-977. The need to make findings of fact is crucial for appellate review because appellate courts "cannot find facts." *Pharr v. Atlanta & Charlotte Air Line Ry. Co.*, 132 N.C. 418, 423 (1903). Instead, appellate courts examine only "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 (2011). When the trial court does not make findings of fact, this can frustrate our ability to engage in appellate review because we have no underlying facts to which we can apply the law. *Bartlett*, 368 N.C. at 312.

Although trial courts can make the necessary findings of fact in an oral ruling, we have long held that entering a written order with findings of fact "is the better practice." *Id.* One reason for doing so is that it can be difficult in an oral ruling to distinguish between "a mere recitation of the evidence" and "true findings." *Harrison v. Gemma Power Sys., LLC*, 369 N.C. 572, 583 (2017).

For example, when announcing an oral ruling, trial courts often will describe the testimony and evidence received at the hearing. The court might say, "The officer testified that the door was open." Is this a finding that the officer's testimony is credible and, thus, a finding that the door was indeed open? On a cold appellate record, it can be hard to tell.

As a result, when the trial court fails to make express findings of fact, either orally or in a written order, we typically remand the matter for the trial court to do so as required by the applicable statutes. *See State v. Salinas*, 366 N.C. 119, 122–26 (2012). But we have also recognized an exception to this general rule: "Although the statute's directive is in the imperative form, 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. When there is no material conflict in the evidence, "the trial court's findings can be inferred from its decision." *Id.*

Here, we cannot infer the necessary findings under *Bartlett* because there is a material conflict in the evidence that the trial court

must resolve. The central issue in this motion to suppress is whether defendant has standing to challenge the officers' search of the home. A defendant may move to suppress evidence only when the defendant's own rights, "not those of some third party," have been violated. *State v. Taylor*, 298 N.C. 405, 415 (1979). Thus, before a defendant may challenge the legality of a search, he must demonstrate that the room in the home "where the search occurred was an area in which he had a reasonable expectation of privacy." *Id.* at 416. The burden is on the defendant to prove that he had the requisite expectation of privacy. *State v. Jones*, 299 N.C. 298, 306 (1980).

There is no fixed test for assessing a defendant's expectation of privacy, but the expectation must be "one that society deems to be reasonable." *State v. Wiley*, 355 N.C. 592, 602 (2002). Every case is fact specific. For example, overnight guests typically have a reasonable expectation of privacy in the area where they are staying, even if they are merely a temporary visitor. *Minnesota v. Olson*, 495 U.S. 91, 98–99 (1990). Similarly, a family member who is a "frequent visitor" to the home of a relative may develop a reasonable expectation of privacy in the relative's home. *E.g.*, *Bonner v. Anderson*, 81 F.3d 472, 475 (4th Cir. 1996). By contrast, one who visits another's home "for a business transaction" and remains there only to conduct that transaction likely does not have a reasonable expectation of privacy in the home. *Minnesota v. Carter*, 525 U.S. 83, 90 (1998).

Here, there are fact questions that must be resolved to apply these legal principles to this case. For example, defendant told the officers that he did not live in the home and that "there is nothing here in my name." Deitz, who identified himself as the resident of the home, consented to the search. Deitz also explained to the officers that Thompson—the man police had followed from the stolen car to the home—was staying in the house for a few days. Thompson confirmed that he had various belongings in the home.

Importantly, Deitz did not tell the officers that defendant also was staying at the home or that defendant had any belongings there. Nor is there any direct evidence of whether defendant was a frequent visitor to Deitz's home or had the sort of relationship with Deitz that could give defendant a reasonable expectation of privacy in the home.

The trial court reasonably could infer from the statements of Deitz and Thompson that only those two individuals had a reasonable expectation of privacy in the home and that the others present were there solely to participate in the illegal drug operation. *See Carter*, 525 U.S.

at 90. This finding would support the trial court's conclusion that defendant, unlike Deitz and Thompson, did not have a reasonable expectation of privacy in the home. But, as noted above, the trial court did not make that fact finding because it did not make any fact findings.

The dissent insists that there is no need for further fact-finding because there are "uncontroverted" facts that show an expectation of privacy. In doing so, the dissent merely highlights why further fact-finding is needed.

For example, the dissent asserts that defendant had "authority to let persons into the home regardless of whether Mr. Deitz was present." There is no direct evidence of this. Deitz did not say this was so. Nor did defendant. This is an *inference* that defendant draws in his appellate briefing from the fact that he opened the door and let Thompson in.

But a fact-finder would not be compelled to draw this inference. Indeed, a fact-finder might reasonably infer the opposite—that defendant ordinarily would not have permission to let others into the home, but did so here because Thompson was pounding on the door shouting, "it's the police," and Deitz was not in the room at the time.

The same is true of the other purported facts identified by the dissent; they are not facts, they are inferences. And for each of them, a fact-finder also could draw a competing inference in the opposite direction. This Court cannot choose between these competing inferences. When "different inferences may be drawn from the evidence," only the trial court, as fact-finder, can determine "which inferences shall be drawn and which shall be rejected." *Knutton v. Cofield*, 273 N.C. 355, 359 (1968).

Accordingly, we reject the Court of Appeals' determination that the trial record "does not support a finding that Defendant lacked a reasonable expectation of privacy in the residence searched." *Jordan*, 282 N.C. App. at 660. We hold that the record *could* support the necessary findings, but there are material fact questions that must be resolved by the fact-finder before any legal conclusion can be reached.

In sum, because the trial court did not enter a written order as intended at the conclusion of the suppression hearing, the trial court did not make adequate findings of fact "that resolved the material conflict in the evidence." *See Bartlett*, 368 N.C. at 312. "Without such a finding, there can be no meaningful appellate review of the trial judge's decision." *Id.*

When the trial court fails to resolve fact issues necessary to review the trial court's legal conclusions, "an appellate court may remand the

cause for appropriate proceedings without ordering a new trial." *State v. Lang*, 309 N.C. 512, 523–24 (1983). We therefore reverse the decision of the Court of Appeals and remand with instructions to further remand this matter to the trial court to make the necessary findings of fact based on the trial record. The trial court, based on those new findings, may again deny the motion to suppress, leaving defendant's convictions intact, or it may grant the motion to suppress in whole or in part and order a new trial. *See Hammonds*, 370 N.C. at 160–62.

Conclusion

We reverse the decision of the Court of Appeals and remand for further proceedings.

REVERSED AND REMANDED.

Justice RIGGS dissenting.

The majority remands this matter to the trial court for further findings of fact that it believes are necessary to conclude that Mr. Jordan possessed a reasonable expectation of privacy in the premises illegally searched by law enforcement. Because I believe there is already adequate uncontradicted evidence in the record to establish such a conclusion, I respectfully dissent.

I begin with the uncontroverted facts established from the evidence introduced at the suppression hearing. Mr. Jordan's uncle, Mr. Deitz, resided in the premises searched.[1] Mr. Jordan himself had permission to be in the residence late at night, even when Mr. Deitz was not at home. Mr. Jordan also had authority to let persons into the home, regardless of whether Mr. Deitz was present.[2] Mr. Jordan was likewise familiar with the home and the fact that the house had been divided to allow businesses, like a salon, to operate out of the space.[3] And Mr. Jordan, at a minimum, had access to and control over a safe in the home—and

1. There is no question from the evidence that the premises searched belonged to Mr. Deitz, or that Mr. Deitz was Mr. Jordan's uncle.

2. The majority asserts this is exclusively based on an inference from the fact that Mr. Jordan opened the door for Mr. Thompson. It is not; instead, it is supported by a witness's statement—captured on an officers' body camera video and introduced into evidence at the suppression hearing—that Mr. Jordan and Mr. Thompson were the only persons present at the home when she arrived.

3. Mr. Jordan evinced such knowledge in direct statements on the body camera footage introduced into evidence.

a safe's very purposes are to sharply limit indiscriminate access, deter discovery, and ensure the privacy of its contents.[4]

The above undisputed facts establish Mr. Jordan's reasonable expectation of privacy in the premises searched. Familial relations certainly weigh in favor of that conclusion. *See, e.g.*, *United States v. Washington*, 573 F.3d 279, 289 (6th Cir. 2009) (holding a nephew had a reasonable expectation of privacy in his uncle's apartment); *United States v. Heath*, 259 F.3d 522, 533 (6th Cir. 2001) (cousins); *Figueroa v. Mazza*, 825 F.3d 89, 110 (2d Cir. 2016) (mother and son); *cf. United States v. Gray*, 491 F.3d 138, 153 (4th Cir. 2007) (recognizing Fourth Amendment standing of "social visitors with near-familial relationships"). That Mr. Jordan was entrusted to be at the home without Mr. Deitz likewise discloses a substantial measure of control over and acceptance into the household. *Cf. Minnesota v. Olson*, 495 U.S. 91, 99 (1990) (noting that overnight guests are likely to have a reasonable expectation of privacy in another's residence because "[i]t is unlikely that the guest will be confined to a restricted area of the house; and when the host is away or asleep, the guest will have a measure of control over the premises"). So, too, does the fact that Mr. Jordan had the ability to control admission into the home. *See Rakas v. Illinois*, 439 U.S. 128, 149 (1978) (holding a visitor had a reasonable expectation of privacy in a friend's apartment because he "had complete dominion and control over the apartment and could exclude others from it"). Further, his ownership and/or control over a safe in the home—together with repeated assertions that police lacked permission to access it—necessarily bestowed him with authority to "preserve as private" materials in the home. *Katz v. United States*, 389 U.S. 347, 351 (1967). All of these facts establish that Mr. Jordan, as a trusted family member of Mr. Deitz with substantial unsupervised control over access to the home and the locked safe within, had "a legitimate expectation of privacy there." *See Olson*, 495 U.S. at 96.

I do not believe the conflicts in the evidence identified by the majority undercut that conclusion. Whether Mr. Deitz and Mr. Thompson were the only overnight residents of the home with common law property interests in the possessions therein is not dispositive. *See Gray*, 491 F.3d at 153 ("[W]e have recognized that persons other than overnight guests can have a legitimate expectation of privacy in the home of another . . . in the context of social visitors with near-familial relationships."); *Rakas*, 439 U.S. at 144 n.12 ("Expectations of privacy protected by the Fourth

4. That Mr. Jordan had access to and control over the safe is not disputed by the evidence and is accepted by the majority.

Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest."). Nor does that question diminish the fact that Mr. Jordan is a family member with the right to control and access both the home—including outside Mr. Deitz's presence—and a safe found inside it. The fact that illegal activity was underway at the time police arrived does not change the calculus; a college student with free and unsupervised access to a relative's home and locked liquor cabinet is still a familial relation with substantial acceptance into the relative's household—even if the student uses the space for a homeowner-approved and invite-only illegal poker game involving underage drinking.[5] Privacy interests of close friends and family with acceptance into and control over the home are not erased because the location is being used for illegal activity at the time of the search. *See*, *e.g.*, *United States v. Pollard*, 215 F.3d 643, 647 (6th Cir. 2000) (holding a defendant had a reasonable expectation of privacy in a friend's home despite his use of the house "to complete an illegal sale of cocaine"); *United States v. Poe*, 556 F.3d 1113, 1122 (10th Cir. 2009) (holding a social guest who was permitted to remain in the home to conduct a drug sale after the resident left had a reasonable expectation of privacy in the home).

In sum, I do not agree with the majority that the identified conflicts in the evidence require resolution to conclude that Mr. Jordan had Fourth Amendment standing to challenge the search of his uncle's residence. His familial relationship, familiarity with the home, unsupervised control of admittance into the house during late-night hours, and his authority over access to the safe inside combine to establish that he was so accepted into the residence as to have a reasonable expectation of privacy independent of his purposes for being there, his status as a non-overnight guest, or his lack of legal ownership. I would therefore affirm the Court of Appeals' decision and respectfully dissent.

Justice EARLS joins in this dissenting opinion.

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5. The majority relies on *Minnesota v. Carter*, 525 U.S. 83, 90 (1998), for the proposition that Mr. Jordan lacked a reasonable expectation of privacy if he was present "solely to participate in the illegal drug operation." This is an overreading of *Carter*, which held that non-overnight guests lacked a reasonable expectation of privacy in the searched premises because they "were essentially present for a business transaction[,] . . . [t]here [was] *no suggestion that they had a previous relationship with* [the resident,] . . . [n]or was there anything similar to the overnight guest relationship . . . *to suggest a degree of acceptance into the household*." *Id.* (emphases added); *see also United States v. Gamez-Orduño*, 235 F.3d 453, 458 (9th Cir. 2000) ("An individual whose presence on another's premises is *purely* commercial in nature . . . has no legitimate expectation of privacy in that location." (emphasis added) (citing *Carter*, 525 U.S. at 90)).

STATE v. WALKER

[385 N.C. 763 (2024)]

STATE OF NORTH CAROLINA
v.
KENNETH LOUIS WALKER

No. 202PA22

Filed 22 March 2024

1. Criminal Law—motion for appropriate relief—standard of review—case overruled

In an appeal from the denial of a criminal defendant's motion for appropriate relief (MAR), in which defendant asserted that he received ineffective assistance of counsel at trial and in his prior appeal, the Supreme Court upheld the standard of review for MARs laid out in N.C.G.S. § 15A-1420(c) while overruling the standard set forth in *State v. Allen*, 378 N.C. 286 (2021), which stated that the factual allegations contained in a defendant's MAR should be reviewed in the light most favorable to the defendant.

2. Constitutional Law—effective assistance of counsel—trial counsel—right to testify at trial—appellate counsel—Anders brief—motion for appropriate relief

The denial of a criminal defendant's motion for appropriate relief (MAR) was affirmed where defendant's claims of ineffective assistance of counsel (IAC) lacked merit. With respect to his first IAC claim, the record did not support defendant's argument that his trial counsel had neither informed him of his right to testify at trial nor allowed him to testify despite his desire to do so; rather, the trial court's colloquy with defendant revealed that defendant was aware of his right to testify, and nothing in the record suggested that defendant intended to exercise that right. With respect to defendant's second IAC claim, defendant's appellate counsel—who filed an *Anders* brief in defendant's appeal—was not ineffective for declining to argue that the trial court erred in limiting the testimony of defendant's expert witness, since defendant's MAR failed to demonstrate that the court abused its discretion in limiting that testimony.

Justice BERGER concurring.

Justice EARLS concurring in part and dissenting in part.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review a unanimous, unpublished opinion of the Court of Appeals, No. COA21-535 (N.C. Ct. App. June 7, 2022), affirming an order entered on 8 April 2020 by Judge Paul C. Ridgeway in Superior Court, Wake County, denying defendant's motion for appropriate relief. Heard in the Supreme Court on 1 November 2023.

Joshua H. Stein, Attorney General, by Benjamin Szany, Assistant Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Katy Dickinson-Schultz, Assistant Appellate Defender, for defendant-appellant.

BARRINGER, Justice.

In this case, we are tasked with determining whether the Court of Appeals properly dispensed with defendant's ineffective assistance of counsel claim and motion for appropriate relief (MAR). For the following reasons, we affirm.

I. Background

On 22 October 1999, defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. On appeal, defendant's attorney filed an *Anders* brief, *see Anders v. California*, 386 U.S. 738 (1967), and the Court of Appeals found no error at trial.

Over two decades later, defendant filed a pro se MAR on 1 April 2020. Defendant raised, for the first time, that his trial counsel had not informed him of his right to testify, denied him the opportunity to testify, and prevented him from testifying despite defendant's desire to do so. Defendant also claimed that the trial court erred in limiting the testimony of defendant's expert witness, a forensic psychiatrist. Further, he alleged he had been denied effective assistance of appellate counsel because his counsel filed an *Anders* brief. The trial court denied the MAR because defendant had "not shown that he was unable, at the time of his appeal, to raise the issues he now raises in his present [MAR]."

The Court of Appeals reviewed the trial court's order to determine "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Walker*, No. COA21-535, slip op. at 4 (N.C. Ct. App. June 7, 2022) (unpublished)

(quoting *State v. Peterson*, 228 N.C. App. 339, 343 (2013)); *see also State v. Stevens*, 305 N.C. 712, 720 (1982). However, when it recounted the standard of review for an MAR, the Court of Appeals failed to state that review is "in the light most favorable to [defendant]," which was first established in an opinion of this Court published in August 2021. *See State v. Allen*, 378 N.C. 286, 296 (2021).

II. Standard of Review

[1] Questions of law are reviewed de novo. *State v. Thomsen*, 369 N.C. 22, 24 (2016). In *Allen*, this Court established that the factual allegations contained in a defendant's MAR should be reviewed "in the light most favorable to [defendant]." 378 N.C. at 296. Under *Allen*, for the first time in our jurisprudential history, MARs were to be read in the light most favorable to defendants. We now return to the standard of review which existed prior to *Allen*—that of statutory review pursuant to N.C.G.S. § 15A-1420(c). *Id.* at 324 (Berger, J., dissenting).

Reviewing a defendant's asserted grounds for relief in the light most favorable to defendant is a departure from this Court's longstanding standard of review. *See*, *e.g.*, *State v. McHone*, 348 N.C. 254 (1998); *State v. Stevens*, 305 N.C. 712 (1982); *Branch v. State*, 269 N.C. 642 (1967); *State v. Graves*, 251 N.C. 550 (1960); *Miller v. State*, 237 N.C. 29, *cert. denied*, 345 U.S. 930 (1953). The mere fact that some ground for relief is asserted does not entitle defendant to a hearing or to present evidence. *McHone*, 348 N.C. at 256. An MAR court need not conduct an evidentiary hearing if a defendant's MAR offers insufficient evidence to support his claim or only asserts general allegations and speculation. N.C.G.S. § 15A-1420 (2023); *see State v. Harris*, 338 N.C. 129, 143 (1994), *cert. denied*, 514 U.S. 1100 (1995).

Although the dissent argues that we are overruling a standard which *Allen* did not prescribe, the Court of Appeals has expressed uncertainty on how to approach *Allen*. In *State v. Ballard*, for example, the concurrence voiced concern over the "novel precedent set out in *Allen*." 283 N.C. App. 236, 250 (2022) (Griffin, J., concurring). The concurrence further wrote that *Allen* is not supported by our jurisprudence nor the text of the North Carolina General Statutes. *Id.* The holding in *Allen* "clearly frustrates the plain language of the statute, takes away discretion from our trial judges, and shows a need for our Supreme Court to revisit its holding." *Id.* Despite the arguments made by our dissenting colleagues, the Court of Appeals has highlighted the continuing issues caused by *Allen*. We now correct these issues.

In the present case, defendant made ineffective assistance of counsel allegations against both his trial and appellate counsel. The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. *State v. Braswell*, 312 N.C. 553, 561 (1985). When asserting that counsel is ineffective, defendant must show that their counsel fell "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). To do so, defendant must first show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* "Thus, both deficient performance and prejudice are required for a successful ineffective assistance of counsel claim." *State v. Todd*, 369 N.C. 707, 711 (2017).

III. Analysis

[2] Defendant argues that his trial counsel refused to allow him to testify, despite his desire to testify. However, the record does not support defendant's argument. Defendant knew of his right to testify, as evidenced by the trial court's colloquy with defendant.

> THE COURT: [Defendant], do you understand, sir, you have the right to remain silent, you don't need to make any statement at this point.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you understand that you're charged here today with first degree murder allegedly occurring on November 14, 1998, in which you were charged with malice . . . [a]forethought, premeditation, murdering one Stephanie V. Keith. Do you understand that you're charged with that, sir?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: State is calling this as a first degree murder case.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Your attorneys advised me, sir, that they don't intend to contest certain aspects of that charge; that is to say they anticipate that they would not contest that decedent Ms. Keith was, in fact, shot

by you and that she died as a result thereof. Have they discussed that with you prior to trial?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand that they don't want to contest those two aspects on your behalf.

THE DEFENDANT: Yes, sir.

THE COURT: That is, they're not pleading guilty to any particular offense at this point on your behalf, but they don't intend to contest the fact that she was shot and that you were the person that shot her. Have they discussed that with you, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Have you given them your specific permission to do that during the course of the trial?

THE DEFENDANT: Yes, sir.

THE COURT: Any other questions or concerns about that issue at this point?

THE DEFENDANT: No, sir.

THE COURT: All right. Be seated.

Contrary to his arguments to this Court, defendant stated, through counsel, to the trial court that he "ha[d] not made a decision yet on whether [he] will testify or not." At no point during trial did defendant indicate he wished to testify.

The only suggestion that defendant wished to testify is contained within defendant's MAR. Furthermore, nothing in the record supports defendant's argument. Defendant has not shown that he intended to testify at trial nor that his trial counsel's conduct fell below an objective standard of reasonableness. Accordingly, he has failed to meet his burden. The Court of Appeals correctly determined that defendant's ineffective assistance of trial counsel claim is without merit.

Defendant further contends that his appellate counsel was ineffective for failing to challenge the trial court's limitation on defendant's forensic psychologist expert witness, Dr. Holly Rogers. In advancing this argument, defendant filed a Motion to Take Judicial Notice, requesting this Court take judicial notice of the prior appellate filings in his case. Judicial notice of the appellate filings is proper, and therefore,

defendant's motion is allowed. *See In re McLean Trucking Co.*, 285 N.C. 552, 557 (1974); N.C.G.S. § 8C-1, Rule 201 (2023).

An expert may not "testify to a particular legal conclusion or that a legal standard has or has not been met." *State v. Fisher*, 336 N.C. 684, 703–04 (1994). The trial court's ruling on whether expert testimony shall be admitted "will not be reversed on appeal absent a showing of abuse of discretion." *E.g.*, *State v. McGrady*, 368 N.C. 880, 893 (2016) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458 (2004)).

In this case, the trial court prohibited Dr. Rogers from using legal terminology in her testimony. *See Fisher*, 336 N.C. at 703–04. However, the trial court allowed Dr. Rogers to testify about defendant's

> major depressive disorder, that he was vulnerable to intense emotion and loss of control. And that because of this depressive disorder . . . it [a]ffected his ability to carry out or make plans to commit murder, or it inhibited his ability to reflect on his actions in a meaningful way. And . . . she can testify that it contributed to or [a]ffected his ability to create a plan or scheme to commit or carry out a murder.

The trial court's limitations on Dr. Rogers' testimony were permissible, as it restricted her use of legal terminology. Accordingly, defendant's MAR did not demonstrate the trial court abused its discretion in limiting Dr. Rogers' testimony. As such, defendant's appellate counsel was not deficient and did not prejudice defendant by failing to raise the issue on appeal. Thus, defendant's allegations of ineffective assistance of appellate counsel are without merit.

IV. Conclusion

The Court of Appeals properly dispensed with defendant's ineffective assistance of counsel claims and MAR. Accordingly, we affirm the Court of Appeals' opinion.

AFFIRMED.

Justice BERGER concurring.

I concur in the majority opinion but write separately because the question arises here whether we should follow the plain language of the post-conviction statutes and our precedent in *State v. McHone*, 348 N.C. 254 (1998), or the recently decided case o*f State v. Allen*, 378 N.C. 286 (2021).

This Court has long understood the extent to which prior decisions may bind future courts. While some distinction has been made for cases involving property and contractual rights not relevant here, in *State v. Ballance*, 299 N.C. 764 (1949), we stated that

> [i]n adjudicating a case, a court is not concerned with what the law ought to be, but its function is to declare what the law is. Moreover, the law must be characterized by stability if men are to resort to it for rules of conduct. These considerations have brought forth the salutary doctrine of *stare decisis* which proclaims, in effect, that where a principle of law has become settled *by a series of decisions*, it is binding on the courts and should be followed in similar cases.

Id. 767 (second emphasis added).

Justice Ervin authored the opinion for the Court in *Ballance*, and he noted that precedential value may be lacking where this Court is "confronted by a single case which is much weakened as an authoritative precedent by a [strong and well-reasoned] dissenting opinion." *Id.*; *See also Sidney Spitzer & Co. v. Commissioners of Franklin Cnty.*, 188 N.C. 30, 123 (1924) (when the Court is "presented with *a single decision*, which we believe to have been inadvisedly made, it is incumbent on us to overrule it, if we entertain a different opinion.") (cleaned up) (emphasis added). Put another way, an isolated holding may be persuasive, but it is not binding, especially when met with a sound dissent. Such is the case here.

My dissent in *State v. Allen*, 378 N.C. 286 (2021), joined by two of my colleagues, addressed several very real concerns with the Court's reasoning in that case. The Court in *Allen* set its thumb upon the scales when it declared for the first time that post-conviction evidentiary matters must be viewed in the light most favorable to the defendant. *Id.* at 296. With this novel approach, the majority gratuitously injected merit into any post-conviction claim that a defendant could imagine. After all, a defendant's factual assertions are deemed by *Allen* to be true in every circumstance.

But *Allen* is an isolated opinion which is not grounded in the plain language of our post-conviction statutes or our case law interpreting the same. Point after point in the dissent was met with silence from the majority, save and except an assertion in a footnote concerning the procedural posture in *State v. McHone* 348 N.C. 254 (1998), and a comment in another footnote concerning the experience level of Allen's trial

counsel. *Id*. at 297, n. 5, 301 n. 6. The conspicuous absence of a cogent rebuttal underscores the soundness of the positions taken in my dissent.

Now, however, it is suggested that the Court's application of the plain language of N.C.G.S. § 15A-1420 and our precedent in *McHone* is somehow improper. But, as Justice Ervin emphasized, "the doctrine of *stare decisis* will not be applied in any event to preserve and perpetuate error and grievous wrong." *Ballance* at 229 N.C. at 767. *See also Patterson v. McCormick*, 177 N.C. 448 (1919) ("The rule of *stare decisis* cannot be applied to perpetuate error."). *Allen* was a grievous wrong, and we appropriately correct course with our opinion today.

Justice EARLS concurring in part and dissenting in part.

I agree with the Court that Mr. Walker's motion for appropriate relief (MAR) lacked the factual support required for an evidentiary hearing. I disagree, however, with the majority's purported and gratuitous reversal of *State v. Allen*, 378 N.C. 286 (2021), in discussing the standard of review.

Despite the majority's framing, *Allen* was not some ahistorical aberration from long-settled law. Just the opposite. In that case, this Court interpreted N.C.G.S. § 15A-1420 to explain when an MAR court must hold an evidentiary hearing. Under that statute, a defendant who files an "MAR within the appropriate time period 'is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit.' " *Allen*, 378 N.C. at 296 (quoting N.C.G.S. § 15A-1420(c)(1) (2019)). The question for the court is "whether an evidentiary hearing is required to resolve questions of fact." *Id.* (cleaned up); *see* N.C.G.S. § 15A-1420(c)(1) (2023). That is because a court *must* decide an MAR "without an evidentiary hearing," when the "motion and supporting and opposing information" raise "only questions of law." *Allen*, 378 N.C. at 296 (cleaned up). By contrast, if the "court cannot rule upon the motion without the hearing of evidence," it must hold that hearing and find facts. N.C.G.S. § 15A-1420(c)(4) (2023).

In construing those provisions, *Allen* did not sail in uncharted waters. This Court's decision in *State v. McHone*, 348 N.C. 254 (1998)—the very case the majority cites—applied the statute to evidentiary hearings:

> Under subsection (c)(4), read *in pari materia* with subsections (c)(1), (c)(2), and (c)(3), an evidentiary

> hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief *even if resolved in his favor* . . . .

Id. at 258 (second emphasis added).

Allen thus explained that MAR courts "are obligated to conduct an evidentiary hearing to resolve any disputed facts unless" the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor. *Allen*, 378 N.C. at 296 (citing *McHone*, 348 N.C. at 257). So when a court summarily dismisses an MAR without a hearing, we review that decision by asking whether the evidence in the record and MAR—"considered in the light most favorable to [the defendant]"—would "if ultimately proven true, entitle him to relief." *Id.* (citing *McHone*, 348 N.C. at 258). Put another way, an evidentiary hearing is required if an MAR's "factual allegations would entitle the defendant to relief if true" and the "filings provide some evidentiary basis for the allegations." *Id.* at 297. In that case, a court must "determine the facts necessary to resolve the claim on its merits." *Id.*

Rather than confront *Allen* head-on, the majority constructs a strawman. As the majority tells it, that decision required MAR courts to review "a defendant's asserted grounds for relief in the light most favorable to defendant." *Allen*, however, did no such thing. As explained above, *Allen* examined when an evidentiary hearing is required to resolve an MAR. We did not prescribe how courts should weigh a defendant's "asserted grounds for relief," as the majority would have it. *Allen* instead focused attention on the "evidence contained in the record and presented in [the defendant's] MAR." *Allen*, 378 N.C. at 296. Only those factual allegations are viewed in the defendant's favor and only "when making the initial determination as to whether the facts alleged by the defendant would entitle the defendant to relief if proven true." *Id.* at 297 n.4. In fact, *Allen* took pains to explain its scope, cautioning that "[n]othing in this opinion alters the undisputed premise that the defendant ultimately bears the burden of proving by a preponderance of the evidence the existence of the asserted grounds for relief." *Id.* (cleaned up). The majority thus criticizes *Allen* for something it did not say and overrules a standard *Allen* did not prescribe. And in all events, *Allen* did not work the sea change the majority wrings from it or conjure up a novel standard. Instead, it moored its holding in the text of Section 15A-1420 and our precedent interpreting it. That remains true, even if the dissent in that case disagreed.

Reversing our precedent is also gratuitous. Here, the parties did not dispute *Allen*'s vitality or ask us to revisit it. And overturning that

decision is as unnecessary as it is unexamined. The Court unanimously agrees that Mr. Walker's MAR lacks the evidentiary support needed for a hearing. Whether or not we view the evidence in Mr. Walker's favor, the outcome is the same. For that reason, I see no need to reach out, misrepresent a precedent, and then needlessly reverse it. Indeed, that holding is mere dicta and should be treated as such.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

GARY W. SURGEON AND MARLA LEPLEY-STARR,
INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARITY SITUATED
v.
TKO SHELBY, LLC, TRADING AS NISSAN OF SHELBY; INTEGRITY AUTOMOTIVE PROMOTIONS, LLC; A TO Z STAFFED EVENTS, INC.; BRIAN LEACHMAN; MICHAEL SMITH; AND TRAVIS K. OSTROM, D/B/A THE TKO GROUP, DEFENDANTS; DEALER COMPLIANCE SERVICES, INC., CROSS-CLAIM DEFENDANT

No. 198A22

Filed 22 March 2024

Class Actions—class certification—inconsistent definitions of class—further issues for review on remand

In a class action lawsuit arising from an allegedly deceptive promotional flyer that a car dealership sent to plaintiffs—who were led to believe that they had won either a large cash prize or a free car when, in fact, they had won only two dollars—the trial court's class certification order was vacated because of an internal inconsistency in the order that precluded meaningful appellate review. Specifically, the court's order defined the prospective class in one way—as individuals who called the hotline listed on the flyer and then went to the car dealership to claim their prize—when analyzing the certification criteria, but then defined the class differently—as individuals who went to the car dealership to claim the prize regardless of whether they called the hotline—when certifying the class. The matter was remanded with additional instructions for the trial court to determine whether any conflicts of interest existed within the proposed class and whether any potential inefficiencies existed that would render class certification inappropriate—two issues that

could only be resolved after the court settled on one definition of the class.

Appeal pursuant to N.C.G.S. § 7A-27(a)(4) from an order granting plaintiff's motion for class certification entered on 13 December 2021 by Judge Forrest D. Bridges, in Superior Court, Gaston County. Heard in the Supreme Court on 12 September 2023.

Higgins Benjamin, PLLC, by John F. Bloss and Frederick L. Berry, for plaintiff-appellees.

Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., by Michael L. Carpenter and D. Scott Hester, Jr.; Wilson Elser Moskowitz Edelman & Dicker LLP, by Jeremy A. Stephenson; and Barnes, Alford, Stork & Johnson, LLP, by Curtis W. Dowling and Matthew G. Gerrald, for defendant-appellants.

DIETZ, Justice.

Plaintiffs brought this class action lawsuit after receiving a promotional flyer from a car dealership. They allege that the flyer was deceptive and misled them into believing they won a free car or $20,000 cash. Instead, they received a $2 prize. Plaintiffs allege that they and nearly one thousand other people were harmed by the deceptive promotion.

The trial court certified plaintiffs' case as a class action in a detailed written order, and defendants appealed. At oral argument, the parties acknowledged that the trial court's certification order is internally inconsistent. Specifically, the trial court's order used one class definition to analyze the certification criteria, then changed the definition when actually certifying the class.

This inconsistency requires us to vacate the order and remand for further proceedings. As explained below, we cannot engage in meaningful appellate review of a trial court order—particularly one that includes a discretionary component—when the order suffers from this type of internal contradiction.

Because we vacate the order on this basis, we need not address all of defendants' arguments in this appeal, many of which may be mooted by entry of a new order. We limit our analysis to a few issues, such as conflicts of interest and efficiency concerns, that are likely to persist on remand even after the inconsistency is corrected.

Facts and Procedural History

I. The promotional sales event

In 2018, plaintiffs Gary Surgeon and Marla Lepley-Starr received a promotional flyer in the mail advertising a "Game On Tent Sale Event" held exclusively at Nissan of Shelby, an automobile dealership. The flyer informed recipients that they had the chance to win one of six "grand prizes," including the largest prize, a 2018 Nissan Sentra SR or $20,000 in cash. In the middle of a grid displaying these grand prizes, there was a scratch-off area that revealed a contest code.

On the flyer, promotional language stated that recipients who "scratch and match" their scratch-off codes with one of the numbers assigned to a prize become a "guaranteed winner." The flyer instructed recipients with a matching code number to call the event hotline and come to the dealership during the sales event to claim their prize.

Although not evident from the flyer itself, the code number beneath the scratch-off portion of all 50,000 flyers was the same. It matched the code number assigned to the largest grand prize, the 2018 Nissan Sentra SR or $20,000 in cash. This scratch-off code was not the code number used to identify the winning contestants of the contest. Instead, each flyer had a separate "activation code" located in a red box under the contest instructions. This code, which was unique to each flyer, was used to identify the contest winners.

After receiving the flyer, plaintiffs each scratched off the area labeled "scratch and match" on their flyers and revealed the code number matching the 2018 Nissan Sentra SR or $20,000 prize. Plaintiffs called the event hotline to claim their prize. An automated answering system congratulated them on winning and prompted them to come to the dealership to claim their prize.[1]

As a result, both plaintiffs visited the dealership during the sales event. When they tried to claim their prizes, plaintiffs learned that they were not winners of the 2018 Nissan Sentra or $20,000. Dealership agents told plaintiffs that the hidden numbers beneath the scratch-off area of their contest flyers did not mean anything. Instead, the agents explained, the "activation code" in the red box on the flyer determined which prize each recipient had won. Those activation code numbers

1. As noted below, the complaint alleges that plaintiff Marla Lepley-Starr called the event hotline, but the record indicates she may have called the dealership directly and spoken to a sales agent.

matched numbers on a poster displayed at the dealership. In addition to the six "grand prizes" on the contest flyer, there was a seventh prize box on the poster that awarded a $2 cash prize. The sales agents at the dealership told plaintiffs that, based on their activation codes, they won the $2 prize.

II. The class action lawsuit

Plaintiffs later brought a class action complaint against the dealership and various other parties connected to the sales promotion. They sought to certify a class of "all individuals who received a contest [f]lyer which had the scratch-off number 801602," which was the number matching the 2018 Nissan Sentra SR or $20,000 cash prize, and who then "went to Nissan of Shelby to claim their prizes."

Plaintiffs alleged that defendants created a deceptive contest flyer in violation of North Carolina law governing unfair or deceptive trade practices; breached the terms of a contract with recipients of the flyer by failing to deliver the prizes; and negligently created and implemented the sales event.

During discovery, defendants produced a log with contact information for approximately 50,000 households that received the flyer in the mail. Defendants also produced a log of the 2,557 people who called the event hotline to claim their prize. That log lists 1,167 people as using the hotline to make an appointment to visit the dealership.

Defendants did not produce any records identifying the people who actually visited the dealership to claim a prize. There is a factual dispute concerning what happened to those records and who is responsible. At this stage in the proceeding, defendants estimate that 927 people visited the dealership during the sales event, although not all of those people necessarily visited to claim a promotional prize.

III. The trial court's class certification

Several years into the lawsuit, the trial court granted plaintiffs' motion to certify a class. *Surgeon v. TKO Shelby, LLC*, No. 18 CVS 3983, 2021 WL 9772618, at *5 (N.C. Super. Dec. 13, 2021).

The trial court defined the class of plaintiffs in its written order as follows:

> All individuals who received at their place of residence a contest Flyer promoting a contest held at Nissan of Shelby in late April and/or early May 2018, which had the scratch-off number 801602 that matched the

> number for Prize 5 (the 2018 Nissan Sentra SR or $20,000.00 cash), and who went to Nissan of Shelby to claim their prize.

Id. at *5.

In its analysis in the order, the trial court explained that it intended to certify a class of the "Ups." *Id.* at *4. The trial court's order defines the "Ups" as "the approximately 927 people who called the number and who showed up at the dealership." *Id.* Notably, the definition of "Ups" used in the court's analysis includes a requirement that the class members both "called the number" and "showed up at the dealership." *Id.*

The class definition quoted above, by contrast, applies to anyone who received the flyer and then "went to Nissan of Shelby to claim their prize" regardless of whether they called the event hotline as the flyer instructed. *Id.* at *5.

Then, in the trial court's instructions regarding notice to potential class members, the court ruled that notice should be sent to the "1,167 people who called the telephone number on the contest flyer and made an appointment to come to the dealership for the sales event," limiting notice to those people who called the event hotline *and* made an appointment—a smaller subset of the 2,557 people who called the hotline to claim a prize, and who may have gone to the dealership without making an appointment. *Id.*

Defendants appealed the trial court's class certification order directly to this Court under N.C.G.S. § 7A-27(a)(4).

Analysis

This Court reviews a trial court's class certification order for abuse of discretion. *Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp.*, 369 N.C. 202, 209 (2016). The "test for abuse of discretion is whether a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Frost v. Mazda Motor of America, Inc.*, 353 N.C. 188, 199 (2000) (cleaned up). Within this analysis, we review the trial court's conclusions of law, including its evaluation of the legal criteria to establish a class, de novo. *Fisher*, 369 N.C. at 209.

I. Class certification criteria

We begin our analysis by reviewing the criteria for class certification. Rule 23 of the North Carolina Rules of Civil Procedure permits class actions when the "persons constituting a class are so numerous

as to make it impracticable to bring them all before the court." N.C.G.S. § 1A-1, Rule 23(a) (2023).

The party seeking class certification bears the burden to show that a proper class exists, meaning "the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 280 (1987).

Beyond this threshold requirement, the party seeking class certification also must satisfy a number of other certification criteria, including: (1) that the class representatives have the ability to fairly and adequately represent the interest of all class members; (2) that there are no conflicts of interest between the class representatives and the unnamed class members; (3) that the class representatives have a genuine personal interest in the outcome of the suit; and (4) that the class representatives have the ability to adequately represent class members outside of the jurisdiction; (5) that the proposed class members are so numerous that it is impractical to bring them all before the court; and (6) that it is possible to provide sufficient notice to all putative class members. *Id.* at 282–83.

Once these legal prerequisites are met, the trial court may, in its discretion, certify a class. *Faulkenbury v. Teachers' & State Emps.' Ret. Sys. of N.C.*, 345 N.C. 683, 697 (1997). In evaluating whether class certification is appropriate, the trial court should consider "whether a class action is superior to other available methods" to adjudicate the controversy and whether the class action is "likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results." *Crow*, 319 N.C. at 284. The court also should balance the potential benefits of class certification against "inefficiency or other drawbacks" to class certification. *Id.* This "inefficiency" includes the possibility that the costs of administering a class action exceed the plaintiffs' potential recovery. *Maffei v. Alert Cable TV of N.C., Inc.*, 316 N.C. 615, 620 (1986).

Defendants argue that the trial court's class certification order fails to comply with many aspects of this multi-step test. They first challenge several of the trial court's conclusions of law, arguing that the class members are not sufficiently ascertainable; that there are irreconcilable conflicts of interest; and that any common issues of law or fact do not predominate over the many other issues affecting individual class members.

Defendants also argue that the trial court abused its discretion by certifying the class because the costs and drawbacks of this particular

class far outweigh any benefits to the putative class members. Before we address defendants' arguments, we first address a conflict in the wording and reasoning of the trial court's order.

II. Conflicting class definitions

In its order, the trial court stated that the "Class consists of the approximately 927 people who called the number and who showed up at the dealership—the 'Ups.' " The court then explained that the plaintiffs "have the names of most class members" because that information is contained in the list of 1,167 people who called the hotline number and made an appointment to go to the dealership to claim their prize.

The trial court used this definition of "Ups"—people who both called the hotline number and went to the dealership to claim a prize—to conduct its class certification analysis, including its analysis of whether class members were sufficiently ascertainable, whether there were conflicts of interest among members of the class, and whether it was possible to provide sufficient notice to class members.

But then, when the trial court certified the class, it used a broader definition that included any person who received the promotional flyer and went to the dealership to claim a prize, regardless of whether that person first called the contest hotline or made an appointment:

> All individuals who received at their place of residence a contest Flyer promoting a contest held at Nissan of Shelby in late April and/or early May 2018, which had the scratch-off number 801602 that matched the number for Prize 5 (the 2018 Nissan Sentra SR or $20,000.00 cash), and who went to Nissan of Shelby to claim their prize.

This definition of the class does not match the one the court used in its certification analysis.

The mismatch between the class the trial court analyzed and the one it ultimately certified requires us to vacate the order and remand the matter for further proceedings. We cannot engage in meaningful appellate review of a trial court order—particularly one that includes a discretionary component—when the court's ultimate decision on an issue cannot be squared with the reasoning used to reach that decision. *See*, *e.g.*, *Coble v. Coble*, 300 N.C. 708, 714 (1980); *Lackey v. Hamlet City Bd. of Educ.*, 257 N.C. 78, 84 (1962). Accordingly, we vacate the trial court's order and remand for further proceedings.

III. Potential conflicts of interest & inadequate representation

Because we vacate and remand this matter to address the inconsistent class definitions in the order, we need not address all of defendants' arguments in this appeal, many of which may be mooted by entry of a new order on remand. But several of defendants' arguments are intertwined with the mismatched class definitions and warrant further discussion to guide the trial court's analysis on remand.

The first of these issues concerns potential conflicts of interest within the class. To obtain class certification, the named plaintiffs must show that "there is no conflict of interest between them and the members of the class who are not named parties, so that the interests of the unnamed class members will be adequately and fairly protected." *Crow*, 319 N.C. at 282. Likewise, the named plaintiffs must show that there are no conflicts within the broader class that prevent class member interests from aligning on key factual or legal questions. *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118–19 (2d Cir. 1999). These intraclass conflicts, depending on their extent, could require certification of subclasses with separate counsel, or could preclude class certification altogether. *Id.*; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864–65 (1999).

Here, some of plaintiffs' claims raise potential conflict-of-interest concerns. For example, plaintiffs' contract claim relies on the Court of Appeals' holding in *Jones v. Capitol Broad. Co., Inc.*, 128 N.C. App. 271, 273–74 (1998). In *Jones*, the plaintiff filled out an entry form for a public raffle, with hopes of winning a new Ford F-150 pickup truck. *Id.* at 272. After the plaintiff submitted the form, defendants called plaintiff and informed him that he had won the truck. *Id.* Later that day, defendants again called plaintiff to tell him that he had not won the contest and the truck had been given to someone else. *Id.* at 272–73.

The Court of Appeals held that this type of contest can create contractual rights. *Id.* at 273. Relying on cases from other jurisdictions, the court held that "advertising a promotion contest to the public is in the nature of an offer. An enforceable contract is formed when a party accepts that offer and consideration is provided by entering the contest and complying with all of the terms of the offer." *Id.* at 274.

Importantly, under the contract theory articulated in *Jones*, the contest participant must have complied with "all of the terms of the offer"—meaning the contest rules set out in the promotion. *Id.*

Assuming plaintiffs proceed under the contract theory articulated in *Jones*, the requirement that contest participants must have complied

with all terms of the offer could create potential conflicts of interest among class members. The "terms of the offer" in these contest cases generally are understood to mean the specific rules or instructions contained in the promotional material. *Id.*

The flyer in this case contains instructions telling winners to call the event hotline number and then go to the dealership immediately to claim their prize:

> HOW TO WIN: SSCRATCH [sic] OFF THE CIRCLE IN THE DICE BELOW AND MATCH THE ACTIVATION CODE. IF THE SCRATCH OFF BELOW MATCHES ONE OF THE SIX LUCKY NUMBER GAME PRIZE BOXES, YOU ARE A GUARANTEED WINNER OF ONE OF THESE PRIZES! CALL THE EVENT HOTLINE NOW AT 980.289.4680 & PROCEED TO NISSAN OF SHELBY IMMEDIATELY!

At the bottom of the flyer, there are additional instructions stating that participants whose scratch-off reveals winning numbers should "call the event hotline" and "proceed to the dealership immediately to claim your prize."

On the reverse side of the flyer, large instructions next to the "SWEEPSTAKES PRIZE BOARD" with images of the prizes states: "If your scratch off matches a lucky number prize box YOU HAVE WON! CALL 908.289.4680 & be sure to have your activation code ready. Then, come to dealership to claim your prize!"

Finally, in very small print at the bottom of the flyer, there is a lengthy statement with more specific contest rules, such as information about who is eligible and when the contest expires. Those rules state that "in order for the grand prize to be awarded, the randomly selected individual designated to receive the winning mail piece must redeem the mail piece in person, and their name and address must match the information on file with promoter." These fine-print rules do not mention a requirement to call the event hotline.

If, as plaintiffs allege, this contest language is an offer under *Jones*, then acceptance of the offer requires complying with the specific terms set out in the offer. *Jones*, 128 N.C. App. at 274. This raises a thorny question about the purported contract language in this case: Is calling the event hotline a term of this purported contract? After all, the promotional flyer repeatedly instructs contestants to do so before going to the dealership to claim the prize.

The answer to this question is meaningful because, as noted above, the trial court's class certification analysis focused on a putative class (the so-called "Ups") that both called the hotline and went to the dealership. To this potential class, assessing whether a call to the hotline is a contract term or not is irrelevant, because they complied with that potential contract term.

By contrast, the class that the trial court actually certified—everyone who received the winning contest flyer and then went to the dealership—includes an unknown number of potential class members who did *not* call the event hotline. Indeed, there is even evidence in the record suggesting that one of the named plaintiffs, Marla Lepley-Starr, did not call the event hotline as alleged in the complaint (the record suggests she may have called the dealership directly and spoken to a sales agent).

Assuming plaintiffs established a valid contract under *Jones*, class members who did not call the event hotline could face contract hurdles that other class members do not. This is precisely the sort of potential conflict that must be examined and resolved in the class certification order. *Crow*, 319 N.C. at 282.

Thus, on remand, the trial court should examine whether the proposed class creates conflicts of interest and, if so, take appropriate steps to remedy the conflict, such as dividing the class into subclasses with separate counsel, or denying class certification of this proposed class altogether. *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 343 (2014); *Dewalt v. Hooks*, 382 N.C. 340, 350 (2022); *Ortiz*, 527 U.S. at 864–65; *Boucher*, 164 F.3d at 118–19.

IV. Potential inefficiencies in the class

Another issue highlighted by the mismatch in class definitions is the potential for inefficiencies that could render class certification inappropriate.

Before certifying a class, the trial court must balance the potential benefits of certifying the proposed class against any "inefficiency or other drawbacks." *Crow*, 319 N.C. at 284. The entire notion of class actions is grounded in this concept of efficiency; class actions provide a means for potential litigants with valid legal claims to have those claims "aggregated in an efficient and economically reasonable manner." *Maffei*, 316 N.C. at 620.

Thus, although class certification analysis ordinarily does not involve an inquiry into the merits of the plaintiffs' claims, it is appropriate for

the trial court to consider, as a matter of law, what remedies would be available if the plaintiffs prevailed on their claims.

In *Maffei*, for example, the trial court determined that the "damages recoverable by any one member of the proposed class could not exceed $.29," and therefore "certification of this action as a class action would be inadvisable, inefficient and inappropriate." *Id.* at 617.

We affirmed the trial court's ruling, holding that class members' recovery "would conceivably not even cover the cost of postage and stationery for a claimant to notify the court of his inclusion within the class." *Id.* at 621. We further held that, when "balancing the costs of litigation against the likely benefits," the costs of administering a class action, compared to the plaintiffs' potential recovery, may render the class action so inefficient that it does not warrant certification. *Id.*

On remand in this case, there are similar analyses that may be appropriate, depending on the class actually certified. For example, the complaint asserts claims for unfair and deceptive trade practices and negligence. The remedy for both negligence claims and unfair and deceptive trade practices claims is damages based on the actual injury suffered by the claimant. *Hansley v. Jamesville & Washington R.R. Co.*, 115 N.C. 602, 605 (1894) (negligence); *Pearce v. Am. Def. Life Ins. Co.*, 316 N.C. 461, 471 (1986) (unfair and deceptive trade practices).

Defendants contend that the only actual injury applicable to these claims is potential class members' wasted time traveling to the dealership and unsuccessfully attempting to claim the grand prize. The value of this wasted time, defendants contend, is so "de minimis" that it precludes class certification under *Maffei*. Plaintiffs, by contrast, contend that each class member suffered an actual injury equal to "the $20,000 grand prize" itself.

On remand, the trial court should examine the potential recovery available for each of plaintiffs' claims and assess whether some or all of those claims present the problem identified by *Maffei*, where the costs of litigating that claim so greatly exceeds class members' potential damages that it renders class certification prohibitively inefficient. 316 N.C. at 617, 621. If so, the court should consider whether, in its discretion, some or all of plaintiffs' claims are inappropriate for class certification.

Conclusion

Because the trial court's class certification order is internally inconsistent, we vacate that order and remand for further proceedings.

VACATED AND REMANDED.

TAYLOR v. BANK OF AMERICA, N.A.

[385 N.C. 783 (2024)]

CHESTER TAYLOR III, RONDA AND BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE AND ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE

v.

BANK OF AMERICA, N.A.

No. 102A20-3

Filed 22 March 2024

Statutes of Limitation and Repose—fraudulent denial of mortgage modification—date of discovery—lack of diligence—claims time-barred

In an action brought by homeowners (plaintiffs) alleging that a bank (defendant) operated a fraudulent scheme to delay plaintiffs' mortgage modification requests—submitted pursuant to a federal mortgage relief program—while continuing to collect trial period payments from them, which eventually resulted in the foreclosure of their homes, the trial court properly dismissed plaintiffs' claims as being time-barred because the claims were filed outside of the applicable statutory time limits from the date plaintiffs knew or should have known of their injuries and of the alleged fraud. At the latest, the statutes of limitations for all of plaintiffs' claims (both non-fraud and fraud) began to run by the date that each plaintiff lost his or her home. Although plaintiffs argued that they could not have discovered defendant's fraud until later, given the nature and frequency of their interactions with defendant without any progress being made on the modification application process, plaintiffs should have known of defendant's misdeeds through the exercise of ordinary diligence.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2021) from the decision of a divided panel of the Court of Appeals, 287 N.C. App. 358, 882 S.E.2d 605 (2022), reversing an order entered on 3 October 2019 by Judge Lisa C. Bell in Superior Court, Mecklenburg County, and remanding to the trial court for further proceedings. Heard in the Supreme Court on 2 November 2023.

Robinson Elliott & Smith, by William C. Robinson and Dorothy M. Gooding; Aylstock, Witkin, Kreis, & Overholtz, PLLC, by Samantha Katen, Chelsie Warner, pro hac vice, and Caitlyn Miller, pro hac vice; and Robert F. Orr, for plaintiffs-appellees.

McGuireWoods LLP, by Bradley R. Kutrow and Dylan M. Bensinger; and Goodwin Procter, LLP, by Keith Levenberg, pro hac vice, and James W. McGarry, pro hac vice, for defendant-appellant.

NEWBY, Chief Justice.

North Carolina law has long recognized that a plaintiff must initiate an action within the statutorily prescribed period to avoid dismissal of his claim. These statutes of limitations strike a balance between one party's right to assert a claim and another party's right to be free from a stale claim. Here plaintiffs' claims arise from defendant's alleged scheme to fraudulently deny mortgage modifications to plaintiffs and then foreclose on their homes. The complaint reveals that each plaintiff knew, or reasonably should have known, of his or her injuries and the alleged fraud at least four to seven years before filing the complaint. As a result, plaintiffs' claims are time-barred by the applicable statutes of limitations. Accordingly, we reverse the decision of the Court of Appeals.

Plaintiffs are citizens of North Carolina, California, Wisconsin, Arizona, Michigan, or Nevada.[1] Their claims arise from defendant's alleged misadministration of the Home Affordable Modification Program (HAMP). HAMP was a federal mortgage relief program "implemented in March of 2009 to assist the millions of American homeowners facing foreclosure" after the 2008 recession. Under the program, homeowners, including plaintiffs, were given the opportunity to modify the terms of their mortgages after submitting an application and completing a brief trial payment period.

Each plaintiff elected to participate in HAMP through his or her mortgage servicer, defendant. Plaintiffs alleged they were each a victim of defendant's "fraudulent scheme" to "intentionally prevent thousands of eligible applicants from receiving permanent HAMP modifications." Specifically, plaintiffs alleged that defendant collected plaintiffs' HAMP

1. Because we must assume that plaintiffs' allegations are true when considering this matter, *see Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 559, 681 S.E.2d 770, 774 (2009), the following recitation of facts is taken from plaintiffs' amended complaint.

trial period payments while simultaneously delaying their permanent mortgage modifications in order to "set [p]laintiff[s] up for foreclosure."

For example, one of the plaintiffs, Chester Taylor III, contacted defendant seeking a HAMP modification in February 2010. According to the complaint, defendant's loan representative advised Taylor "to refrain from making his regular mortgage payments" because he "had to be two to three months behind on his mortgage loan" to qualify for HAMP. Taylor later learned that this statement was false, but at the time, he relied on this statement and defaulted on his mortgage so that he could participate in HAMP.

About one month later, Taylor submitted a "properly completed" HAMP application to defendant. Taylor received a letter approving him for a HAMP trial period and requesting that he make three "trial payments" to receive a permanent modification to his mortgage terms. Taylor then began making trial payments to defendant hoping that he would receive a permanent modification and "save his home" from foreclosure.

Over the course of the next two years, however, defendant collected Taylor's trial period payments while also purposefully delaying Taylor's permanent loan modification. Defendant delayed the modification process by repeatedly telling Taylor there were problems with his application and requesting that he resubmit certain paperwork. For example, defendant would tell Taylor that his documents were "not current," "incorrect," or "missing" even though defendant had already received all necessary documents. Taylor alleges that defendant's representatives made these false statements "for the specific purpose of frustrating the HAMP application process to ensure a modification was ultimately denied, resulting in foreclosure." Continuing to rely on these statements, Taylor resubmitted his application and documentation more than thirty times between 2010 and 2012. Ultimately, defendant never approved Taylor for a permanent HAMP modification and foreclosed on Taylor's home in September 2012. By the time defendant foreclosed on Taylor's home, Taylor had made fourteen trial period payments to defendant. Defendant retained the money but never applied these payments to Taylor's account.

All plaintiffs allege that they experienced a similar pattern of conduct after applying with defendant for a HAMP modification. The complaint reveals that each plaintiff lost his or her home to foreclosure between April 2011 and January 2014. Plaintiffs further allege that defendant "fraudulently concealed the facts giving rise to" their claims

and that, as a result, they "could not have reasonably discovered the facts that formed the basis of their fraud claims against [defendant] until they retained their attorneys."

As alleged in their complaint, plaintiffs are not the only purported victims of defendant's fraudulent misadministration of HAMP. Homeowners filed numerous lawsuits "across the country" in state and federal courts alleging claims based on the exact same conduct. *See, e.g.*, *In re Bank of Am. Home Affordable Modification Program (HAMP) Cont. Litig.*, M.D.L. No. 10-2193-RWZ, 2013 WL 4759649 (D. Mass. Sept. 4, 2013). Defendant's scheme was so widespread that in March 2012, the federal government and forty-nine state attorneys general sued defendant for conduct "involv[ing] identical issues in fact and law" as those alleged by plaintiffs. Under a consent judgment entered in that lawsuit in April 2012, defendant agreed to pay over $2 billion to homeowners to "remediate harms" resulting from its HAMP misconduct. These lawsuits were ongoing during the time that plaintiffs were seeking their own HAMP modifications from defendant, and plaintiffs acknowledged the existence of these lawsuits in their complaint.

Plaintiffs filed their complaint in this case on 1 May 2018 and their amended complaint on 13 March 2019. The complaint alleged claims based on common law fraud, fraudulent concealment, intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, unfair and deceptive trade practices, and, in the alternative, negligence. On 11 April 2019, defendant filed a motion to dismiss the amended complaint. The trial court granted defendant's motion to dismiss on the grounds that all plaintiffs' claims were barred by the applicable three-year and four-year statutes of limitations.[2] *See* N.C.G.S. §§ 1-52(9), 75-16.2 (2021). Plaintiffs appealed to the Court of Appeals.

In a 29 December 2022 opinion, the Court of Appeals majority held that the trial court erred in dismissing plaintiffs' claims as barred by the statute of limitations. *Taylor v. Bank of Am., N.A.*, 287 N.C. App. 358, 361, 882 S.E.2d 605, 608 (2022). The Court of Appeals majority reasoned that because the complaint "suggest[s] [p]laintiffs remained unaware of [d]efendant's alleged fraudulent scheme for many years," plaintiffs had pled sufficient facts to avoid dismissal of their claims on statute of limitations grounds. *Id.* at 360, 882 S.E.2d at 607. Accordingly, the Court of Appeals reversed the trial court's ruling and remanded the matter for further proceedings. *Id.* at 361, 882 S.E.2d at 608.

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2. The trial court concluded that plaintiffs' claims were also barred by *res judicata* and collateral estoppel.

The dissent would have affirmed the trial court and held that all plaintiffs' claims were barred by the statute of limitations. *Id.* at 361, 882 S.E.2d at 608 (Dillon, J., dissenting). The dissent concluded that, at the very latest, the statute of limitations began to run when defendant foreclosed on each of plaintiffs' homes. *Id.* The dissent reasoned that "the statute of limitations ceased to be tolled" at that time because "each plaintiff became aware of his/her injury" at that moment. *Id.* Accordingly, because the foreclosures occurred "more than three years before the complaint was filed," the dissent concluded that all plaintiffs' claims were time-barred. *Id.* Defendant appealed to this Court based on the dissent. *See* N.C.G.S. § 7A-30(2) (2021).[3]

Here we must determine whether the trial court erred in dismissing plaintiffs' claims as time-barred by the applicable statutes of limitations. We review dismissals under Rule 12(b)(6) of the Rules of Civil Procedure de novo. *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 852, 786 S.E.2d 919, 923 (2016). In doing so, we "treat the plaintiff[s'] factual allegations as true" and view them "in the light most favorable to plaintiffs." *Turner*, 363 N.C. at 559, 681 S.E.2d at 774. Dismissal pursuant to Rule 12(b)(6) is "proper when the complaint 'fail[s] to state a claim upon which relief can be granted.' " *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5, 802 S.E.2d 888, 891 (2017) (quoting *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015) (alteration in original)). "When the complaint on its face . . . discloses facts that necessarily defeat the claim," the complaint must be dismissed. *Arnesen*, 368 N.C. at 448, 781 S.E.2d at 8 (citing *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). Specifically, dismissal is appropriate when a complaint alleges "uncontroverted facts" demonstrating that the cause of action is barred by the statute of limitations. *Latham v. Latham*, 184 N.C. 55, 61, 113 S.E. 623, 626 (1922).

This Court has "long recognized that a party must initiate an action within a certain statutorily prescribed period after discovering its injury to avoid dismissal of a claim." *Christenbury*, 370 N.C. at 5, 802 S.E.2d at 891. Statutes of limitations are intended to "afford security against stale demands, not to deprive anyone of his just rights by lapse of time." *Id.* at 5–6, 802 S.E.2d at 891 (quoting *Shearin v. Lloyd*, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1957), *superseded by statute*, N.C.G.S. § 1-15(b) (1971),

3. *See* N.C.G.S. § 7A-30(2) (2021), *repealed by* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-134.pdf. The repeal of N.C.G.S. § 7A-30(2) only applies to cases filed with the Court of Appeals on or after 3 October 2023. *See* Current Operations Appropriations Act § 16.21(e).

as enacted by An Act to Provide that a Cause of Action Accrues When Injury Is Or Should Have Been Known, ch. 1157, § 1, 1971 N.C. Sess. Laws 1706, 1706, *on other grounds as recognized in Black v. Littlejohn*, 312 N.C. 626, 630–31, 325 S.E.2d 469, 473 (1985)). This protection is strictly enforced because "[w]ith the passage of time, memories fade or fail altogether, witnesses die or move away, [and] evidence is lost or destroyed." *Estrada v. Burnham*, 316 N.C. 318, 327, 341 S.E.2d 538, 544 (1986), *superseded by statute*, N.C.G.S. § 1A-1, Rule 11(a) (Cum. Supp. 1988), *as enacted by* An Act . . . to Make Changes in Rule[ ] . . . 11(a) of the Rules of Civil Procedure, ch. 1027, § 55, 1985 N.C. Sess. Laws (Reg. Sess. 1986) 617, 639, *on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 163–64, 381 S.E.2d 706, 712–13 (1989).

A three-year statute of limitations applies to all of plaintiffs' claims, N.C.G.S. § 1-52(1), (4), (5), (9), (16) (2021), except for their unfair and deceptive trade practices claim, which is subject to a four-year statute of limitations, *id.* § 75-16.2.[4] Generally, a statute of limitations runs from the moment a plaintiff is injured. *Shearin*, 246 N.C. at 367, 98 S.E.2d at 511 ("In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises."). For claims sounding in fraud, however, "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C.G.S. § 1-52(9). This Court has repeatedly held that the statute of limitations for fraud claims is tolled until "discovery of the facts" constituting the fraud "or from the time when they should have been discovered in the exercise of proper diligence or reasonable . . . prudence." *Latham*, 184 N.C. at 64, 113 S.E. at 627; *see also Feibus & Co. (N.C.) v. Godley Constr. Co.*, 301 N.C. 294, 304–05, 271 S.E.2d 385, 392 (1980).

This discovery rule tolls the statute of limitations for fraud claims because fraud involves intentional deception and, therefore, may not always be readily discoverable at the moment a plaintiff's injury is complete. *See Forbis v. Neal*, 361 N.C. 519, 526–27, 649 S.E.2d 382, 387

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4. Because plaintiffs are from six different states, we must first decide which states' statutes of limitations apply to plaintiffs' claims—the statutes of limitations where plaintiffs' homes were located (the situs of the claims) or North Carolina's statutes of limitations (the forum of the suit). Generally, matters affecting substantive rights of the parties are determined by the law of the situs of the claim, while matters relating to procedure are governed by the laws of the forum state. *Howle v. Twin States Express, Inc.*, 237 N.C. 667, 671–72, 75 S.E.2d 732, 736 (1953). This Court has generally held that "statutes of limitation are clearly procedural" because they "affect[ ] only the remedy" available to a party "and not the right to recover." *Boudreau v. Baughman*, 322 N.C. 331, 340, 368 S.E.2d 849, 857 (1988). Therefore, North Carolina's statutes of limitations apply to plaintiffs' claims.

(2007). Nevertheless, a plaintiff is not permitted "to close his eyes to facts observable by ordinary attention" and thereby to toll the statute of limitations indefinitely. *Latham*, 184 N.C. at 64, 113 S.E. at 627 (quoting *In re Will of Johnson*, 182 N.C. 522, 525, 109 S.E. 373, 375 (1921)). "[A]s soon as the injury becomes apparent to the [plaintiff] or should reasonably become apparent, the cause of action is complete and the limitation period begins to run." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 493, 329 S.E.2d 350, 354 (1985).

The discovery rule is an objective standard, not a subjective one. It tolls the statute of limitations only until a reasonable person should have discovered the fraud under the circumstances and in the exercise of reasonable prudence. The particular moment that a specific plaintiff alleges he *actually* discovered the fraud is irrelevant. *See Latham*, 184 N.C. at 66, 113 S.E. at 627 (citing *In re Will of Johnson*, 182 N.C. at 525–27, 109 S.E. at 375).

Here we must determine when the statutes of limitations began to run for plaintiffs' claims. As for plaintiffs' non-fraud claims, the allegations of the complaint reveal that each plaintiff's injuries were complete—at the very latest—when they lost their homes. It is clear that by that point in time plaintiffs knew they would not receive a permanent HAMP modification, that defendant would not apply their trial period payments to their mortgage accounts, and that plaintiffs could not save their homes from foreclosure. Thus, the statutes of limitations that apply to plaintiffs' non-fraud claims began to run on the date that each plaintiff lost his or her home.

As for plaintiffs' fraud claims, the complaint makes clear that the statute of limitations also began to run—at the very latest—by the date they lost their homes. At that point in time, each plaintiff knew, or reasonably should have known, of the "facts constituting [defendant's] fraud," N.C.G.S. § 1-52(9), that is, defendant's wrongful delay and denial of plaintiffs' HAMP applications and the resulting foreclosures on plaintiffs' homes. By the time plaintiffs lost their homes, they were clearly aware of all facts regarding their prior interactions with defendant during the HAMP application process. Thus, on the dates that plaintiffs lost their homes, plaintiffs knew all the facts from which their fraud claims arise, and therefore, the statute of limitations for those fraud claims began to run.

Accordingly, all plaintiffs' claims accrued and the statutes of limitations began to run at the latest by the date that each plaintiff lost his or her home. Each plaintiff lost his or her home sometime between

April 2011 and January 2014. Thus, the latest point in time any plaintiff could have filed a complaint was January 2017, or in the case of an unfair and deceptive trade practices claim, January 2018. Plaintiffs did not file their original complaint until May 2018. Therefore, their claims are time-barred.

Plaintiffs argue that the discovery rule tolls the statute of limitations for their fraud claims beyond the dates of their foreclosures because they could not have discovered defendant's fraud until they consulted their current counsel. Plaintiffs' own allegations foreclose this argument, however, because their alleged experiences during the HAMP application process should have put a reasonable person on notice that something was wrong. The complaint reveals that each plaintiff "contacted [d]efendant repeatedly" during the application process "to ensure proper compliance with HAMP." Defendant, however, repeatedly asked plaintiffs to resubmit the same application materials numerous times without ever advancing the application process. Some plaintiffs complied with these resubmission requests fifteen, nineteen, or even thirty times over the course of several years.

Simultaneously, defendant told each plaintiff he or she could receive a permanent mortgage modification after making three trial payments. Defendant, however, collected as many as fourteen trial payments from plaintiffs without ever modifying their mortgages. All the while, defendant continued to delay approval of plaintiffs' applications and eventually, foreclosed on their homes. Even if plaintiffs did not understand the full extent of defendant's misconduct at the time of their foreclosures, their own alleged frustrations with the HAMP application process were sufficient to put them on notice that defendant had not acted in good faith and that they needed to investigate further.

Additionally, the complaint makes clear that had plaintiffs investigated further, they could have easily discovered the ongoing, nationwide litigation involving defendant's similar mistreatment of homeowners throughout the country. They also would have discovered the settlement to which defendant agreed in response to a 2012 lawsuit brought by the federal government and forty-nine state attorneys general for the exact same conduct underlying plaintiffs' claims. Plaintiffs' complaint alleges no facts suggesting that defendant fraudulently concealed any of this public information from plaintiffs. Even when viewed in the light most favorable to plaintiffs, these facts indicate that plaintiffs either knew of defendant's fraud or "should have [ ] discovered [it] in the exercise of ordinary diligence" by the time they lost their homes. *Latham*, 184 N.C. at 64, 113 S.E. at 627 (quoting *In re Will of Johnson*, 182 N.C. at

526, 109 S.E. at 375). Thus, the statute of limitations for plaintiffs' fraud claims began to run on the date that each plaintiff lost his or her home and was not tolled beyond that point in time.

While civil causes of action exist to provide remedies to aggrieved parties, statutes of limitations operate inflexibly and without reference to the merits of a cause of action. Even in the case of fraud, a plaintiff cannot avoid the statute of limitations by "sit[ting] on [his] rights," *Pembee Mfg. Corp.*, 313 N.C. at 493, 329 S.E.2d at 354, or "clos[ing] his eyes to facts observable by ordinary attention," *Latham*, 184 N.C. at 64, 113 S.E. at 627 (quoting *In re Will of Johnson*, 182 N.C. at 525, 109 S.E. at 375). Plaintiffs' complaint reveals that they had notice of their injuries and defendant's alleged fraud at least four to seven years before filing their complaint. Whatever injuries plaintiffs suffered, they lost the right to pursue a remedy for those injuries by failing to exercise ordinary diligence within the statutory limitations period. Because plaintiffs failed to timely file their action before the statutes of limitations expired, their claims are time-barred, and the trial court did not err in dismissing their complaint. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

Justice BERGER did not participate in the consideration or decision of this case.

Justice RIGGS dissenting.

I do not agree with the majority's application of the discovery rule to the plaintiffs' fraud claims because the majority's analysis does not fully align with our discovery rule jurisprudence. The majority anchors its conclusion that the discovery rule does not toll the statute of limitations for plaintiffs' fraud claims beyond the date of foreclosure to two facts or perceptions: (1) that plaintiffs encountered numerous difficulties during the HAMP application process; and (2) that plaintiffs "could have easily discovered" Bank of America's widespread mistreatment of homeowners through the nationwide litigation and a consent judgment entered in that litigation. Relying on these facts and perceptions, the majority concludes that the statute of limitations "began to run—at the very latest—by the time [plaintiffs] lost their homes." This conclusion disregards portions of the complaint and gives the news coverage of problems with the HAMP program more legal significance than

the allegations and record support. After considering the complaint and the allegations therein, especially the implications of the consent judgment in earlier Bank of America HAMP program litigation, I would hold that the statute of limitations should be equitably tolled for the fraud claims of those plaintiffs who lost their homes after Bank of America executed the consent judgment. I respectfully dissent.

I. Analysis

Broadly speaking, our discovery rule jurisprudence demonstrates that foreclosure itself is insufficient to cause the fraud claims to accrue. That is because the foreclosure process itself does not represent an act constituting fraud nor do the facts surrounding a foreclosure give rise to an inference of fraud. Indeed, the facts that the majority wants us to believe would put a reasonable person on notice to look for fraud—the HAMP application process and news coverage of litigation related to Bank of America's administration of the HAMP program—are not nearly as informative to a reasonable person as the majority would suggest. I dissent because, while I recognize that our jurisprudence requires us to apply an "objective" reasonable person standard to the discovery of fraud, I do not believe we are required to filter every fact through a lens least sympathetic to regular citizens trying to navigate complex bureaucracies.

Under N.C.G.S. § 1-52(9), a cause of action in fraud "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C.G.S. § 1-52(9) (2023). This Court has interpreted this discovery rule "to set accrual at the time of discovery *regardless* of the length of time between the fraudulent act or mistake and plaintiff's discovery of it." *Feibus & Co. (N.C.) v. Godley Constr. Co.*, 301 N.C. 294, 304 (1980). Typically, however, a duty of inquiry begins "when an event occurs to 'excite [the aggrieved party's] suspicion or put [that party] on such inquiry as should have led, in the exercise of due diligence, to a discovery of the fraud.' " *Forbis v. Neal*, 361 N.C. 519, 525 (2007) (first alteration in original) (quoting *Vail v. Vail*, 233 N.C. 109, 117 (1951)). Significantly, and what the majority does not address, is that this Court has held "[e]quity will deny the right to assert the defense of the statute of limitations when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." *Duke Univ. v. Stainback*, 320 N.C. 337, 341 (1987) (citing *Nowell v. Great Atl. & Pac. Tea Co.*, 250 N.C. 575 (1959)).

Applying this principle, we have held that "discovery rules are capable of being construed broadly to comport with the policy of fairness to

plaintiffs who are unaware that they have been injured in a legal sense." *Black v. Littlejohn*, 312 N.C. 626, 645 (1985). To determine when these fraud claims would accrue in this complex and allegedly dishonest mortgage assistance program scenario, it is instructive to consider this Court's application of the discovery rule in a different context. In *Black v. Littlejohn* this Court considered the discovery rule in the context of a medical malpractice matter, in which actions accrue when the plaintiff knew or should have known of a latent injury. *Id.* at 628. In that case, the plaintiff underwent a hysterectomy after being told by her doctor that nothing else would resolve her endometriosis. *Id.* at 627. After the statute of limitations had run, using the date of the surgery as the date from which the action accrued, plaintiff learned of an FDA-approved medication that may have resolved her condition without requiring a hysterectomy. *Id.* The Court clarified that an injury only triggers the statute of limitations when the plaintiff "discovers, or in the exercise of reasonable care, should have discovered, that she was injured *as a result of defendant's wrongdoing*." *Id.* at 642 (emphasis added). The Court concluded that the removal of the reproductive organs was not the injury from which the action accrued; instead, the action accrued only once the plaintiff learned that the defendant was negligent by failing to advise her of the alleged alternative treatment. *Id.* at 637, 646–47.

Similarly, here, the facts constituting the fraud are not the foreclosure or loss of the home, but instead the fraudulent business practices Bank of America allegedly employed in each plaintiff's HAMP application process. The majority's assertion that the frustrating HAMP application process itself should have put plaintiffs on notice of fraud conflates what many Americans struggle with daily—navigating financial bureaucracies—with evidence of fraud. Here, in concluding that having to contact Bank of America repeatedly, resubmitting the same application materials numerous times, and making trial payments should have put the plaintiffs on notice of the fraud dramatically expands the investigatory burdens placed on harmed citizens in seeking justice in a court of law, and imposes those burdens earlier. I agree that plaintiffs are not permitted "to close [their] eyes to facts observable by ordinary attention," thereby tolling the statute of limitations indefinitely. *Latham v. Latham*, 184 N.C. 55, 64 (1922) (quoting *In re Will of Johnson*, 182 N.C. 522, 525 (1921)). But the majority's "discovery" inference from plaintiffs' allegations that a complex, bureaucratic loan modification process was difficult to navigate just undercuts the equity inherent in the discovery rule, particularly when there is a power imbalance between the harmed citizen and the sophisticated business perpetrating fraud. Beyond that, submitting application information,

contacting Bank of America, and making trial payments are also part of the normal HAMP servicing guidelines. The line between a HAMP application process that aligns with the servicing guidelines and a fraudulent process is not so bright a line as the majority believes.

This Court has noted that "[t]he presence of fraud, when resorted to by an adroit and crafty person, is at times exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote it." *Standard Oil Co. v. Hunt*, 187 N.C. 157, 159 (1924). In identifying characteristics of the HAMP application process that—according to the majority—should have put plaintiffs on notice of fraud, the majority overlooks the numerous tactics that plaintiffs allege, and we must assume are true, Bank of America employed to hide, deny, and normalize these deceptive processes. For example, while plaintiffs contacted Bank of America repeatedly during the application process to ensure their compliance with servicing guidelines, the plaintiffs did not know until 2017 that Bank of America was trying to "prevent as many homeowners as possible from obtaining permanent HAMP loan modification while leading the public and the government to believe that it was making efforts to comply with HAMP." Additionally, while each plaintiff was aware that he or she had resubmitted the application material numerous times, the plaintiffs did not know until 2017 that Bank of America purposefully delayed HAMP applications by telling customers that documents were incomplete or missing when, in actuality, the documents were routinely shredded without review. Finally, the plaintiffs did not have access until 2017 to the declaration from a Bank of America home retention specialist documenting its practice of not providing permanent modifications and of sending foreclosure notices to borrowers who were current on their temporary modification payments.

Because of the nature of these fraud claims, the facts constituting the fraud reside primarily within the files of Bank of America, its computer systems, and the memories of its employees. As such, "a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances." *Forbis*, 361 N.C. at 524. The notions of fundamental fairness underpinning the discovery rule contradict an argument that the statute of limitations can bar plaintiffs' claims before plaintiffs are aware of defendant's tortious conduct—especially when the defendant's deceptive denials delayed or interfered with the plaintiffs' discovery of the conduct. *Misenheimer v. Burris*, 360 N.C. 620, 626 (2006). In the context of a complex federal mortgage modification program, when the plaintiffs are not experienced or trained

financial experts and are simply trying to navigate what are undoubtedly challenging processes, the majority's cramped application of the discovery rule rewards Bank of America's deceptive behaviors.

Next, in its focus on what plaintiffs might have "easily discovered" based on widespread litigation related to Bank of America's activities during the mortgage crisis, the majority misses the forest for the trees. It seems to me to be a dangerous path to tread—looking to news coverage or public understanding of complicated financial operations or litigation surrounding that—to make assumptions about what an average, "reasonable" person would derive from the existence of widespread litigation. I would not adopt this approach at all, but to the extent we credit the "easy" discovery of Bank of America's alleged misdeeds, there was also available in the public domain the "easy" discovery of Bank of America's denials and repudiation of any malfeasance. In early 2012, Bank of America publicly affirmed in a consent judgment—without admitting prior fraudulent behavior—that it would properly administer the HAMP program per the servicing guidelines moving forward from 2012. This assurance coincided with an agreement to pay more than two billion dollars in penalties to reimburse Bank of America customers "whose homes were finally sold or taken in foreclosure between and including January 1, 2008, and December 31, 2011." Plaintiffs who experienced difficulties with the HAMP application process after entry of the 2012 consent judgment might expect, rightfully, that any shortcomings in the administration of the process had been remediated based on Bank of America's own binding representations in a settlement with the federal government.

The majority's rule—focused on what plaintiffs "should have known" *based on news reports or the existence of litigation about* Bank of America's problems administering HAMP—invites the question that follows logically: how are we to treat Bank of America's public denials of fraud and assurances that no such fraud would occur going forward? We addressed the impact of denials of wrongdoing on this equitable calculus in *Misenheimer v. Burris*, in which the plaintiff suspected tortious conduct and asked the defendant—more than three years before the claim was filed—if he was engaging in criminal conversation. 360 N.C. at 621. The defendant responded with a denial leading us to expressly hold that failure to apply the discovery rule in the face of the defendant's deceptive denial had "the unacceptable consequence of rewarding" the defendant's deception. *Id.* at 626.

In short, the majority's approach here perpetuates the problem we sought to curtail in *Misenheimer*. Although the statute of limitations

is generally only tolled until "an event occurs to excite the aggrieved party's suspicion or put [that person] on such inquiry as should have led, in the exercise of due diligence, to a discovery of the fraud," *Forbis*, 361 N.C. at 525 (cleaned up), Bank of America's signature on the consent judgment is conduct concealing any continuing fraud. Although I would be hesitant to follow the majority down the road of "what would a reasonable person know or have reason to suspect" based on news coverage or just the existence of litigation, to the extent this Court's jurisprudence takes that path, we must then grapple with why a reasonable person could not rely upon a consent judgment signed by Bank of America, an associate Attorney General of the United States, and representatives of forty-nine states for the proposition that fraudulent activity, if it existed, had ceased.

Beyond Bank of America's public and legally binding denials, many people experience frustration when attempting to modify a mortgage even under the best of circumstances, and especially when they face imminent default. But that frustration does not necessarily put them on notice of fraud. The discovery of ongoing fraudulent business practices designed to keep homeowners from a HAMP modification should trigger the accrual of the fraud action. Given the conflicting evidence in the complaint about when these homeowners should reasonably have been on notice of the fraudulent schemes—which Bank of America represented were ameliorated—is a question for a finder of fact at trial. *See Forbis*, 361 N.C. at 523–24; *Feibus*, 301 N.C. at 305.

II. Conclusion

In sum, I would hold that Bank of America's public affirmations to properly administer the HAMP modification program after entry of the consent judgment equitably toll the statute of limitations for homeowners who lost their homes after Bank of America signed the consent judgment. Therefore, I would affirm the holding of the Court of Appeals reversing the trial court's dismissal of the complaint asserting fraud claims of plaintiffs who lost their homes after Bank of America signed the consent judgment. For these reasons, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

TERRY v. PUB. SERV. CO. OF N.C.

[385 N.C. 797 (2024)]

ANTHONY TERRY
v.
PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INCORPORATED,
AND WILLIAM V. LUCAS

No. 28A23

Filed 22 March 2024

1. Premises Liability—common law negligence—rental property—corroded gas line—requirement of notice to landlord

In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted summary judgment in favor of defendant on plaintiff's common law negligence claim, because there was no duty for defendant to repair absent actual knowledge or notice given by plaintiff about a dangerous condition on the property. Plaintiff, who had lived in the property for years, knew that there was a hole in the bathroom floor directly above the gas furnace through which water leaked and that the gas company and fire department had come to the home more than once after receiving reports of a gas smell coming from the home, but at no time did plaintiff inform defendant about these issues or request a repair.

2. Premises Liability—negligence per se—rental property—corroded gas line—housing code violation—knowledge by landlord required

In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted summary judgment in favor of defendant on plaintiff's claim that defendant was negligent per se for violating the housing code, because there was no evidence that defendant knew or should have known that there was a housing code violation, particularly where plaintiff never informed defendant that the bathroom floor directly over the furnace had a large hole through which water leaked or that a smell of natural gas had been detected in the home.

3. Landlord and Tenant—Residential Rental Agreements Act—corroded gas line—notice requirement—no duty to inspect

In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted

summary judgment in favor of defendant on plaintiff's claim that defendant violated the Residential Rental Agreements Act (RRAA), because the RRAA does not include a duty for landlords to regularly inspect rental property and there was no evidence that defendant knew or should have known about the hazardous condition or that there was a violation of the housing code, particularly since plaintiff did not inform defendant about the hole in the bathroom floor directly over the furnace through which water leaked or that a smell of natural gas had been detected in the home.

4. Landlord and Tenant—implied warranty of habitability—corroded gas line—notice requirement

In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted summary judgment in favor of defendant on plaintiff's claim for breach of implied warranty of habitability, because there was no evidence that defendant knew or should have known about the need for any repairs to keep the property in a fit and habitable condition, where plaintiff never informed defendant that the bathroom floor directly over the furnace had a large hole through which water leaked or that a smell of natural gas had been detected in the home, and plaintiff did not ask defendant to make any repairs.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 287 N.C. App. 362 (2022), reversing an order entered on 21 September 2021 by Judge Orlando F. Hudson Jr. in Superior Court, Durham County, and remanding the case. Heard in the Supreme Court on 8 November 2023.

Poyner Spruill LLP, by Steven B. Epstein; and Hendren Redwine & Malone, PLLC, by J. Michael Malone, for plaintiff-appellee.

Haywood, Denny & Miller, LLP, by Robert E. Levin, for defendant-appellants.

Katharine Woomer-Deters, Isaac W. Sturgill, Celia Pistolis, Rick Glazier, Charles R. Holton, Jesse Hamilton McCoy II, Jennifer

Simmons, and Kathryn A. Sabbeth for Blanchard Community Law Clinic, Duke Civil Justice Clinic, Legal Aid of North Carolina, North Carolina Equal Justice Alliance, The North Carolina Justice Center, and Professor Kathryn A. Sabbeth, amici curiae.

Harris, Creech, Ward & Blackerby, P.A., by A. Ruthie Sheets; and Jay C. Salsman for the North Carolina Association of Defense Attorneys, amicus curiae.

BARRINGER, Justice.

In this matter, we consider whether the Court of Appeals erred in reversing and remanding the trial court's entry of summary judgment in favor of defendant on plaintiff's claims of common law negligence, negligence per se, violation of the Residential Rental Agreements Act, and breach of the implied warranty of habitability. Upon careful review, we hold that the Court of Appeals erred. Therefore, we reverse the decision of the Court of Appeals on all claims.

I. Factual Background

On 15 September 2005, plaintiff's wife entered into a written lease agreement for the rental of a single detached residential property located in Durham, North Carolina, owned by defendant, William Lucas. At the time of the lease, the home had a crawl space where the water heater and furnace were located, just below the home's bathroom.

In January 2017, plaintiff and his wife were away from home when they received a telephone call from plaintiff's brother-in-law. Plaintiff's brother-in-law informed plaintiff that the Public Service Company of North Carolina (PSNC) and the fire department were at plaintiff's home investigating a neighbor's report of smelling natural gas near plaintiff's home. In March 2017, plaintiff smelled natural gas while he was standing in the front yard of his home. Also in March 2017, a neighbor told plaintiff that she smelled natural gas around plaintiff's home. Yet again in March 2017, PSNC and the fire department responded to plaintiff's home in response to another report of the smell of natural gas outside, in the area surrounding plaintiff's home. Plaintiff did not inform defendant of any of the above instances of smelling natural gas, and defendant was not aware of any of the above occurrences.

On 13 April 2017, plaintiff entered the bathroom in his home and turned on the light. Immediately upon switching on the light, there was an explosion. As a result of the explosion, plaintiff suffered serious burns all over his body, requiring extensive medical treatment.

Examination of the property after the explosion revealed that the pipe supplying natural gas to the furnace was severely rusted and corroded. Defendant had not inspected the furnace or any other part of the property since plaintiff and his family occupied the property. Defendant did not inspect the furnace prior to plaintiff occupying the property.

Plaintiff and defendant spoke frequently during the course of plaintiff's lease. Throughout the course of the lease, defendant regularly asked plaintiff if there were any problems with the property. Plaintiff would respond that everything was "fine."

During the course of plaintiff's long tenancy of the property, a hole had developed in the bathroom flooring, above the furnace located in the crawlspace. The hole measured approximately ten to twelve inches long and an inch and a half wide. Plaintiff's expert witness, a metallurgist, opined that water had been leaking from the bathroom above onto the furnace pipe for approximately seven years, causing severe corrosion of the piping. Plaintiff was aware of this hole and did not provide notice to defendant regarding the hole or the water leak that caused the hole. Plaintiff never expressed to defendant that there were any issues with the furnace, the flooring, or unrepaired water leaks.

II. Procedural History

Plaintiff filed a complaint against defendant and PSNC seeking damages for the personal injuries he sustained from the gas explosion in the home he leased from defendant. Following discovery, plaintiff amended his complaint twice, ultimately asserting four claims against defendant Lucas: common law negligence, negligence per se, violation of the North Carolina Residential Rental Agreements Act (RRAA), and breach of the implied warranty of habitability. All claims against defendant PSNC were dismissed, leaving Lucas as the sole defendant.

The trial court granted defendant's motion for summary judgment, dismissing all of plaintiff's claims. Plaintiff timely appealed to the Court of Appeals. The Court of Appeals issued a majority opinion reversing the trial court's order and remanding the case to the trial court, with Judge Carpenter dissenting. *Terry v. Pub. Serv. Co. of N.C.*, 287 N.C. App. 362 (2022). Defendant filed an appeal with this Court based upon Judge Carpenter's dissent, pursuant to N.C.G.S. § 7A-30(2).

III. Standard of Review

"We review a trial court's order for summary judgment de novo . . . ." *Robins v. Town of Hillsborough*, 361 N.C. 193, 196 (2007).

> While summary judgment is rarely appropriate in cases involving negligence and contributory negligence, summary judgment is appropriate in such cases when the moving party carries his initial burden of showing the nonexistence of an element essential to the other party's case and the non-moving party then fails to produce or forecast at hearing any ability to produce at trial evidence of such essential element of his claims.

DiOrio v. Penny, 331 N.C. 726, 729 (1992) (footnote omitted); *see also Collingwood v. Gen. Elec. Real Est. Equities, Inc.*, 324 N.C. 63, 66 (1989). 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) (2023).

IV. North Carolina Common Law

Prior to the enactment of the RRAA, codified in part by N.C.G.S. §§ 42-38 to -49, North Carolina common law established that, "[o]rdinarily, the landlord is under no duty to make repairs." *Robinson v. Thomas*, 244 N.C. 732, 736 (1956). The common law also established the standard that a tenant must meet to have an actionable claim against his landlord for tortious injury. He must show that there was a dangerous hidden defect on the premises, of which the landlord knew or should have known, and of which the tenant was unaware or could not, through ordinary diligence, discover. *Id.* "If the landlord [was] without knowledge at the time of the letting of any dangerous defect in the premises, [the landlord was] not responsible for any injuries which result from such defect." *Id.* (quoting *Harrill v. Sinclair Refin. Co.*, 225 N.C. 421, 425 (1945)).

Prior to enactment of the relevant statutes, "the doctrine of *caveat emptor* applie[d] to the lessee." *Id.* (quoting *Harrill*, 225 N.C. at 425). Aside from hidden dangers in existence at the time of leasing, of which the landlord knew or should have known, and of which the tenant did not and should not have known—the landlord had no responsibility to provide any level of habitability in the leased space. *See id.* Stated another way, the common law imposed no duty on the landlord to oversee the condition of the property after the tenant occupied the space, and no duty to make necessary repairs that arose. *See id.*

V. Relevant Statutes

The RRAA, enacted in 1977, codified the implied warranty of habitability. After codification of the RRAA, all common law "not abrogated, repealed, or . . . obsolete" remained "in full force." *Conley v. Emerald Isle Realty, Inc.*, 350 N.C. 293, 296 (1999) (quoting N.C.G.S. § 4-1 (1986)); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318–19 (2012) (explaining that a statute should be construed to alter the common law only when that disposition is clear).

The statutory lattice of the RRAA overlays the common law backdrop. The common law, as stated in *Robinson*, is changed only where the RRAA's departure from common law is clearly expressed. *See* Scalia & Garner at 319 ("[A]ny legislative change of the common law requires 'exactness of expression' and . . . a statute should not 'be extended beyond the necessary and unavoidable meaning of its terms.' " (quoting *Scharfeld v. Richardson*, 133 F.2d 340, 341 (D.C. Cir. 1942))).

The RRAA, in relevant part, reads as follows:

> (a) The landlord shall:
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> (1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code.
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> . . . .
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> (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
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> . . . .
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> (4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations.

. . . .

> (8) Within a reasonable period of time based upon the severity of the condition, repair or remedy any imminently dangerous condition on the premises after acquiring actual knowledge or receiving notice of the condition.

N.C.G.S. § 42-42 (2023).

The RRAA abrogates the common law in that it requires a landlord to comply with "current applicable building and housing codes." N.C.G.S. § 42-42(a)(1). The RRAA further abrogates the common law in that it requires a landlord to make repairs, whereas under the common law "the landlord is under no duty to make repairs." *Robinson*, 244 N.C. at 736. The RRAA, having instituted the landlord's duty to repair, also implements a notice requirement and retains the knowledge requirement found in the common law. *See id.* (holding that a landlord is not liable for injuries a tenant sustains on the leased property "if he did not believe or suspect that there was any physical condition involving danger" (quoting *Harrill*, 225 N.C. at 425)).

The RRAA, subsection 42-42(a)(8), requires the landlord receive notice or obtain actual knowledge of "any imminently dangerous condition on the premises" before being statutorily required to repair or remedy the condition "[w]ithin a reasonable period of time." N.C.G.S. § 42-42(a)(8). Under subsection (a)(8), the landlord is statutorily required to make the necessary repairs when he acquires actual knowledge of the need for the repair—regardless of whether the tenant provides notice. *Id.* Subsection (a)(4) requires an even higher standard of notice—written notice. N.C.G.S. § 42-42(a)(4). Except for emergency situations, which do not afford time for memorialization, subsection (a)(4) requires a tenant to provide written notice of needed repairs to the landlord before the landlord may be found in violation of the RRAA. *Id.*

This Court has previously had the opportunity to review the RRAA and its relationship with the common law. In *DiOrio*, 331 N.C. 726, we recognized the layered landscape of the statutory overlay of the RRAA atop the common law groundwork. In *DiOrio*, a residential tenant brought an action against her landlords to recover for injuries sustained when she fell down the stairs of her leased home. *Id.* at 727. The fall was caused by carpet on the stairs extending beyond the solid underpinning

of the actual stairs beneath. *Id.* at 726–27. In bringing the claim, the plaintiff relied on subsection 42-42(a)(2). *Id.* at 729.[1]

Construing the RRAA, this Court noted that the duty to repair imposed by subsection 42-42(a)(2) "only arises once the tenant notifies the landlord of the need for repairs." *Id.* at 730 (citing N.C.G.S. § 42-42(a)(4) (1984)). As here, the *DiOrio* plaintiff never notified the defendants, the landlords, of a need for repair of the stairs, nor was there evidence that the defendants had any knowledge, actual or implied, that the staircase was dangerous. *Id.* at 729; *see* N.C.G.S. § 42-42(a)(8) (requiring a landlord to repair or remedy, within a reasonable time period, any imminently dangerous condition "after acquiring actual knowledge or receiving notice of the condition," including unsafe flooring or steps).

This Court affirmed the Court of Appeals' holding on the basis that the "plaintiff . . . failed to produce any evidence showing that defendants had actual or implied knowledge" of the problem with the stairs. *DiOrio*, 331 N.C. at 730. This Court also held "that plaintiff had sufficient knowledge of the staircase's narrowness, uneven risers and lack of handrail to place the burden on plaintiff to either correct the problem or inform the defendants of the need for repair." *Id.*

VI. Analysis

Under the common law, a landlord has no duty to inspect a leased property and no duty to make repairs to a leased property. *Robinson*, 244 N.C. at 736. The RRAA expressly abrogates the common law in that it requires landlords to make repairs after receiving notice or acquiring actual knowledge, depending on the nature of the necessary repair or remedy. N.C.G.S. § 42-42(a)(2), (4), (8). Accordingly, no duty to inspect exists and no duty to repair arises prior to the tenant providing notice to the landlord or the landlord acquiring actual knowledge of the needed repair. The RRAA also requires the landlord to meet certain standards, outlined in the Housing Code, to provide a habitable property. N.C.G.S. § 42-42(a)(1), (2).

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1. In *DiOrio*, the Court of Appeals affirmed summary judgment for the defendants on the basis of the plaintiff's contributory negligence because the plaintiff "knowingly expos[ed] herself to a risk of which she had long-term prior notice and which she could have avoided by notifying the landlord." *DiOrio*, 331 N.C. at 728 (citing *DiOrio v. Penny*, 103 N.C. App. 407 (1991)). On appeal to this Court, we did "not disagree as to the Court of Appeals' conclusion regarding plaintiff's contributory negligence. However, we [did] not need to reach [that] question, as we proceed[ed] first to the plaintiff's allegations and projection of evidence regarding defendants' negligence." *Id.* at 728–29.

A. Common Law Negligence

[1] This Court considers whether the Court of Appeals erred by reversing the trial court's order granting summary judgment in favor of defendant regarding plaintiff's claim of negligence. We hold that the Court of Appeals erred. Accordingly, we reverse the Court of Appeals on this issue.

The Court of Appeals dissent noted that an inspection of plaintiff's "bathroom may have revealed the gas pipe's condition because in the light most favorable to [plaintiff], it was visible through a hole in the floor, but [d]efendant had no reason and no duty to conduct an inspection." *Terry*, 287 N.C. App. at 380 (Carpenter, J., dissenting). The dissenting opinion points out that the Court of Appeals majority "invent[s] a duty to inspect . . . an endeavor better suited for the Legislature." *Id.* We agree.

As exemplified by *DiOrio*, section 42-42 softens—but does not completely abrogate—the common law concept of *caveat emptor* regarding repairs and imminently dangerous conditions on leased residential premises. All common law "not abrogated, repealed, or . . . obsolete" remains "in full force." *Conley*, 350 N.C. at 296 (quoting N.C.G.S. § 4-1 (1986)). "[T]he statute requires that a landlord must *have knowledge*, . . . *or be notified*, of a hazard's existence *before being held liable in tort*." *DiOrio*, 331 N.C. at 729 (emphases added) (citing N.C.G.S. § 42-42(a)(4) (1984)).

This Court has explained that a tenant, as an occupier of land, stands in the same position as the landowner with respect to standards of care and duties owed to others. *Nelson v. Freeland*, 349 N.C. 615, 617 n.1 (1998). This is because the tenant, as the occupier, is "in a much better position to know about the condition" of the property. *Robinson*, 244 N.C. at 737. Accordingly, the tenant bears the burden to "inform the [landlord] of the need for repair." *DiOrio*, 331 N.C. at 730. The RRAA applies this common law concept to tenants generally. By codifying the notice requirement, the RRAA further highlights the interplay between common and statutory law. *See* N.C.G.S. § 42-42; *DiOrio*, 331 N.C. 726; *Robinson*, 244 N.C. 732. No duty to repair arises until the notice or knowledge requirements of subsections (a)(4) and (a)(8) are met.[2] N.C.G.S. § 42-42(a)(4), (8).

Statutes are to be read harmoniously in a way that renders them internally compatible, not contradictory. *E.g.*, *Town of Pinebluff v. Moore*

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2. If a landlord has a duty to maintain, in good and safe working order, certain components as designated in subsection (a)(4), nowhere in this opinion does this Court say that such a duty only arises upon written notice.

Cnty., 374 N.C. 254, 257 (2020); *Bd. of Adjustment of the Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427 (1993); *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 371 (1956). Subsection (a)(2) of the RRAA refers to "*all* repairs." N.C.G.S. § 42-42(a)(2) (emphasis added). When read harmoniously, "*all* repairs" encompasses the specific repairs of subsections (a)(4) and (a)(8). Under subsection (a)(4), besides emergencies, the landlord's duty to repair arises upon receipt of written notice from the tenant. Under subsection (a)(8) the landlord's duty arises upon the landlord receiving notice from the tenant or acquiring actual knowledge.

Here, plaintiff, as the tenant and occupier of the leased property, had "long-term prior notice," before the 13 April 2017 gas explosion, that there was an issue of some sort with the gas line and with the flooring above the furnace. *See DiOrio*, 331 N.C. at 728. The record contains evidence that there was a hole in the bathroom floor, adjacent to the commode, measuring approximately ten to twelve inches long and an inch and a half wide, directly above the furnace. This hole developed over time, while plaintiff resided in the property. Plaintiff was aware of the hole. Expert testimony indicated that water leaked through this hole onto the furnace piping for approximately seven years, leading to the corrosion and deterioration of the furnace piping.

In January 2017, the neighbor living directly adjacent to plaintiff smelled gas coming from plaintiff's home. The neighbor was so concerned that she called the gas company. Because plaintiff was away from home, the neighbor also called plaintiff's brother-in-law in January 2017 to tell him that she was concerned about the smell of gas. Plaintiff's brother-in-law told plaintiff's wife, who told plaintiff, about the neighbor's concerns and that the fire department and gas company were at plaintiff's home. Plaintiff testified that he was aware that the gas company and fire department had come to the home in January 2017 after receiving reports of the smell of gas coming from the home. Plaintiff was at home in March 2017 when the fire department and gas company came to the house again after an additional report from a neighbor who smelled gas coming from the home. On yet another occasion, in March 2017, plaintiff "got a pretty good whiff" of natural gas while standing in the front yard of his home. Plaintiff was warned by a neighbor on "a couple of occasions" in March 2017 that the neighbor was smelling gas coming from the house.

Plaintiff did not present any evidence that he or anyone else had ever informed defendant of the hole in the bathroom floor or requested a repair. Plaintiff never told defendant about any of the occasions,

between January and the April explosion, that the fire department or the gas company had come to the house to investigate reports of a gas leak. The record presents no evidence that defendant knew there was a problem with the flooring or that there was a suspected gas leak.

Without a showing of notice or defendant's knowledge, plaintiff cannot maintain an action for negligence because defendant's duty under N.C.G.S. § 42-42 had not yet arisen. The "pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that [defendant] is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). Plaintiff failed to "produce or forecast at hearing any ability to produce at trial evidence" that he notified defendant or that defendant knew of the gas leak. *See DiOrio*, 331 N.C. at 729.

A successful negligence claim requires a plaintiff to prove that the plaintiff was owed a duty by defendant and that defendant breached that duty. *See Cummings v. Carroll*, 379 N.C. 347, 362 (2021). In this circumstance, defendant had no common law duty and the RRAA did not create a duty. Thus, as the movant, defendant fulfilled his "initial burden of showing the nonexistence of an element essential to" plaintiff's claim.[3] *DiOrio*, 331 N.C. at 729. Accordingly, we hold that the Court of Appeals erred in reversing summary judgment in favor of defendant on plaintiff's negligence claim.

B. Negligence Per Se

[2] This Court considers whether the Court of Appeals erred by reversing the trial court's order granting summary judgment in favor of defendant regarding plaintiff's claim that defendant was negligent per se. We hold that the Court of Appeals erred. Accordingly, we reverse the Court of Appeals on this issue.

Subsection 42-42(a)(1) provides that the landlord shall "[c]omply with the current applicable building and housing codes." N.C.G.S. § 42-42(a)(1). Similarly, in *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412 (1990), this Court analyzed the duty to comply with applicable building codes. The plaintiff in *Lamm* brought claims against the defendants, including a negligence per se claim, seeking damages after she slipped

3. Here, defendant raised the affirmative defense of contributory negligence in his pleadings. We decline to address defendant's arguments to this Court on contributory negligence. "[W]e do not need to reach this question, as we proceed first to the plaintiff's allegations and projection of evidence regarding defendants' negligence." *DiOrio*, 331 N.C. at 729.

and fell as she descended a set of stairs outside an office building owned by two of the defendants. *Id.* at 413. The alleged violation was a lack of a handrail and disparity in step height. The disparity in step height led to a deeper drop between the last step and the ground as compared to the previous steps. *Id.* at 414. The plaintiff argued that the defendants were negligent per se because the building violated two sections of the applicable building code. *Id.* at 415.

Reversing the Court of Appeals, this Court held that the plaintiff had "not shown that defendants [were] negligent *per se* for a violation of the [building c]ode because plaintiff made no showing that . . . the [defendants] . . . knew or should have known of the violation of the [building c]ode." *Id.* This Court further held that "the owner of a building may not be found negligent *per se* for a violation of the Code unless: (1) the owner knew or should have known of the Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage." *Id.*

Applying the sound reasoning set forth in *Lamm*, we hold that a landlord "may not be found negligent *per se* for a violation of the [applicable housing code] unless: (1) the owner knew or should have known of the [housing code] violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage."[4] *Id.*

Here, plaintiff argues that he presented evidence sufficient for a jury to conclude that defendant knew or should have known that the leased property was in violation of the housing code. However, plaintiff presented no evidence that defendant knew there was natural gas leaking from the furnace. Plaintiff presented no evidence that defendant knew there was a problem with the flooring. Plaintiff presented no evidence that he notified defendant of any of these issues so that defendant should have known there was a violation of the housing code.

The record reveals that defendant had no knowledge of and received no notice that there was an issue with the furnace or the flooring, affording him no opportunity to take reasonable steps to remedy a violation. The purpose of the housing code is to "cause the repair and rehabilitation

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4. We acknowledge the Court's holding in *Lamm*—that the trial court had erred by granting summary judgment in favor of the defendants because the plaintiff had presented sufficient evidence to make out a prima facie case of defendants' common law negligence. The *Lamm* Court went on to analyze the relationship of the plaintiff and the defendant in the context of invitee and owner. The invitee, licensee, trespasser trichotomy does not apply in the instant case.

. . . of such housing," Durham, N.C., Ord. No. 14271, § 2, 6-4-2012, Sec. 10-231 (2012), not to serve as a strict liability statute against landlords.

For the reasons stated above, we hold that the Court of Appeals erred in reversing summary judgment in favor of defendant on plaintiff's claim that defendant was negligent per se.

C. Violation of the RRAA

[3] This Court considers whether the Court of Appeals erred by reversing the trial court's order granting summary judgment in favor of defendant regarding plaintiff's claim that defendant violated the RRAA. We hold that the Court of Appeals erred. Accordingly, we reverse the Court of Appeals on this issue.

As discussed above in section VI(A) and (B) of this opinion, section 42-42 is to be read as a whole, with each subsection in harmony with the others. Specifically, subsection (a)(2) is to be read in harmony with subsection (a)(1), referencing the housing codes, and with subsections (a)(4) and (a)(8), referencing repairs. "Whatever is necessary" is language broad enough to encompass the requirements of each of these subsections when read harmoniously. *See* N.C.G.S. § 42-42(a)(2). It is not a codified requirement for a landlord to stop at nothing to comply—such as regular inspections to find violations. "Whatever is necessary" leaves room for the multitude of requirements detailed within the RRAA and the building and housing codes, incorporated into a landlord's responsibility by subsection (a)(1).

For example, subsections (a)(5) and (a)(7) require a landlord to provide smoke detectors and carbon monoxide alarms; subsection (a)(6) requires a landlord to notify the tenant (if the landlord has actual knowledge) of water contamination levels exceeding an established limit. Providing smoke detectors, providing carbon monoxide alarms, and notifying tenants of water contamination are not repairs—but rather stipulations of *what is necessary* to comply with the statute.

The Durham housing code requires a landlord to comply with various standards such as providing clean equipment and ensuring adequate ventilation for fuel-burning appliances. *See* Ord. No. 14271, § 2, 6-4-2012, Sec. 10-234(a)(2)(c)–(d) (2012). "[*W*]*hatever is necessary* to put and keep the premises in a fit and habitable condition" may require something other than repair. *See* N.C.G.S. § 42-42(a)(2) (emphasis added). "Whatever is necessary" may be an alteration or something else. *See id.*

As analyzed in section VI(A) of this opinion, plaintiff has presented no evidence that he notified defendant of any issues with the flooring,

the heating system, or the natural gas utilities, or that defendant had any actual knowledge of any such issues. As analyzed in section VI(B) of this opinion, and as required under *Lamm*, plaintiff has presented no evidence that defendant had the requisite knowledge or should have known that he was in violation of the Durham housing code. *See Lamm*, 327 N.C. at 415. Therefore, summary judgment in favor of defendant was not error. Accordingly, we reverse the decision of the Court of Appeals on this issue.

D. Breach of Implied Warranty of Habitability

[4] This Court considers whether the Court of Appeals erred by reversing the trial court's order granting summary judgment in favor of defendant regarding plaintiff's claim that defendant breached the implied warranty of habitability. We hold that the Court of Appeals erred. Accordingly, we reverse the Court of Appeals on this issue.

In reversing the trial court's order, the Court of Appeals relies on *Surratt v. Newton*, 99 N.C. App. 396 (1990). Misreading *Surratt*, the Court of Appeals made the implausible leap that because only subsection (a)(4) requires written notice, subsection (a)(2) "places an affirmative obligation on landlords to 'do whatever is necessary to put and keep the premises in a fit and habitable condition.' " *Terry*, 287 N.C. App. at 375 (majority opinion) (quoting N.C.G.S. § 42-42(a)(2)). While we agree that written notice is required only in the circumstances of repair contemplated in subsection (a)(4), our agreement stops there.

As an initial matter, in no way does *Surratt* hold that there is an "affirmative obligation on landlords to 'do whatever is necessary to put and keep the premises in a fit and habitable condition' " without knowledge or notice. *Compare id.*, *with Surratt*, 99 N.C. App. at 405–06. The salient issue before the *Surratt* court was whether the plaintiff presented sufficient evidence of notice to the landlord such that a jury must determine whether the landlord had a reasonable opportunity to repair. Finding that the tenant provided sufficient notice, albeit oral notice, the *Surratt* court held that the plaintiff's claim was rightfully presented to the jury. *Surratt*, 99 N.C. App. at 406.

While not binding precedent upon this Court, *Surratt* is instructive. A close reading of *Surratt* reveals that the statute requires that a landlord must receive notice of necessary repairs and have reasonable opportunity to repair before the landlord is liable for applicable housing code violations. As analyzed in subsections VI(A), (B), and (C) of this opinion, the record reveals that plaintiff presented no evidence that he provided defendant with notice of a problem with the flooring or the

furnace, so as to render defendant in violation of N.C.G.S. § 42-42 or the housing code.

We agree with the Court of Appeals dissenting opinion that when repair is necessary to keep a premises in a fit and habitable condition, this "does not obviate the requirement that a tenant must give notice to the landlord of the repair that is needed." *Terry*, 287 N.C. App. at 384 (Carpenter, J., dissenting). Here, plaintiff has presented no evidence that he provided the landlord with any notice of any needed repairs. Thus, summary judgment in favor of defendant was not error. Accordingly, we reverse the decision of the Court of Appeals on this issue.

VII. Conclusion

We reverse the decision of the Court of Appeals on all of plaintiff's claims. The trial court's order granting summary judgment in favor of defendant is reinstated. The matter is dismissed.

REVERSED.

Justice RIGGS dissenting.

The majority endorses the trial court's grant of summary judgment, establishing that a landlord has no duty, absent a written request, to provide regular maintenance of potentially dangerous housing components to keep rental premises in good and safe working order. However, I read the Residential Rental Agreements Act (RRAA), codified as N.C.G.S. §§ 42-38 to 49, as legislatively creating a duty for landlords to "[m]aintain in good and safe working order . . . all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances." N.C.G.S. § 42-42(a)(4) (2023). This duty is *in addition* to the duty to "promptly repair" the same systems and does not require written notice by the tenant. *See id.* Because the record demonstrates genuine issues about whether this landlord was negligent in the duty to maintain in "good and safe" working order the gas-fired furnace and associated gas piping, I would affirm the Court of Appeals' holding as to a duty created by the RRAA.[1] I would entrust to a jury the questions of whether this landlord negligently breached the duty and whether that breach, if found, was the proximate cause of Mr. Terry's life-altering burns. For that reason, I respectfully dissent.

1. Because I would hold this matter should proceed to trial based on the statutory imposition of a duty by the RRAA, I do not reach the issues addressed in the majority on common law negligence, negligence per se, or breach of the implied warranty of habitability.

"Summary judgment provides a drastic remedy and should be cautiously used so that no one will be deprived of a trial on a genuine, disputed issue of fact." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972). In negligence cases, summary judgment "should rarely be granted." *Moore v. Crumpton*, 306 N.C. 618, 624 (1982). It is only 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." N.C.G.S. § 1A-1, Rule 56(c) (2023). We consider these materials in the light most favorable to the non-movant, drawing all inferences in their favor. *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018).

The General Assembly passed the RRAA to codify the rights, obligations, and remedies under rental agreements for dwelling units in North Carolina. N.C.G.S. § 42-38 (2023). Section 42-42 identifies the obligations of the landlord, and subsection (a) delineates eight interrelated elements that constitute the landlord's duty to provide tenants with fit premises. N.C.G.S. § 42-42(a)(1) to (8). The first three subsections apply generally to building and housing code compliance and the need to keep the premises fit and habitable. N.C.G.S. § 42-42(a)(1)–(2). The remaining subsections provide specific requirements: subsection (3) focuses on common areas; subsections (5), (5a), and (7) focus on smoke alarms and carbon monoxide sensors; and subsection (6) addresses water quality. N.C.G.S. § 42-42(a)(3), (5)–(7).

Subsection (a)(4) targets the specific issue of operating mechanical systems that degrade over time and require maintenance, and the General Assembly designed a specific solution to address this problem. The solution requires two elements: first, the landlord shall maintain in good and safe working order, *and* second, the landlord shall promptly repair. N.C.G.S. § 42-42(a)(4). This reading of the statute gives effect to every word that the General Assembly used. *Nance v. S. Ry.*, 149 N.C. 366, 372 (1908) (recognizing that this Court must interpret a statute as it is written, without adding or omitting words).

The word "maintain" is not defined in the RRAA, but we afford words that are undefined in statutes their plain and definite meaning. *Spruill v. Lake Phelps Volunteer Fire Dep't., Inc.*, 351 N.C. 318, 322 (2000). Indeed, the ordinary definition of the verb "maintain" is to keep something in operating condition. *Maintain*, *The American Heritage College Dictionary* (3d ed. 1993) ("To keep in an existing state; preserve or retain; . . . [t]o keep in a condition of good repair or efficiency."). Under the plain language of this subsection, the landlord has a duty to preserve or retain the condition of electrical, plumbing, sanitary,

heating, ventilating, air conditioning, and other facilities and appliances. N.C.G.S. § 42-42(a)(4). In short, the statute creates a duty for the landlord to maintain the components identified in subsection (a)(4).

The plain language of subsection (a)(4) does not require the tenant to notify the landlord in writing for maintenance—and that makes sense. Maintenance is a task that homeowners engage in regularly to avoid having to make repairs. The last portion of subsection (a)(4) reads "provided that notification of needed *repairs* is made to the landlord in writing by the tenant, except in emergency situations." N.C.G.S. § 42-42(a)(4) (emphasis added). Common sense tells us that in a landlord–tenant situation, the tenant would generally be the one most likely to be aware of a repair and would need to communicate that to the landlord, but maintenance is an entirely different obligation. In specifically requiring written notice for repairs, the legislature intentionally excluded maintenance from the requirement, and we cannot impute that requirement to the duty to maintain. *See Campbell v. First Baptist Church of Durham*, 298 N.C. 476, 482 (1979) (citing *Walla Walla City v. Walla Walla Water Co.*, 172 U.S. 1, 22 (1898)) (acknowledging that under the doctrine of *expressio unius est exclusio alterius*, the mention of specific exceptions implies the exclusion of others). We assume that if the General Assembly intended to require written notice by the tenant for regular maintenance, it would have expressly required written notice for maintenance in addition to repairs.

The majority holds that the landlord had no duty to provide preventative maintenance for the gas-fired furnace and its associated piping which may have revealed concerns before the explosion and fire that led to Mr. Terry's injuries because Mr. Terry did not provide notice that a repair was required. However, this interpretation of subsection 42-42(a) of the RRAA, does not give effect to every word of the statute. The majority glosses over the first clause of subsection (a)(4), which by its plain language creates a duty for landlords to *maintain* in good and safe working order "all electrical, plumbing, sanitary, heating, ventilating, air conditioning and other facilities and appliances." N.C.G.S. § 42-42(a)(4). The foundational principle of statutory construction is that "[w]here 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 (1990).

To the extent this Court finds it ambiguous whether the written notice requirement also relates back to maintenance, not just repairs, the application of canons of construction only reinforce the reading of

the plain language in this dissent. "[T]his Court does not read segments of a statute in isolation. Rather, we construe statutes *in pari materia*, giving effect, if possible, to every provision." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188 (2004). N.C.G.S. § 42-42(a)(4) imposes a duty to maintain, in addition to the duty to repair, the equipment and systems identified in subsection (a)(4). The statutory language—"provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations"—only imputes a requirement of written notice for repairs, not for maintenance. N.C.G.S. § 42-42(a)(4); *see Lunsford v. Mills*, 367 N.C. 618, 623 (2014) ("[I]t 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.").

The majority relies on *DiOrio v. Penny*, 331 N.C. 726 (1992), for the proposition that a "landlord must have knowledge, . . . or be notified, of a hazard's existence before being held liable in tort." *See id.* at 729. But *DiOrio* addressed the question of a landlord's duty to repair carpeting on a staircase, a housing component not listed amongst the enumerated components found in N.C.G.S. § 42-42(a)(4). *Id. DiOrio* does not consider the landlord's duty to maintain "electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord." *See DiOrio*, 331 N.C. 726; N.C.G.S. § 42-42(a)(4). *DiOrio*'s holding that a tenant must request repair of a hazardous condition created by carpeting on a staircase is inapposite because this case is centrally about the landlord's duty to *maintain* the specific equipment and systems identified in N.C.G.S. § 42-42(a)(4), not simply repair a defect.

This duty to maintain in N.C.G.S. § 42-42(a)(4) does not extend to concealed components. Building codes, with which landlords shall comply per subsection (a)(1), mandate access for equipment such as a furnace that requires maintenance. *See, e.g.*, N.C. State Bldg. Code: Fuel Gas Code § 611.8 (2018) (requiring access to gas-fired furnaces for removing the burner; replacing motors, controls, filters and other working parts; and for inspection, adjustment, and lubrication of parts requiring maintenance). The furnace and associated piping were located in a four-feet-tall crawlspace underneath the home and accessible from the exterior of the home. And the crawlspace provided access to both the gas-fired furnace and associated gas piping for maintenance. That is to say, there appears to be no dispute in this case that the furnace here was in an accessible crawlspace that the landlord had a legal right to access for maintenance purposes, so this case does not implicate questions about concealed, inaccessible elements.

This statutory duty to maintain, and indeed, the legislature's decision to abrogate the common law to allow it to ensure safe rental housing, does not create the "sky is falling" situation that the dissenting judge at the Court of Appeals catastrophized. *Terry v. Pub. Serv. Co. of N.C.*, 287 N.C. App. 362, 381 (2022) (Carpenter, J., dissenting). This case only presents the question of the duty to maintain, in "good and safe working order," N.C.G.S. § 42-42(a)(4), a gas-fired furnace and associated gas piping, which the landlord, in his own sworn deposition testimony, recognized as equipment requiring maintenance and which the lease allowed him access to maintain. This case simply does not require us to resolve how often maintenance must be performed or answer other questions not presented on the facts here. I would constrain our analysis to the facts presented in this case and avoid speculation on the wide array of hypotheticals presented by the dissenting judge at the Court of Appeals.

Mr. Terry has proffered sufficient evidence at this stage of the litigation to present to a jury the question of whether the landlord was negligent in the duty to maintain in good and safe working order the gas-fired furnace and associated gas piping. In the interrogatories, the landlord admitted to being responsible for management, maintenance, and inspection of the property. In the lease, the landlord specifically reserved the right to enter and inspect the premises at any and all reasonable times to "maintain said premises in a clean, orderly, and law abiding manner." The deposition testimony indicates that the gas-fired furnace and associated gas piping were located in a crawlspace that was four feet in height, accessible from the exterior of the home, and that the crawlspace was kept unlocked. The landlord admitted in his interrogatories that he did not inspect or maintain the gas-fired furnace and connecting gas piping. Mr. Terry provided expert testimony to establish that the deterioration of the gas pipe took place over years, likely more than seven. The landlord acknowledged in his deposition testimony that heating units typically require maintenance and that the units degrade over time. Further, the landlord conceded that in another one of his six rental properties, he had a problem with a gas-fired furnace, which he resolved by shutting off the gas and replacing the furnace with an electric furnace. Taken in the light most favorable to Mr. Terry, these facts may have provided notice, even though not required, that the type of furnace in this case, at the age it was, required attention that it did not receive in order to keep the system in good working order. Collectively, this evidence constitutes, I believe, evidence sufficient to establish material issues of fact that must be resolved by a fact finder.

The North Carolina General Assembly chose to abrogate the common law *caveat emptor* rule and create a duty for landlords to "[m]aintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances." N.C.G.S. § 42-42(a)(4). Further, Mr. Terry's proffered evidence, considered in the light most favorable to him, is sufficient to establish disputed material issues of fact. For these reasons, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

FARRON JEROME UPCHURCH
v.
HARP BUILDERS, INC. AND VALENTINE JOSEPH CLEARY

No. 176PA22

Filed 22 March 2024

Statutes of Limitation and Repose—compulsory counterclaim—relation back to filing of complaint—permitted by Rules of Civil Procedure

In a case arising from a motor vehicle accident, the Rules of Civil Procedure did not preclude the relation back of defendant's counterclaim to the date that the complaint was filed, and therefore defendant's counterclaim—which was filed one day after both the filing of plaintiff's complaint and the expiration of the three-year statute of limitations in N.C.G.S. § 1-52(16)—was not time-barred. Since, pursuant to Rule 3, the filing of a compulsory counterclaim does not amount to the commencement of a civil action, counterclaims relate back to the date an action is filed, and the Supreme Court overruled a prior Court of Appeals decision that concluded otherwise.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 283 N.C. App. 321 (2022), affirming an order entered on 22 April 2021 by Judge Phyllis Gorham in Superior Court, New Hanover County, granting plaintiff's motion for summary judgment on defendant's counterclaim and dismissing defendant's counterclaim with prejudice. Heard in the Supreme Court on 8 November 2023.

Ennis, Baynard, Morton, Medlin & Brown, PLLC, by Maynard M. Brown, for plaintiff-appellee.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Brian J. Kromke, for defendant-appellant Valentine Joseph Cleary.

ALLEN, Justice.

The Court of Appeals ruled that the statute of limitations bars defendant Valentine Joseph Cleary from pursuing his counterclaim for negligence against plaintiff Farron Jerome Upchurch because defendant filed his counterclaim one day after the three-year limitations period expired. Based on this Court's precedent and pertinent statutory provisions, we hold that defendant's counterclaim must be regarded for statute-of-limitations purposes as having been filed on the same date that plaintiff commenced his lawsuit. We therefore reverse and remand.

A two-automobile accident involving plaintiff and defendant occurred on 19 December 2015. On 19 December 2018, plaintiff filed a lawsuit against defendant in the Superior Court, New Hanover County, over injuries he allegedly sustained in the accident. Plaintiff's complaint alleged that the accident resulted from defendant's negligence. One day later, on 20 December 2018, defendant filed an answer denying liability for plaintiff's injuries and asserting a counterclaim against plaintiff for defendant's injuries on the theory that plaintiff's own negligence caused the accident.

On 27 February 2020, plaintiff filed a response denying defendant's allegations of negligence and asserting that defendant's contributory negligence and gross negligence barred defendant from pursuing his counterclaim. On 7 December 2020, plaintiff filed an amended response to defendant's counterclaim, asserting for the first time that the counterclaim should be dismissed under N.C.G.S. § 1-52(16) because defendant filed it outside the statute's three-year limit for personal injury claims.

On 18 December 2020, plaintiff filed a motion for judgment on the pleadings or alternatively for summary judgment. The motion asked the trial court to dismiss defendant's counterclaim in accordance with N.C.G.S. § 1-52(16). The trial court denied the motion after concluding that Rule 15(a) of the North Carolina Rules of Civil Procedure required plaintiff to seek leave of court to amend his response to the counterclaim. On 19 January 2021, plaintiff filed a motion requesting the court's permission to do just that. The trial court granted the motion,

and plaintiff filed his amended response with the statute-of-limitations defense on 26 February 2021. On 4 March 2021, again citing N.C.G.S. § 1-52(16), plaintiff filed a second motion for judgment on the pleadings or alternatively for summary judgment. On 22 April 2021, the trial court entered an order granting summary judgment in favor of plaintiff on defendant's counterclaim and dismissing it with prejudice. Defendant appealed to the Court of Appeals.[1]

On appeal, "[t]he parties seemingly agree[d] that the cause of action in the instant case began to accrue on the day of the accident, 19 December 2015, and claims must have been filed by 19 December 2018 to be within the three-year statute of limitations delineated by [N.C.G.S.] § 1-52(16)." *Upchurch v. Harp Builders, Inc.*, 283 N.C. App. 321, 323 (2022). Nonetheless, "[d]efendant argue[d] that his counterclaim filed on 20 December 2018 should be deemed to relate back to the filing of the original complaint by [p]laintiff on 19 December 2018, and thus should be considered timely filed within the three-year statute of limitations." *Id.*

The Court of Appeals unanimously affirmed the trial court's summary judgment order dismissing defendant's counterclaim. *Id.* at 324–25. In reaching its decision, the appellate court relied on *PharmaResearch Corp. v. Mash*, 163 N.C. App. 419, *disc. rev. denied*, 358 N.C. 733 (2004), wherein an earlier panel of the Court of Appeals had "concluded that 'counterclaims do not "relate back" to the date the plaintiff's action was filed[,]' and that the counterclaims [of the defendant in *PharmaResearch*] were barred by the applicable statute of limitations." *Upchurch*, 283 N.C. App. at 323 (first alteration in original) (quoting *PharmaResearch*, 163 N.C. App. at 427).

Defendant subsequently filed a petition for discretionary review with this Court pursuant to N.C.G.S. § 7A-31. We allowed the petition.

"Summary judgment is proper only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.' " *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, No. 227A22, slip op. at 6 (N.C. Dec. 15, 2023) (quoting N.C.G.S. § 1A-1, Rule 56(c) (2021)). "We review de novo an appeal of a summary judgment order. When reviewing a matter de novo, this Court considers the matter anew and freely substitutes its own judgment for that of the lower courts." *Id.* (internal quotation marks and citations omitted).

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1. On 3 June 2021, plaintiff filed a voluntary dismissal with prejudice.

With respect to plaintiff's statute-of-limitations defense, no material facts are in dispute. The question before this Court is solely a legal one: whether N.C.G.S. § 1-52(16) bars defendant's counterclaim because defendant filed it more than three years after the parties' automobile accident.

Before proceeding, we note that defendant's counterclaim constitutes a "compulsory counterclaim" under Rule 13 of the Rules of Civil Procedure in that it (1) existed when defendant served his answer on plaintiff; (2) arose from the same events that gave rise to plaintiff's claim against defendant; and (3) did not require the presence of third parties over whom the trial court lacked jurisdiction. N.C. R. Civ. P. 13(a). Unlike permissive counterclaims, compulsory counterclaims "must be asserted by [the] defendant in a pending action or be forever foreclosed" unless one of the exceptions in Rule 13(a) applies. G. Gray Wilson, *North Carolina Civil Procedure*, § 13-2, at 13-5 (4th ed. 2020). *See generally* N.C. R. Civ. P. 13(b) (defining a permissive counterclaim as a counterclaim "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim").

In *Brumble v. Brown*, 71 N.C. 513 (1874), this Court held that a three-year statute of limitations did not bar a defendant's counterclaim filed more than three years after the events from which it arose:

> [W]e ascertain that three years . . . had not elapsed at the date of the action, but more than three years had elapsed when the counter-claim was pleaded . . . .
>
> We think the law is clear that a . . . counter-claim[ ] refers to the commencement of the action, . . . [a]nd if not barred by the statute [of limitations] at that time, it does not become so afterwards during the pending of the action.

Brumble, 71 N.C. at 516 (citations omitted).

Here, plaintiff filed his lawsuit one day before the expiration of the three-year limitations period specified in N.C.G.S. § 1-52(16). Consequently, if *Brumble* remains good law, defendant's compulsory counterclaim must be considered timely filed, even though defendant filed it more than three years after the automobile accident that led to this litigation.

In *PharmaResearch*, the Court of Appeals concluded that *Brumble* no longer accurately states the law regarding the relation back of compulsory counterclaims. 163 N.C. App. at 427. The appellate court observed that *Brumble* predates the General Assembly's enactment

of the Rules of Civil Procedure by "almost a century" and argued that *Brumble* cannot be reconciled with some of the provisions in the Rules.[2] *Id.* at 426–27.

This Court has previously encountered a conflict between our precedent and the Rules of Civil Procedure. In *Burcl v. North Carolina Baptist Hospital, Inc.*, 306 N.C. 214 (1982), we noted that Rule 15—on amended pleadings—had "changed our approach" to determining whether an amendment to a complaint relates back to the filing of the complaint for statute-of-limitations purposes. 306 N.C. at 224. Prior to Rule 15, the common law prevented such an amendment from relating back if it "stated a new cause of action, even on the same facts originally alleged." *Id.* at 221. With the legislature's enactment of Rule 15, however, whether an amendment to a complaint relates back to the original complaint "depends no longer on an analysis of whether it states a new cause of action; it depends, rather, on whether the original pleading gives 'notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.' " *Id.* at 224 (quoting N.C. R. Civ. P. 15(c)).

As *Burcl* acknowledges, the Rules of Civil Procedure generally prevail when they conflict with pre-Rules decisions from this Court. Nonetheless, we do not agree with *PharmaResearch* that the Rules have superseded *Brumble* on the relation back of compulsory counterclaims.

Crucially, *PharmaResearch* ignores that N.C.G.S. § 1-52(16) and other statutes of limitations found in Chapter 1, Article 5 of the General Statutes apply to "the commencement of actions." N.C.G.S. § 1-46 (2021); *see also id.* § 1-15(a) ("Civil actions can only be commenced within the periods prescribed in [Chapter 1 of the General Statutes, titled "Civil Procedure"], after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute."). Thus, on its face, N.C.G.S. § 1-52(16) does not preclude a compulsory counterclaim filed outside its three-year limitations period unless a defendant may be said to have commenced a civil action by filing the counterclaim.

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2. In holding that the Rules of Civil Procedure effectively overruled *Brumble*, the Court of Appeals impermissibly departed from its own precedent. It had previously ruled in a decision issued after the enactment of the Rules that *Brumble* remains good law as to compulsory counterclaims. *In re Foreclosure of Gardner*, 20 N.C. App. 610, 618 (1974). The *Gardner* decision was binding on the Court of Appeals in *PharmaResearch*. *See In re Civil Penalty*, 324 N.C. 373, 384 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

Rule 3 of the Rules of Civil Procedure specifies that "[a] civil action is commenced by filing *a complaint* with the court."[3] N.C. R. Civ. P. 3(a) (emphasis added). Ordinarily, as in this case, a defendant asserts a compulsory counterclaim in her answer to the complaint. Although the Rules classify both complaints and answers as pleadings, they repeatedly distinguish between the two. *E.g.*, *id.* at R. 7(a) ("There shall be a complaint and an answer . . . ."); *id.* at R. 12(a)(1) ("A defendant shall serve his answer within 30 days after service of the summons and complaint upon him."). In this case, because defendant asserted his compulsory counterclaim in an answer, the plain language of Rule 3 indicates that his filing did not commence a civil action.[4]

Nothing in Rule 13's counterclaim provisions contradicts this understanding. *See In re Foreclosure of Gardner*, 20 N.C. App. 610, 618 (1974) (noting that the requirement to file and serve a counterclaim "does not make a new or separate litigation out of a counterclaim . . . which arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim"). Rule 13 refers only once to an "action" being "commenced," and it is clear from the context that the reference is to a civil action commenced against—not by—the party having the compulsory counterclaim. Specifically, Rule 13(a)(1) excuses a defendant from alleging a compulsory counterclaim if "*[a]t the time the action was commenced* the claim was the subject of another pending action." (emphasis added). The term "action" in the phrase "[a]t the time the action was commenced" obviously means the lawsuit in which the defendant would have to file her counterclaim if that claim were not the subject of a prior lawsuit. In short, Rule 13 nowhere characterizes the filing of a counterclaim as the commencement of a civil action. *Id.*

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3. Rule 3 also allows for the commencement of a civil action by the issuance of a summons under certain conditions. A party may commence a civil action by the issuance of a summons upon "mak[ing] application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days." N.C. R. Civ. P. 3(a)(1). A court then "makes an order stating the nature and purpose of the action and granting the requested permission." *Id.* at R. 3(a)(2). Finally, the summons and court order must be served in accordance with Rule 4. *Id.* at R. 3(a). Filing a complaint is, therefore, still a necessary condition for commencing a civil action in this manner. *See id.* ("*When the complaint is filed* it shall be served in accordance with the provisions of Rule 4 . . . ." (emphasis added)).

4. We recognize, of course, that certain kinds of civil proceedings can be initiated by the filing of petitions. *See*, *e.g.*, N.C.G.S § 7B-401(a) (2021) (establishing that a juvenile abuse, neglect, or dependency action is commenced by filing a petition in a clerk's office or by acceptance of the petition by a magistrate); *id.* § 122C-261(a) (2021) (providing for involuntary civil commitment proceedings upon affidavit and petition to a clerk or magistrate). This case does not involve such a proceeding.

In *PharmaResearch*, the Court of Appeals rested its holding largely on what it perceived as a significant distinction between Rule 13 and Rule 15. 163 N.C. App. at 426–27. As noted above, Rule 15 expressly allows an amended pleading to relate back to the filing of the original pleading so long as the original pleading "give[s] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." *Id.* at R. 15(c). Remarking that Rule 13 lacks a similar provision, the Court of Appeals reasoned: "Had the General Assembly intended for counterclaims to 'relate back' to the date of filing of plaintiff's complaint, it could have so provided." *PharmaResearch*, 163 N.C. App. at 426.

We are not persuaded. In our view, *Burcl* cuts squarely against the rationale of *PharmaResearch*. The outcome in *Burcl* was based on the General Assembly's adoption of a standard in Rule 15 that differed from the pre-Rules standard for analyzing whether an amendment relates back to the original pleading. In *PharmaResearch*, the Court of Appeals turned *Burcl* on its head by essentially treating the complete absence of any reference to the relation back of compulsory counterclaims in Rule 13 as evidence of legislative intent to overrule this Court's pre-Rules precedent on the subject. Had the General Assembly wished to change the law on the relation back of compulsory counterclaims, it could have articulated a different approach in Rule 13, just as it altered the law on the relation back of amendments to pleadings by enacting Rule 15. *See State v. S. Ry. Co.*, 145 N.C. 495, 542 (1907) ("The Legislature is presumed to know the existing law and to legislate with reference to it.").

During oral argument, plaintiff's counsel directed our attention to N.C.G.S. § 1-2, which defines an "action" as "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." According to plaintiff's counsel, this definition is broad enough to encompass compulsory counterclaims, and thus the filing of a compulsory counterclaim amounts to the commencement of a civil action, at least insofar as statutes of limitations are concerned.

We disagree. The Rules of Civil Procedure recognize an assortment of pleadings, including complaints, answers, replies to counterclaims, and answers to crossclaims. N.C. R. Civ. P. 7(a). Nonetheless, Rule 3 unambiguously states that "[a] civil action is commenced by filing a complaint," *id.* at R. 3(a), and we deem it controlling here. *See Piedmont Publ'g Co. v. City of Winston-Salem*, 334 N.C. 595, 598 (1993) ("One canon of construction is that when one statute deals with a particular

subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, the more specific statute will be construed as controlling.").

The Rules of Civil Procedure do not treat the filing of compulsory counterclaims as procedurally equivalent to the commencement of civil actions. Consequently, the Rules do not preclude the relation back of such counterclaims. The Court of Appeals therefore erred in *PharmaResearch* by not following *Brumble*, and we overrule *PharmaResearch* to the extent it conflicts with this opinion.

Furthermore, as this case illustrates, the relation back of compulsory counterclaims serves the interests of justice and judicial economy. By not filing and serving his lawsuit until the last day of the three-year limitations period established by N.C.G.S. § 1-52(16), plaintiff made it impossible for defendant to file his compulsory counterclaim within the limitations period. At this point, we cannot know which party is in the right. It may be that defendant has the superior claim but was willing to forgo litigation for magnanimous reasons. Were this Court to hold that N.C.G.S. § 1-52(16) forecloses defendant's compulsory counterclaim, we would encourage plaintiffs in future cases to wait until the last moment to file suit as a means of defeating even meritorious compulsory counterclaims. We would also create a perverse incentive for some who would rather not sue to file suit anyway to avoid the risk of finding themselves in defendant's position.

For purposes of the statute of limitations in N.C.G.S. § 1-52(16), the filing of a compulsory counterclaim relates back to the filing of the complaint. We therefore hold that N.C.G.S. § 1-52(16) did not bar defendant's compulsory counterclaim against plaintiff. The decision of the Court of Appeals is hereby reversed, and this case is remanded to that court for remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice DIETZ did not participate in the consideration or decision of this case.

FRANKIE DELANO WASHINGTON AND FRANKIE DELANO WASHINGTON, JR.
v.
TRACEY CLINE, ANTHONY SMITH, WILLIAM BELL,
JOHN PETER, ANDRE T. CALDWELL, MOSES IRVING,
ANTHONY MARSH, EDWARD SARVIS, BEVERLY COUNCIL,
STEVEN CHALMERS, PATRICK BAKER, THE CITY OF DURHAM, NC,
AND THE STATE OF NORTH CAROLINA

No. 148PA14-2

Filed 22 March 2024

Constitutional Law—North Carolina—right to a speedy trial—convictions set aside—adequacy of remedy

Where plaintiff's criminal convictions were vacated as a remedy for the State having violated plaintiff's constitutional right to a speedy trial, plaintiff was not entitled to additional relief in the form of money damages, which he sought in a private action pursuant to *Corum v. Univ. of N.C.*, 330 N.C. 761 (1992), because *Corum* claims are reserved solely for instances in which a plaintiff has no other forum in which to seek redress for a constitutional violation. Where plaintiff had an opportunity to present and have his constitutional claim heard, and was given an adequate state remedy, the trial court properly granted summary judgment against plaintiff in his action against the State and the officials involved in his criminal prosecution. The Supreme Court modified and affirmed the Court of Appeals' decision where, although the latter court correctly upheld the trial court's order, its reliance on a federal case rather than *Corum* to reach its conclusion was expressly disavowed.

Justice EARLS dissenting.

Justice RIGGS 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, 267 N.C. App. 370 (2019), affirming an order entered on 11 May 2018 by Judge C. Winston Gilchrist in Superior Court, Durham County. Heard in the Supreme Court on 8 November 2023.

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DIETZ, Justice.

Where there is a right, there is a remedy. This is a foundational principle of every common law legal system, including ours. We have long called it a "time-honored maxim." *See Von Glahn v. Harris*, 73 N.C. 323, 332 (1875). It is even enshrined in the North Carolina Constitution. *See* N.C. Const. art. I, § 18.

To protect this principle—to ensure that every right does indeed have a remedy in our court system—this Court created what are known as "*Corum* claims." *Corum v. Univ. of N.C.*, 330 N.C. 761 (1992). *Corum* claims are constitutional claims for damages directly against the State. These claims are extraordinary and defy many principles of this Court's jurisprudence, not least the principle that money damages against the State are barred unless the State has authorized them. Nevertheless, we held in *Corum* that where there is a right, there must be a remedy. *Id.* at 782. Thus, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Id.*

The question, then, is what constitutes an "adequate remedy." For decades since *Corum*, we have recognized that for a claim "to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339–40 (2009). Applying this principle, we repeatedly recognized *Corum* claims where the plaintiff had no other forum in which to raise the

1. Plaintiff Frankie Delano Washington passed away during this appeal and the Court allowed a motion to substitute his son as his personal representative.

constitutional violation and receive a remedy. But this Court has never recognized a *Corum* claim where the plaintiff had the opportunity to raise a constitutional violation in court, did so and received a remedy, and then sought even more remedies in a second proceeding. Indeed, we have expressly rejected this approach. *See Copper v. Denlinger*, 363 N.C. 784, 788–89 (2010).

Yet this is what plaintiff asks this Court to do today. A jury convicted plaintiff of serious felony offenses including burglary, kidnapping, robbery, and attempted sex offense. During that criminal proceeding, plaintiff argued that the State violated his constitutional right to a speedy trial. He lost that argument at trial but won on appeal. As a remedy for the State's violation of his speedy trial rights, the Court of Appeals set aside plaintiff's criminal convictions.

In this action, plaintiff asserts that vacating his convictions was not enough. He also wants money damages from the State as a second remedy for the constitutional violation. As explained below, this request goes too far beyond the "critical limitations" set in *Corum*. 330 N.C. at 784. Plaintiff already received a powerful remedy for the State's violation of his rights—he had his criminal convictions permanently set aside. That remedy distinguishes this case from every successful *Corum* case in our jurisprudence, where the plaintiff had no opportunity to go to court and obtain a meaningful remedy at all. Instead, this case mirrors other, similar cases in which a plaintiff had an available remedy for a constitutional violation but still wanted greater relief. This scenario, we have held, does not permit a *Corum* claim.

In short, plaintiff had an adequate state law remedy, and a separate *Corum* claim is unavailable. Thus, the Court of Appeals properly upheld the trial court's entry of summary judgment.

Facts and Procedural History

In 2002, law enforcement officers arrested plaintiff Frankie Delano Washington for a violent home invasion. Nearly five years later, plaintiff went to trial and a jury convicted him of multiple serious felonies including first-degree burglary, second-degree kidnapping, robbery with a dangerous weapon, and attempted first-degree sex offense.

In the years between plaintiff's arrest and his conviction at trial, plaintiff tried repeatedly to move the criminal process forward, for example, by seeking to expedite the State Bureau of Investigation's analysis of the evidence. Ultimately, three years after his arrest, plaintiff moved to dismiss the charges for violation of his constitutional right to

a speedy trial. The trial court denied the motion, plaintiff's case went to trial, and, as noted above, the jury convicted plaintiff of multiple charges.

Plaintiff appealed his criminal convictions to the Court of Appeals and raised the speedy trial issue. He prevailed on that issue, and the Court of Appeals set aside his convictions on the ground that he had been deprived of his right to a speedy trial guaranteed by both the state and federal constitutions. *State v. Washington*, 192 N.C. App. 277, 297–98 (2008).

Several years later, plaintiff and his son brought this action against the State and various state and local officials. Plaintiff alleged that the State knew he was not the perpetrator of the crimes for which he was charged. For example, plaintiff alleges that the State withheld evidence showing that another suspect committed numerous similar home invasions and sexual assaults in the same geographic area around the time of plaintiff's arrest. That suspect matched the description of the perpetrator of the crimes with which plaintiff was charged. Plaintiff also alleged that officials manufactured false evidence against him and ignored obviously exculpatory evidence.

Based on these allegations, plaintiff pursued a number of claims against officials involved in his prosecution. Among plaintiff's many claims, he asserted a common law claim against the State for damages caused by the deprivation of his state constitutional right to a speedy trial.

The parties later filed cross-motions for summary judgment, and the trial court entered summary judgment against plaintiff on his direct constitutional claim against the State. Plaintiff appealed that ruling to the Court of Appeals.

On appeal, the Court of Appeals affirmed the trial court's entry of summary judgment, holding that "no private cause of action for injunctive relief or damages lies in connection with the deprivation of the right to a speedy trial as guaranteed by Article I, section 18 of the North Carolina Constitution." *Washington v. Cline*, 267 N.C. App. 370, 375 (2019). Plaintiff then filed a notice of appeal based on a constitutional question and also petitioned this Court for discretionary review. We dismissed the appeal of right but allowed the petition for discretionary review.

Analysis

The North Carolina Constitution guarantees that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18.

"This provision has ancient roots in English and American law." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 603 (2021). Its core concept is recited in some of the most impactful decisions in American jurisprudence. Take, for example, this passage from *Marbury v. Madison*: "It is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded. . . . for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." 5 U.S. (1 Cranch) 137, 163 (1803).

This Court, too, has invoked the principle in landmark constitutional cases, holding, for example, that when "the provisions of a Constitution, as does ours, forbids damage to private property, and points out no remedy, and no statute affords one, for the invasion of the right of property thus secured, the provision is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance." *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 618 (1955) (cleaned up).

This Court's foundational expression of "where there is a right, there is a remedy" in the constitutional context is found in *Corum v. University of North Carolina*, 330 N.C. 761 (1992). In *Corum*, a university professor brought suit against various arms of the State for violating his constitutional right to free speech. *Id.* at 766. At the time, there was no cause of action available for this type of state constitutional violation. *Id.* at 783. Recognizing that there must be a remedy for this right, the Court established what are now commonly known as "*Corum* claims," reasoning that "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Id.* at 782.

Although *Corum* referred to the absence of an *adequate* state remedy, it never specified what remedies could be considered adequate. To be fair, though, it did not need to; the plaintiff in *Corum* had "no other remedy." *Id.* at 783.

But *Corum* did provide some guidance. The Court held that, when examining a *Corum* claim, "the judiciary must recognize two critical limitations." *Id.* at 784. "First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power." *Id.* "Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong." *Id.*

From these limitations, we know that an adequate remedy does not mean a complete remedy—that is, the remedy that is necessary to make the plaintiff whole again. If a complete remedy were required, it would not be possible to "bow to" alternative remedies or to choose the "least intrusive" remedy available. *Id.* Only a complete remedy would suffice. Instead, *Corum*'s discussion of these "critical limitations" shows that an adequate remedy is one that meaningfully addresses the constitutional violation, even if the plaintiff might prefer a different form of relief. *Id.* at 784.

Other cases following *Corum* confirm that an adequate remedy is a meaningful one, though not necessarily the one the plaintiff might prefer. For example, in *Craig v. New Hanover County Board of Education*, the plaintiff sued his county board of education for failing to protect him from a sexual assault at school. 363 N.C. at 335. He brought both common law claims and constitutional ones. *Id.* This Court held that his common law claims, which were barred by sovereign immunity, were not adequate remedies. *Id.* at 338. We explained that "to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Id.* at 339–40. Thus, the Court permitted a *Corum* claim because, without it, the plaintiff would "be left with *no remedy* for his alleged constitutional injuries." *Id.* at 340 (emphasis added).

By contrast, in *Copper v. Denlinger*, the plaintiff sued his county school board and other school officials seeking compensatory and punitive damages for allegedly suspending him without due process over "gang affiliated" conduct. 363 N.C. at 785–86. We rejected plaintiff's *Corum* claim in *Copper*, explaining that there was an administrative appeal process that could lead to the suspension being reversed. *Id.* at 788–89. Thus, we reasoned, "under our holdings in both *Corum* and *Craig*, an adequate remedy exists at state law to redress the alleged injury, and this direct constitutional claim is barred." *Id.* at 789.

Importantly, the "adequate remedy" in *Copper* was not the one the plaintiff sought. *Id.* at 786. He wanted relief including "compensatory and punitive damages" for the violation of his due process rights, not merely to have his school suspension set aside. *Id.* This Court nevertheless concluded that the administrative appeal process itself offered an adequate remedy under *Corum*. *Id.* at 789.

The lesson from these cases—and one that is consistent across all *Corum* decisions—is that an "adequate remedy" exists when the plaintiff has access to court to raise the constitutional violation, and the court

can provide some form of relief for that violation, even if plaintiff does not view that relief as complete. By contrast, when the plaintiff has a cognizable state constitutional claim and cannot access the courts to obtain any form of relief, *Corum* is available. *Compare Deminski ex rel. C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 415 (2021) (*Corum* claim available because constitutional violation "cannot be redressed through other means"), *and Bunch v. Britton*, 253 N.C. App. 659, 669 (2017) (*Corum* claim available because absolute bar of governmental immunity left "no remedy at common law" for the violation), *with Copper*, 363 N.C. at 789 (*Corum* claim not available because there was remedy in administrative appeal); *Taylor v. Wake County*, 258 N.C. App. 178, 189–90 (2018) (*Corum* claim not available because plaintiff had tort claims in the Industrial Commission, despite "limited" damages available on those claims); *and Wilcox v. City of Asheville*, 222 N.C. App. 285, 300 (2012) (*Corum* claim not available because plaintiff could sue police officers in their individual capacities).

Simply put, *Corum* is the embodiment of "where there is a right, there is a remedy." It applies when one's rights are violated, and the law offers either no remedy or a remedy that is meaningless. *Craig*, 363 N.C. at 340. In that circumstance, *Corum* creates a common law cause of action.

But that is the limit of *Corum*. It is not a state law equivalent of 42 U.S.C. § 1983. It does not guarantee a cause of action for money damages in every constitutional case where money damages otherwise are unavailable. It offers a court-created claim only in "extraordinary" circumstances where the law does not already provide other "established claims and remedies." *Corum*, 330 N.C. at 784. Like the plaintiff in *Copper*, many litigants who allege violations of their constitutional rights have access to established claims and remedies that are meaningful, even if not necessarily complete or the relief they want. These litigants cannot bring *Corum* claims. We knew this when we established the *Corum* doctrine and expressly embraced it when we outlined *Corum*'s "critical limitations." *Id.*

That brings us to this case. Plaintiff here argues that the State violated his constitutional right to a speedy criminal trial and that he has no other adequate remedy for the constitutional violation beyond this *Corum* claim for money damages. Plaintiff's argument cannot be squared with the precedent discussed above.

First, plaintiff has an alternative remedy. When criminal defendants believe they are being deprived of their right to a speedy trial, the

Criminal Procedure Act expressly provides a mechanism to obtain court review and a remedy for the violation. *See* N.C.G.S. § 15A-954(a)(3) (2023). The Act provides that, "on motion of the defendant," the trial court "must dismiss" criminal charges if the defendant "has been denied a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina." *Id.*

Second, this Court crafted the relief for a speedy trial violation specifically to ensure it was adequate to remedy the harm. Decades ago we held that the "right to a speedy trial is different from other constitutional rights" because of the difficulty of assessing when it is violated and what impact it has on the accused's defense. *State v. McKoy*, 294 N.C. 134, 140 (1978). We therefore held that "dismissal of the charges is the only possible remedy for denial of the right to a speedy trial." *Id.*

Dismissal of the charges is, of course, an incredibly meaningful remedy. Indeed, the Supreme Court of the United States has referred to dismissal for a speedy trial violation as an "unsatisfactorily severe remedy" because "it means that a defendant who may be guilty of a serious crime will go free, without having been tried." *Barker v. Wingo*, 407 U.S. 514, 522 (1972). Or, as in this case, it means a criminal defendant *convicted* of very serious crimes will go free.[2]

As a result, and consistent with the "critical limitation" established in *Corum* that the judiciary "must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power," we reject the use of *Corum* claims in speedy trial cases because the law already provides an adequate remedy for that alleged constitutional violation. 330 N.C. at 784.

We close with one final point. The Court of Appeals decision in this case reached the correct outcome and we affirm it. But the Court of Appeals relied on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* is a federal decision applicable only to federal constitutional claims against federal government agents. *Id.* at 397. The *Bivens* doctrine has some similarities to *Corum*, but it is not controlling in matters of our state constitution and state jurisprudence. Thus, while the reasoning of *Bivens* cases—in particular, those examining whether there are sufficient alternative remedies—may imbue them with some persuasive authority in a *Corum* case,

2. As noted above, plaintiff alleges that various officials—primarily District Attorney Tracey Cline—manufactured evidence against him, pursued criminal charges, and asserted his guilt, despite knowing he was not the perpetrator of the alleged crimes. Our decision today in no way discounts plaintiff's allegations.

the Court of Appeals should have started its analysis with *Corum*. It did not do so—in fact, it never cited *Corum* or any of its state law progeny in the decision. To the extent that this could be interpreted as holding that *Corum* is somehow coextensive with *Bivens*, we expressly disavow that notion. Like *Bivens* claims, *Corum* claims are extraordinary and subject to considerable limitations. But they are creatures of state law, and their analysis should begin with our state law doctrine.

Conclusion

Because there is an adequate alternative remedy for the alleged constitutional violation in this case, plaintiff's *Corum* claim is barred. We therefore affirm the decision of the Court of Appeals, which in turn affirmed the entry of summary judgment against plaintiff on that claim.

MODIFIED AND AFFIRMED.

Justice ALLEN did not participate in the consideration or decision of this case.

Justice EARLS dissenting.

In May 2002, police arrested and charged Frankie Delano Washington as a suspect in a home invasion. Mr. Washington's trial, however, did not start until February 2007—almost five years later. That years-long delay was not Mr. Washington's fault. It was the State's. *See State v. Washington*, 192 N.C. App. 277, 298 (2008). As he waited for trial—the shadow of the charges hanging over his head—Mr. Washington tried again and again (and again) to move his case along. As the years passed, he lodged a flurry of motions, asking the trial court to reduce his bond, to compel evidentiary testing, and, finally, to dismiss his charges.

But the State stalled. For three years, it withheld key evidence from forensic testing. When the trial court ordered the evidence tested, the State never alerted the labs. And even when the case was finally scheduled for trial, the State thrice asked to continue it.

Small wonder, then, that the Court of Appeals vacated Mr. Washington's conviction on speedy trial grounds, chiding that "if the State had exercised even the slightest care," the delay could have been avoided. *Id.* at 297. Relying on Article I, Section 18 of the North Carolina State Constitution—the Open Courts Clause—the Court found "overwhelming evidence" that the State's "repeated neglect and

underutilization of court resources" caused the five-year delay and thus violated Mr. Washington's constitutional right to a speedy trial. *Id.* at 284.

Once outside the prison walls, Mr. Washington sought accountability from the State and District Attorney Tracy Cline (DA Cline), the lead prosecutor in his case. To that end, he brought a civil suit for damages and injunctive relief, seeking redress for the harms inflicted by the State and beyond the reach of his criminal appeal. *See Washington v. Cline*, 267 N.C. App. 370 (2019). Mr. Washington—invoking this Court's landmark ruling in *Corum*—sued directly under the State Constitution and its guarantee of a speedy trial. *See State v. Patton*, 260 N.C. 359, 363–64 (1963).

But today, the majority extinguishes his claim and bars him from redressing the panoply of constitutional harms inflicted by the State. According to the majority, the dismissal of Mr. Washington's charges was an adequate remedy for his speedy trial violation. In other words, dismissal cured his constitutional injury—he is not entitled to more.

I disagree. The protections afforded by the speedy-trial right ripple beyond the criminal courtroom. And so too do the harms from the right's violation. When the State drags out a criminal case, it impairs the integrity of those proceedings and the reliability of the result. But the harms of that constitutional violation are far broader. The State's delay, among other things, jeopardizes the defendant's ability to provide for himself and his family, exposes him to health and safety risks, severs him from his community, hobbles his liberty, and robs him and his loved ones of opportunities to flourish.

Mr. Washington's case is a prime example. Dismissing his charges freed him from prison and voided the tainted proceedings that put him there. But it did not—indeed could not—touch the constitutional harms in the world beyond the prison gates. No reasonable person would believe that mere release from custody and removal of a conviction is adequate redress for the years-long deprivation of their freedom. "Sorry we violated your rights, you can go home" is not a satisfactory remedy for the denial of this foundational right, especially when the charges were shaky and ill-examined from the start. That is precisely what *Corum* seeks to remedy. *See Corum v. Univ. of N.C.*, 330 N.C. 761 (1992). When a plaintiff suffers "a colorable constitutional injury that c[annot] be redressed through other means," *Corum* provides relief. *Craig v. New Hanover Cnty Bd. of Educ.*, 363 N.C. 334, 342 (2009). Because vacating Mr. Washington's conviction was a half-measure, and

because Mr. Washington lacks other avenues to fully redress his constitutional injuries, he may bring a *Corum* claim.

I start with the majority's view of *Corum* and the constitutional rights it protects. I then examine the constitutional guarantee of a speedy trial. After charting the contours of that right, I explain how its violation can inflict injuries beyond the criminal process and unreachable by criminal remedies. That is true of Mr. Washington. I examine his claims and how the State's constitutional breach harmed him in more ways than his criminal appeal could redress. And because his constitutional harms cannot be cured by criminal courts using criminal remedies, he may seek civil relief under *Corum*. Dismissing his charges was a partial fix—it cannot extinguish his right to full and fair redress for a constitutional violation. In holding the opposite, the majority denies Mr. Washington the relief our Constitution affords and our precedent demands. Respectfully, I dissent.

I. *Corum*'s vision of constitutional rights and remedies.

On its face, this case asks what counts as an "adequate remedy" under *Corum*. But in truth, Mr. Washington's claim—like *Corum* itself—taps into deeper principles about constitutional rights and the judiciary's role in protecting them.

Corum made the point most clearly, mooring this Court's power to craft remedies to "the nature of constitutional government." *Corum*, 330 N.C. at 788. From the first, North Carolina's Constitution has opened with a Declaration of Rights—a catalogue of "individual and personal rights entitled to protection against state action." *Id.* at 782. Those fundamental guarantees—chiseled into constitutional stone—embody "the will of the people in this State." *In re Martin*, 295 N.C. 291, 299 (1978). They are "the supreme law of the State," and thus secured from impingement by "state officials and shifting political majorities." *Corum*, 330 N.C. at 786–87. The "fundamental purpose" of those rights is "to provide citizens with protection from the State's encroachment." *Id.* at 782. So at its inception—as today—the Declaration ensures that the "violation of constitutional rights is *never* permitted by anyone who might be invested under the Constitution with the powers of the State." *Craig*, 363 N.C. at 339 (emphasis added) (quoting *Corum*, 330 N.C. at 783).

From that, *Corum* derived a corresponding truth: A right requires a remedy. And not just any remedy, but one that breathes life into the right itself. That is, a remedy worthy of a constitutional right must "protect th[e] right[ ] from encroachment by the State" and "correct the State's violation" of it. *Corum*, 330 N.C. at 787. Put differently, an adequate

remedy provides a salve to a plaintiff's injuries and packs enough sting to deter future violations. *See* The Federalist No. 15, at 95 (Alexander Hamilton) (Cooke ed., 1961) ("It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolution or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.").

Understandably, then, *Corum* rejected a paint-by-numbers approach to rights and remedies. Depending on "the right violated and the facts of the particular case," "[v]arious rights" may "require greater or lesser relief to rectify" their violation. *Corum*, 330 N.C. at 784. In other words, "[t]he nature of the right and the extent of the violation dictate the appropriate nature and extent of the corresponding remedy." *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 436 (2022) (citing *Corum*, 330 N.C. at 784). And so a grave breach of constitutional guarantees "demands a remedy of equivalent magnitude." *Id.*

Extending that logic, *Corum* tied constitutional remedies to the "purpose for the Declaration of Rights" and the "function and traditional role of the courts in North Carolina's constitutional democracy." *Corum*, 330 N.C. at 787. Because the judiciary "is the ultimate interpreter of our State Constitution," it "is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens." *Id.* at 783. That duty, however, is nothing new—the courts' "obligation to protect the fundamental rights" of citizens is "as old as the State." *Id.* And the power to vindicate rights carries with it the power to enforce them. That duty, too, "belongs to the courts." *See Hoke Cnty.*, 382 N.C. at 438. And the judiciary accomplishes that task by crafting relief and disbursing it in proper cases.

Thus, this Court's power to fashion remedies flows from and is coterminous with its constitutionally mandated duty to "protect the state constitutional rights of the citizens." *Corum*, 330 N.C. at 783; *see also Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 642 (2004) ("[W]hen the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it."). *Corum* thus drew from a deeper strand of constitutional "spirit," and fortified this Court's "long-standing emphasis on ensuring redress for every constitutional injury." *See Craig*, 363 N.C. at 342. And at its heart, *Corum*'s promise is simple but profound: "[I]n the absence of an

adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum*, 330 N.C. at 782.

In that vein, a plaintiff bringing a *Corum* claim "must allege that no adequate state remedy exists to provide relief for the injury." *Copper v. Denlinger*, 363 N.C. 784, 788 (2010). In fashioning relief, *Corum* flagged two restraints on this Court's remedial powers. When existing remedies do the job, we should bow to them. *See Corum*, 330 N.C. at 784. And of the remedies that would "right the wrong," we should choose the "least intrusive" one available. *Id.* Both rules rest on similar intuitions. When the law affords a fitting remedy for constitutional harms, fashioning an extra one is duplicative. And by needlessly reinventing the wheel, courts may spark friction with the other branches. *See In re Alamance Cnty. Ct. Facilities*, 329 N.C. 84, 100 (1991). So "in the interests of the future harmony of the branches" and in the "spirit of mutual cooperation," the judiciary should deploy its remedial authority with responsibility and pragmatism. *Id.* at 100–01.

The majority, however, converts *Corum*'s words of caution into its central teaching. According to the majority, a remedy is "adequate"—and thus *Corum* unavailable—if a plaintiff has "access to court to raise the constitutional violation, and the court can provide *some* form of relief for that violation." (Emphasis added). What counts as "some relief," we are not told. But it lies between a "meaningless" remedy and a "complete" one. The majority imports those bookends from *Corum*'s self-imposed limits. If citizens are entitled to complete relief, the majority reasons, "it would not be possible to 'bow' to alternative remedies or to choose the 'least intrusive' remedy available." To the majority, then, *Corum*'s pragmatic advice sets the ceiling on constitutional remedies and the judiciary's power to grant them.

I think that analysis has it backwards—it overstates the limits set by *Corum* and elevates form over substance, thus diluting this Court's duty to "guard and protect" constitutional guarantees. *Corum*, 330 N.C. at 785. Properly read, *Corum* does not require the judiciary to defer to existing remedies merely because they exist. And it does not mandate that we select the "least intrusive" remedy merely because it is the least intrusive. Instead, *Corum* guides *how* we fulfill our duty to mend constitutional wrongs, in a way that promotes responsibility, pragmatism, and inter-branch harmony. In other words, *Corum*'s prudential restraints do not—and cannot—swallow citizens' constitutional protections. And they cannot override our duty to "ensure that the violation of constitutional rights is *never* permitted by anyone who might be invested under

the Constitution with the powers of the State." *Craig*, 363 N.C. at 342 (cleaned up).

Instead, as *Corum* itself made clear, we start by examining the constitutional injury and the relief needed to cure it. That inquiry and our answer will depend on "the right violated and the facts of the particular case." *Corum*, 330 N.C. at 784. "Various rights" in various contexts may "require greater or lesser relief to rectify" their violation. *Id.* *Corum*'s limits apply on the back end, not at the threshold—that is, after this Court examines the right denied and the redress due. Put differently, *Corum*'s restraints guide which remedy we select from the menu of satisfactory relief. If existing remedies vindicate the right, we should bow to them. And if various forms of relief would do the job, we should select the "least intrusive" course.

But we accede to those alternatives when—and only when—they suffice to "right the wrong." *Id.* If available mechanisms are too insipid to "correct the State's violation of the plaintiff's particular constitutional right at issue," they fall short of constitutionally adequate redress. *See id.* at 785. And in that case, this Court may—indeed must—"fashion a common law remedy." *Id.*; *accord In re Alamance Cnty. Ct. Facilities*, 329 N.C. at 101 (explaining that this Court should defer to "established procedural methods" like "statutory remedies" so long as they "do not stand in the way of obtaining what is reasonably necessary for the proper administration of justice"); *Hickory v. Catawba Cnty.*, 206 N.C. 165, 174 (1934) (explaining that indictment of commissioners did not bar courts from granting mandamus relief because a valid remedy must be "one competent to afford relief on the particular subject-matter of [a party's] complaint" and "[p]unishment of the defendants would not provide the relief to which the plaintiffs are entitled").

To bolster that point, *Corum* examined our decision in *Sale*. In that case, the State deprived a plaintiff "of his private property for public use." *See Corum*, 330 N.C. at 785 (quoting *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 618 (1955)). But the plaintiff could not air his constitutional grievance through existing channels of statutory, contract, or tort claims. *See id.* In response, this Court allowed his constitutional challenge "to proceed under the common law." *Craig*, 363 N.C. at 341. That was so because, when existing mechanisms are insufficient, the "common law, which provides a remedy for every wrong will furnish the appropriate action for the adequate redress of such grievance." *Sale*, 242 N.C. at 618 (cleaned up). Even more, the available relief must align with and vitalize the constitutional right. "[N]othing short of actual payment, or its equivalent, constitutes just compensation," we

explained—"entry of a judgment is not sufficient." *Corum*, 330 N.C. at 785 (quoting *Sale*, 242 N.C. at 618). We thus allowed the plaintiff to seek damages because it was the least intrusive remedy that "would correct the State's violation of the plaintiff's particular constitutional right at issue." *Id.*

Put another way, this Court did not start its analysis by examining the convenience of the existing options. If that were so, an "entry of a judgment" would be the obvious, far less burdensome choice. Instead, to safeguard the "fundamental law of this State, based on natural justice and equity," *Sale*, 242 N.C. at 618, we endorsed damages because that relief "would correct the State's violation" of the plaintiff's rights, and "we were unable to fashion" a "less intrusive" remedy to right the wrong, *Corum*, 330 N.C. at 785.

In broader perspective, too, the majority's view of remedies clashes with *Corum*'s reasoning and the principles animating it. If this Court must bend the knee to existing remedies, we, in effect, outsource our duty to interpret and enforce constitutional protections. And if we start by charting the "least intrusive" course, then we skew our Constitution's meaning to the lowest common denominator. The status quo and convenience are poor measures of constitutional worth. And a regime built on those foundations is a fragile one indeed. *Corum* recognized that point, explaining that even long-standing doctrines like sovereign immunity "cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights." *Id.* at 785. To borrow *Corum*'s language, our constitutional protections are mere "fanciful gesture[s]" if they must yield to legal formalism. *Id.* at 786.

In that vein, I would anchor the analysis of an adequate remedy to the underlying right, the purposes animating it, and "the facts of the particular case." *Id.* at 784. Though this Court has offered sparse guidance on when a remedy is adequate, other states have tackled the question more directly—often citing *Corum*'s articulation of rights and remedies. Many courts—drawing on the Second Restatement of Torts—ask whether a remedy is "consistent with the purpose of and necessary to enforce" the constitutional right at issue, in view of the provision's "language and history." *Mack v. Williams*, 522 P.3d 434, 444–45, 448 (Nev. 2022); *see id.* at 451–52 (allowing damages remedy for violation of Nevada's search-and-seizure provision because it "remains essential to effectuate and advance the goals of" that constitutional right); *Katzberg v. Regents of the Univ. of Calif.*, 58 P.3d 339 (Cal. 2002); *Brown v. State*, 674 N.E.2d 1129, 1139 (N.Y. 1996) (allowing damages remedy for state constitutional violations because monetary relief is "consistent with the

purposes underlying the duties imposed by these provisions and is necessary and appropriate to ensure the full realization of the rights they state"); *see also Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017); *Dorwart v. Caraway*, 58 P.3d 128 (Mont. 2002); *Widgeon v. E. Shore Hosp. Ctr.*, 479 A.2d 921 (Md. 1983); *Shields v. Gerhart*, 658 A.2d 924 (Vt. 1995).

That precedent in mind, I would hold that an adequate remedy exists when a plaintiff may vindicate his constitutional claim in court and, if successful, obtain relief that would both "right the wrong[s]," *Corum*, 330 N.C. at 784, and restrain future "encroachment by the State," *id.* at 787. On that view, an adequate remedy has one foot in the past and the other in the future. Looking backwards, a remedy should redress the constitutional harms inflicted by the State's breach, thus vindicating the "purposes underlying" the right and "the duties imposed by" it. *See Brown*, 674 N.E.2d at 1139. And looking forwards, it should realize the foundational purpose of our Constitution: To protect "rights from encroachment by the State," and to secure them from infringement by "state officials and shifting political majorities." *Corum*, 330 N.C. at 787.

Thus, to keep the State in check and the right intact, an adequate remedy must meaningfully deter future government illegality. *See Mack*, 522 P.3d at 448–49 (explaining that "a damages remedy furthers the purpose of [Nevada's] search-and-seizure provision to the extent it acts as a deterrent to government illegality"). In my view, that formulation is faithful to *Corum*'s vision, the "fundamental right[s]" it protects, and this Court's duty to its citizens. *Corum*, 330 N.C. at 783; *Hoke Cnty.*, 382 N.C. at 438 ("The duty to ensure . . . redress belongs to the courts.").

It also fits with our precedent. As the majority acknowledges, many of our *Corum* cases have dealt with patently inadequate remedies. We have held, for instance, that a claim barred by immunity is not "adequate by any realistic measure." *Craig*, 363 N.C. at 339. To supplant *Corum* relief, existing mechanisms must provide, at a minimum, the "possibility of relief under the circumstances." *Id.* at 340. So when a plaintiff lacks the "opportunity to enter the courthouse doors and present his claim," he lacks an adequate remedy. *Id.* So too when "state law does not provide for the type of remedy sought by the plaintiff." *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 413 (2021) (cleaned up). In *Deminski*, for instance, the plaintiff sought compensatory and punitive damages, a permanent injunction, and attorneys' fees to remedy a school board's deliberate indifference to ongoing student harassment. *Id.* at 410. Because the "remedy sought . . . c[ould not] be redressed through other means," we held that "no other adequate state law remedy exist[ed]" for the plaintiff's colorable constitutional claim. *Id.* at 415. And even when

a remedy exists in theory, it is not adequate if it "does not apply to the facts alleged by the plaintiff." *Craig*, 363 N.C. at 342. So a "statutory remedy to recover damages"—even if the "ordinarily exclusive" mode of redress—does not satisfy *Corum* if the "statutory cause of action" expires before a plaintiff may invoke it. *Id.* at 341 (citing *Midgett v. N.C. State Highway Comm'n*, 260 N.C. 241 (1963)). In each of those cases, the plaintiffs lacked an adequate remedy because they had no opportunity to "have the merits of [their] case heard and [their] injury redressed if successful on those merits." *See id.*

By contrast, in the lone case where an existing remedy was "adequate," that remedy closely fit—and thus fully vindicated—the constitutional right at play. *See Copper*, 363 N.C. at 788. In *Copper*, Mr. Douglas—a public school student—alleged that the Durham School Board violated his "state constitutional right to procedural due process." *Id.* at 788. He sued under *Corum*, asserting two procedural deprivations: That he was denied a "hearing before his long-term suspension from school," and that he "was never given" the chance to appeal the disciplinary measure. *Id.* at 788–89. Put another way, Mr. Douglas's constitutional injury was the deprivation of school access *without proper procedure*. We held that Mr. Douglas could not bring a *Corum* claim because existing mechanisms would "redress [his] alleged constitutional injury." *Id.* at 788. More specifically, we noted "two separate statutes" allowing students to appeal disciplinary decisions—including suspensions—to their school board and then the superior court. *Id.*

So while Mr. Douglas alleged a denial of proper procedure, existing channels "provide[d] a means of redressing such an injury" and curing the constitutional harm. *Id.* Nothing suggested that Mr. Douglas "was somehow barred from the doors of either the courthouse or the Board." *Id.* at 789. In other words, he "always had the statutory right to appeal." *Id.* But he never did so. Mr. Douglas neglected to take "any affirmative steps" to challenge his suspension, even with "representation from not one, but two, attorneys." *Id.* He never claimed that "it would have been futile to attempt to appeal his suspension" through the channels in place. *Id.* And he never argued that existing statutory remedies were "inadequate or would fail to redress the alleged constitutional injury." *Id.* at 790. In short, Mr. Douglas could not bring a *Corum* claim to allege the denial of procedural due process when he "failed to avail [himself] of the due process offered under state law." *Id.* at 791.

Copper charted the contours of an adequate remedy. In that case, this Court withheld *Corum* relief because multiple statutes afforded Mr. Douglas the very procedure he sought. In other words, there was a close

fit between the asserted harms and the available remedies. Fashioning extra relief was unnecessary and duplicative because existing statutes patched the alleged constitutional gaps. This Court thus bowed to those remedies because they "provide[d] a means of redressing" Mr. Douglas's constitutional harm—not because they merely existed. *Id.* at 788. *Copper*, then, hardly supports the idea that an adequate remedy need only provide "*some* form of relief." The lesson from that case is far more modest: When a plaintiff enjoys "a statutory right to appeal" that would "provide a means of redressing" an alleged deprivation of procedural due process, a separate *Corum* claim is redundant and unavailable. *Id.* at 788–89. That is especially true when the plaintiff does not dispute the sufficiency of existing mechanisms and has "failed to avail [himself] of the due process offered" by current law. *Id.* at 791.

Applied here, *Copper*'s conception of an adequate remedy underscores why Mr. Washington lacked one. In *Copper*, separate statutes furnished the plaintiff with the very procedure he claimed he was denied. Those remedies were thus adequate because they allowed him to raise his claim and, if successful, fully cure his injury. Not so for Mr. Washington. A criminal appeal on speedy trial grounds involves limited claims, limited issues, and limited remedies. For that reason, Mr. Washington could only raise one facet of his constitutional violation and redress one facet of his injuries. Unlike in *Copper*, there was a yawning gap between his constitutional harms and the relief available. And so unlike in *Copper*, Mr. Washington had no forum to vindicate the full scope of his injuries and, if successful, to redress them.

Which raises a more fundamental difference between Mr. Washington's case and our precedent. In the majority's view, Mr. Washington is attempting to double dip on his remedies. Because he had the "opportunity to raise a constitutional violation in court," "did so," and "received a remedy," the majority frames his civil suit as a bid to snag "even more remedies in a second proceeding." But unlike other *Corum* claimants, Mr. Washington could not obtain relief in a single proceeding. In challenging his criminal conviction, Mr. Washington could *only* challenge his criminal conviction. He could not air the full spectrum of harms inflicted by the State's speedy trial violation or seek noncriminal forms of relief. Indeed, had he asked for damages in his criminal appeal, the courts would have jettisoned those claims at the threshold. *See* N.C.G.S. § 1-8 (2023) ("Where the violation of a right admits both of a civil and a criminal remedy, the right to prosecute the one is not merged in the other."); *see also Shore v. Edmisten*, 290 N.C. 628, 637 (1976) ("[T]he criminal trial itself may not be conducted to decide the question

of how much damage or loss has been suffered."). Mr. Washington thus lacked a mechanism to fully vindicate his speedy trial right and meaningfully redress the scope of the State's violation. For that reason, it is simplistic and distortive to frame his *Corum* claim as a grasping effort to nab a "second remedy" in a "second proceeding."

Most regrettably, recasting Mr. Washington as an opportunistic, double-dipping litigant cheapens *Corum*'s constitutional vision and this Court's duty to its citizens. This case is not about what Mr. Washington "wants," as the majority puts it. It is about the relief he is *owed* for the State's breach of his fundamental protections. Properly viewed, Mr. Washington does not seek multiple remedies for a single harm. He seeks redress for nine years' worth of harms stemming from the violation of his rights. *Corum* itself disclaimed the majority's artificial and rigid view of constitutional remedies, cautioning that the facts of the case and the nature of violation will "require greater or lesser relief to rectify" the harm. *See Corum*, 330 N.C. at 784. And to ignore the reality of Mr. Washington's case and the limited relief available in his criminal appeal injects rigidity where *Corum* prescribes flexibility.

Dismissing Mr. Washington's charges was an important first step. But it did not redress the varied harms stemming from the State's constitutional violation. For that reason, dismissal alone did not sufficiently vindicate his speedy trial right and the values underlying it. And for the same reason, Mr. Washington may bring a *Corum* claim to redress the constitutional injuries left untouched by his criminal appeal.

II. The harms of a speedy trial violation reach beyond and are not redressable by criminal process.

I next examine the "purposes underlying" the speedy trial right and "the duties imposed" on the State. *See Brown*, 89 N.Y.2d at 189. For North Carolinians, the right to swift justice is doubly protected. At the federal level, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const., amend. VI. Our state constitution extends similar protections in more sweeping language, guaranteeing that, "All courts shall be open . . . and right and justice shall be administered without favor, denial, or *delay*." N.C. Const., art. I, § 18 (emphasis added); *see State v. McKoy*, 294 N.C. 134, 140 (1978). Both constitutional provisions sprang from the same historical roots. The right to "swift justice" lies "at the very foundation of our English law heritage." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). It was inscribed in Magna Carta and etched into our state and federal constitutions. *See id.* at 223–26. Today, the guarantee

of a speedy trial remains "one of the most basic rights preserved by our Constitution," *id.* at 226, and is "secured by the fundamental law of this State," *McKoy*, 294 N.C. at 140.

On its face, the right to a speedy trial seems crafted for and cabined by criminal proceedings. But that guarantee is of broader constitutional berth. The U.S. Supreme Court has recognized as much. *See Barker v. Wingo*, 407 U.S. 514, 519 (1972). This Court has, too. *See State v. Hollars*, 266 N.C. 45, 50–51 (1965); *see also State v. Johnson*, 275 N.C. 264 (1969). And because the right extends beyond the criminal process, so must the remedy for its violation. Dismissing Mr. Washington's charges—on its own—resolves a narrow slice of the State's harms. It does not mend the constitutional injuries or ward off future constitutional violations. And it thus fails "to effectuate and advance the goals of" the speedy trial guarantee. *See Mack*, 522 P.3d at 452.

The right to a speedy trial is "generically different" from other constitutional protections for criminal defendants. *Barker*, 407 U.S. at 519. It ensures that the defendant is "treated according to decent and fair procedures." *Id.* at 519–20. And it limits "the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Marion*, 404 U.S. 307, 320 (1971) (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)). Extended delays, for example, may prevent witnesses from accurately recalling events. *Barker*, 407 U.S. at 532. And in the lag between arrest and trial, witnesses may die or disappear. *Id.* For that reason, "persons who are detained between arrest and trial are more likely to receive prison sentences than those who obtain pretrial release." *Id.* at 533 n.35. That procedural imbalance "skews the fairness of the entire system." *Id.* at 532. And so, of the available *criminal* remedies, we have held that "dismissal of the charges is the only possible remedy" when the State withholds a speedy trial. *McKoy*, 294 N.C. at 140. That said, "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *Marion*, 404 U.S. at 320. What, then, are these evils?

When a defendant is left lingering in jail awaiting trial, that time is "dead time." *Barker*, 407 U.S. at 533. It means job loss and a "drain [on] his financial resources." *Id.* at 537 (White, J., concurring) (quoting *Marion*, 404 U.S. at 320). Evidence bears that out. People "detained in jail while awaiting the resolution of their criminal cases" lose "almost $30,000 in foregone earnings and social benefits" over the "course of the working-age life cycle." Will Dobbie & Crystal Yang, *The Economic Costs of Pretrial Detention*, Brookings Papers on Econ. Activity, at 251, 251, 253 (2021). Pretrial criminal involvement also dissuades employers

from conducting interviews, making it substantially harder for defendants awaiting trial to find jobs. *See* Terry-Ann Craigie et al., *Conviction, Imprisonment, and Lost Earnings* 13 (Brennan Ctr. for Just. 2020), https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal [hereinafter Craigie, *Conviction, Imprisonment, and Lost Earnings*]. While a defendant's case is delayed, that time "means time out of the workforce," slashing the likelihood of gainful employment. *Id.* Further, "child support payments, credit card debt, rent, and other living expenses" accrue during pretrial detention and increase due to late charges or unpaid interest. Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America* 15 (Vera Inst. of Just., Feb. 2015), https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf [hereinafter Subramanian, *Incarceration's Front Door*]. And if a defendant is convicted, their economic prospects face even steeper hurdles. Formerly imprisoned people "earn nearly half a million dollars less over their careers than they might have otherwise." Craigie, *Conviction, Imprisonment, and Lost Earnings* at 6–7.

More broadly, the harms of a speedy trial violation ripple through families and communities. *Id.* at 7. Over half of pretrial detainees have children under 18. *See* Dobbie & Yang at 253. Children with parents in prison report higher rates of mental health and behavioral problems. *See* Sara Wakefield, *Incarceration, Families, and Communities: Recent Developments and Enduring Challenges*, 51 Crime & Just. 399, 404–05 (2022). Those trends extend into the teenage years. *See id.* at 405. Adolescents with incarcerated parents report higher rates of teenage aggression and external behavioral problems, such as depression and anxiety. *Id.* Economically, too, a speedy trial violation can alter children's life trajectory. Studies suggest that pretrial detention has intergenerational spillover effects—counties with "high levels of pretrial detention when children are young (age 7-12) exhibit significantly lower levels of intergenerational mobility for children" when they reach adulthood. *See* Dobbie & Yang at 254; *see also id.* at 283–88.

Pretrial detention also affects a broader set of family members, including partners, parents, and siblings. *See* Wakefield at 407. Incarceration of a partner increases material insecurity, homelessness, and financial strain. *Id.* at 407–08. Secondary expenses also mount, including costly visits to prisons and the toll of lengthy separations. *See id.* at 408. Families feel the brunt of that strain. Lost earnings, for instance, add up when one parent's imprisonment forces the other parent to quit their job and provide childcare. *See* Dobbie & Yang at 260.

Other costs soon follow. A family's money is shunted into commissary accounts, phone and video calls, court costs, criminal justice debt, and the cost of an attorney. *See* Craigie, *Conviction, Imprisonment, and Lost Earnings* at 7; *see also* Dobbie & Yang at 252. Even when the parent is released from incarceration, the reentry period can pose an "acute stressor when families try to reunite with little access to supportive services." *See* Wakefield at 408.

The right to swift justice also lessens the "overcrowding and generally deplorable" conditions of jails. *Barker*, 407 U.S. at 519–20. Incarceration "jeopardizes health and well-being" because people who need health care while in prison may not receive any treatment and may be forced to adopt survival behaviors that are not marketable in the workplace. Craigie, *Conviction, Imprisonment, and Lost Earnings* at 13. As the COVID-19 pandemic laid bare, there is "greater prevalence of contagious diseases in jails" that increases lethal outcomes for detainees, especially those with chronic health problems. Subramanian, *Incarceration's Front Door* at 17.

The speedy trial right has a communal facet, too. As the U.S. Supreme Court has noted, delay leaves the defendant "unable to lead a normal life because of community suspicion and his own anxiety." *Barker*, 407 U.S. at 527. It also subjects him to "public obloquy" and "seriously interferes with [his] liberty." *Id.* at 537 (White, J., concurring) (quoting *Marion*, 404 U.S. at 320). This "cloud of anxiety, suspicion, and . . . hostility," *id.* at 533, fuels the cycle of incarceration, "making jail a gateway to deeper and more lasting involvement" in the criminal justice system, Subramanian, *Incarceration's Front Door* at 5.

In short, the right to a speedy trial guarantees fair criminal proceedings and protects against prejudice. But it reaches beyond the criminal process to forestall injuries that exist far apart from procedural fairness. As such, when the State violates that right and delays a defendant's day in court, it inflicts harms that the criminal process simply cannot remedy.

III. Dismissing Mr. Washington's charges did not redress the full scope of his constitutional harms.

This case exemplifies the sprawling harms that flow from a speedy trial violation. Mr. Washington's complaint details the injuries inflicted outside the criminal process and beyond the reach of any criminal remedy. In recounting his harms, we treat the allegations in his complaint as true and view the facts in his favor.

After his arrest, Mr. Washington spent more than 366 days in the Durham County Jail because he could not afford the $1 million bond. During that time, Mr. Washington lost his job as an auto mechanic. His ten-year-old son was also victimized. When Mr. Washington was arrested, his son was left "home alone" and not found until a day later. *Washington*, 192 N.C. at 277. Mr. Washington's "sudden separation" from his son stretched for the duration of his confinement. *Id.*

After a year in detention and four motions asking for bond reduction, Mr. Washington was forced to pay $37,500 just to secure release. Even when freed from formal detention, Mr. Washington's liberty was straitjacketed by the conditions in his pretrial release order. He remained subject to those restraints on his liberty as the State delayed his trial, refused to test critical evidence, and ignored other suspects.

When his trial finally started—almost five years after his arrest—the delay preceding it "significantly impaired Mr. Washington's defense." Many witnesses struggled to remember "events that occurred nearly five years" before and could not "recall details pertinent to the defense." Police witnesses, in particular, "recalled no details" from the arrest or investigation, reciting statements from old reports without remembering enough facts to respond to cross-examination. Across all categories of witnesses, the common refrain was "I don't recall." And Mr. Washington's inability to meaningfully cross-examine witnesses was devastating, as the "prosecution relied at trial solely on the witnesses' long-faded memories."

Because of the State's years-long delay, Mr. Washington lost "direct evidence of [his] actual innocence," and the "ability to challenge pretrial identification evidence." That stale evidence, in turn, created "a substantially greater likelihood that the in-court identifications would result in misidentification of [Mr. Washington] as the perpetrator of the offenses." And given the witnesses' muddled memories, Mr. Washington could not meaningfully probe their description of events, challenge their credibility, or "otherwise expose the multiple dimensions of their identifications' unreliability." Mr. Washington was then convicted and sentenced to consecutive multi-year terms of imprisonment. *See Washington*, 192 N.C. App. at 281.

Even after the Court of Appeals overturned his conviction, Mr. Washington's injuries persisted. Incensed by public criticism, DA Cline continued to make "numerous false, conclusory assertions of [Mr. Washington's] guilt to representatives of the media." In fact, she "insisted that a local newspaper publish all of" her comments despite

the newspaper warning her of the risks of publicizing "false statements." Her "multiple false, stigmatizing assertions relating to" Mr. Washington cropped up in "written correspondence with representatives of the news media" and were "re-published and amplified" by DA Cline in interviews.

In short, since his arrest in 2002, Mr. Washington felt the full weight of the State's systemic failures. He was deprived of his liberty, sustained "irreparable harm to his reputation," and suffered "severe, disabling emotional, mental, and physical harm." While handling his case, the State and its agents marked Mr. Washington "as an infamous violent criminal who committed racially motivated crimes." In effect, the State turned Mr. Washington "into a public pariah, subjecting him to extreme and sustained public obloquy." Both he and his family endured "public scorn, taunts, and insults." And the State's attacks on his character were reprinted by "local media" and amplified by "national publications that reproduced those local reports." Even after the dismissal of charges, Mr. Washington will never escape the stains of the "false allegations that Defendants advanced and repeatedly publicized." And because of the State's long-running denial of his speedy trial rights, Mr. Washington struggled with "severe and chronic depression, anxiety, and other diagnosable conditions."

Economically, too, Mr. Washington bore the costs of the State's actions. He lost his job as well as opportunities for "education, training, earnings, and earning capacity." And those economic losses were even more staggering because Mr. Washington "was required to incur exorbitant costs associated with securing bail, retaining professional assistance in connection with the criminal proceedings against him, and other expenses in connection with defending against the unlawful criminal proceedings." Mr. Washington's family suffered as well. Because of the State's constitutional violation, Mr. Washington's son, for instance, was deprived of his father's care, support, and guidance.

IV. Because dismissing Mr. Washington's charges did not—and could not—cure his constitutional harms, it is not an adequate remedy.

The majority holds that dismissing Mr. Washington's charges "meaningfully" remedies nine years' worth of constitutional injuries. In other words, releasing him from prison and removing his faulty conviction is "good enough"—anything more is a windfall. I disagree.

As a criminal remedy, dismissal addresses just one facet of Mr. Washington's injuries: The integrity of his conviction. If Mr. Washington challenged his conviction alone—as he successfully did in his criminal

appeal—then the majority would be correct; the scope of the State's speedy trial violation is cured. The Court of Appeals recognized as much, explaining that "in the context of his *criminal* prosecution, [Mr. Washington] has already received the only acceptable remedy for the violation of the speedy trial right." *Washington*, 267 N.C. App. at 373 (emphasis added).

But that is not the case before us. Mr. Washington has filed "a civil lawsuit, not a criminal prosecution." *Id.* And he does not seek "to overturn his criminal convictions, but to redress harms he allegedly suffered as a result of the denial of his right to a speedy trial." *Id.* In other words, Mr. Washington invokes *Corum* to redress all the major evils inherent in violating his constitutional guarantees—evils that exist vastly apart from the prejudice that the State injected in his criminal conviction. Though dismissal is a "meaningful remedy" for his *criminal* prosecution, it does nothing for the injuries that stand apart from procedural unfairness.

To the majority, however, that distinction makes no difference. Under its ruling, Mr. Washington is now barred from receiving compensation for all the past and future economic losses he suffered. He is barred from receiving compensation for the physical injuries he suffered and the emotional trauma he endured. He no longer has a means to redress the liberty and privacy he was stripped of. He cannot be compensated for the education, training, and earnings he lost, nor for the time missed with his son. And Mr. Washington cannot even repair the damage to his reputation from the criminal proceedings and DA Cline's mudslinging.

In my view, however, a criminal procedural remedy for a criminal procedural violation does not foreclose civil relief for civilly cognizable harms. Again, *Corum* prescribed a flexible, fact-specific analysis of rights and their corresponding remedies: "[v]arious rights that are protected by our Declaration of Rights may require greater or less relief to rectify the violation of such rights, *depending upon the right violated and the facts of the particular case*." *Corum*, 330 N.C. at 784 (emphasis added). Of course, a different case with a different claimant might warrant different relief. The redress due to Mr. Washington, for instance, is quite different than the redress due a defendant who successfully raised a speedy trial claim, secured prompt release, and suffered minimal hardships. But categorically extinguishing civil relief, as the majority does today, is a sprawling step that ignores the disjuncture between criminal cases and civil suits, and the relief available through each.

Indeed, this Court has also recognized the divide between criminal and civil remedies, and the discrete interests vindicated through

those channels. Most relevant here, we have allowed civil redress for violations of a defendant's right to a speedy trial. In *Simeon v. Hardin*, 339 N.C. 358 (1994), a group of defendants awaiting trial brought a civil action against the Durham County district attorney for breaching their speedy trial rights. According to the defendants, prosecutors declined to schedule their cases "for trial for the tactical purposes of keeping [them] in jail, delaying a trial at which [they were] likely to be acquitted," and "pressuring [them] into entering a guilty plea." *Id.* at 378. The defendants also linked the alleged constitutional violations to concrete harms. By denying the defendants a speedy trial, prosecutors exacted "pretrial punishment," worked to "surprise criminal defense counsel," and "impair[ed] the quality of criminal defendants' legal representation." *Id.* The violations also "force[d] criminal defendants released on bail to miss work and come to court repeatedly," *id.* at 364, as well as to "incur[ ] unnecessary witness-related expenses," *id.* at 378.

This Court allowed the defendants to seek civil remedies for their constitutional claims. *Id.* at 379. We explained that "the issues raised by [the defendants] could not be authoritatively settled in their individual criminal cases and the relief sought could not be adequately provided by the criminal court." *Id.* at 368. True, the civil cases overlapped with criminal proceedings. But we reasoned that "the civil action in this case does not involve the same issues as [the defendants'] individual criminal prosecution." *Id.* at 367. For that reason, the civil claims were "collateral to the underlying criminal charges against [them] and the issues which normally arise during a criminal prosecution." *Id.* And the relief sought—declaratory and injunctive relief—is "more adequately addressed in a civil action." *Id.* at 368. *Simeon* thus makes clear that the criminal process simply does not provide adequate relief to redress injuries inherent in violations of the speedy trial right. That is true for Mr. Washington, just as it was for Mr. Simeon.

V. Conclusion

The majority starts and ends with a familiar legal refrain: For every right, there is a remedy. That is true. But the deeper issue is whether a remedy is enough to sustain a right. As *Corum* recognized, rights and remedies are symbiotic—one without the other is nothing at all. And when one wilts, the other does too.

For that reason, a constitutional violation demands a correlatively robust remedy—one that secures the right "from encroachment by the State," and vindicates its purpose and underlying values. This Court, after all, has "the responsibility to protect the state constitutional rights

of the citizens." *Corum*, 330 N.C. at 783. And when we leave a constitutional violation insufficiently redressed, we cheapen the underlying right and disserve the citizens it protects.

With those principles in mind, I would hold that dismissing Mr. Washington's charges was not an adequate remedy for his speedy trial violation. Standing alone, that remedy redressed only a sliver of the harms inflicted by the State. Though dismissal corrected his defective conviction, it did not—and could never—remedy the full scope of his constitutional injuries. To vindicate his speedy trial right—and to secure that protection for others, too—Mr. Washington should be allowed to seek the civil relief needed to "right the wrong." *See id.* at 784. *Corum* gives him that chance, and I would allow his claim to continue. By divesting Mr. Washington of the remedy he is due, the majority erodes the right itself. I respectfully dissent.

Justice RIGGS joins in this dissenting opinion.

LOUIS M. BOUVIER, JR., KAREN ANDREA NIEHANS, SAMUEL R. NIEHANS, AND JOSEPH D. GOLDEN

v.

WILLIAM CLARK PORTER, IV, HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC, STEVE ROBERTS, ERIN CLARK, GABRIELA FALLON, STEVEN SAXE, AND THE PAT MCCRORY COMMITTEE LEGAL DEFENSE FUND

From N.C. Court of Appeals
20-441

From Guilford
17CVS3273

No. 403PA21

ORDER

Defendants-petitioners Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund have filed a motion respectfully requesting my recusal in this matter. Though filed in the ordinary course, the motion itself occupies a peculiar procedural posture. I already recused myself from this matter while a judge at the Court of Appeals. Moreover, in obeisance to Canons C(1)(a) and (b) of the North Carolina Code of Judicial Conduct given my recent proximity to this case and relationship with plaintiffs/parties in this matter, I informed this Court in advance of defendants-petitioners' motion (and before the disposition of any other matter in this case following my investiture as Associate Justice) that I have recused myself in this case to protect and maintain the dignity of this Court. And while defendants-petitioners were informed by the Court of my recusal following the filing of their motion, they have nonetheless elected to pursue the motion notwithstanding my prior decision to recuse myself from this matter.

A standing order of this Court provides that when a motion is

> filed with the Court under Rule 37 of the North Carolina Rules of Appellate Procedure seeking the recusal or disqualification of a Justice from participation in the deliberation and decision of a matter pending before the Court, the Court shall assign the motion to the Justice who is the subject of the motion for their determination. That determination shall be final.

Order Concerning Recusal Motions, 379 N.C. 693 (2021). Consistent with the sole discretion afforded to me by that order, and having already recused from this matter, defendants-petitioners' motion is dismissed as moot. *Cf.*, *e.g.*, *Simeon v. Hardin*, 339 N.C. 358, 370 (1994) ("Whenever during the course of litigation it develops that the relief sought has been granted . . . the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law." (citation omitted)). I am and remain recused from this matter for all other purposes notwithstanding entry of this order.

This the 4th day of March 2024.

/s/ Riggs, J.
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of March 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

BREWER v. RENT-A-CENTER

[385 N.C. 853 (2024)]

ROBERT BREWER, EMPLOYEE

v.

RENT-A-CENTER, EMPLOYER,
TRAVELERS INSURANCE CO.
(SEDGWICK CLAIMS SERVICES,
THIRD-PARTY ADMINISTRATOR), CARRIER

From N.C. Court of Appeals
22-296

From N.C. Industrial
Commission
W94420

No. 139PA23

ORDER

Plaintiff's consent motion to dismiss appeal is allowed. The decision of the Court of Appeals in *Brewer v. Rent-A-Ctr.*, 288 N.C. App. 491 (2023) is vacated. *See State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 289, 221 S.E.2d 322, 324–25 (1976) (vacating a decision of the Court of Appeals because the case became moot while on appeal) ("When a case becomes moot while on appeal, the usual disposition is simply to dismiss the appeal. This procedure, however, leaves the decision of the Court of Appeals undisturbed as a precedent when, but for intervening mootness, it might not have remained so. While we express no opinion as to its correctness, *the better practice in this circumstance is to vacate the decision of the Court of Appeals*." (internal citation omitted) (emphasis added)).

By order of the Court in Conference, this the 1st day of February 2024.

/s/ Allen, J.
For the Court

Justices Earls and Riggs concur in the dismissal of the appeal but dissent with respect to vacatur for the reasons explained in Justices Earls and Morgan's dissents in *Walker v. Wake Cnty. Sheriff's Dep't*, 385 N.C. 300, 303–09 (2023).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of February 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

BYRD v. SAPPER

[385 N.C. 854 (2024)]

HENRY CLIFFORD BYRD, SR.

v.

SUPERINTENDENT JOHN SAPPER

No. 412P13-9

ORDER

Pursuant to an administrative order entered by this Court on 23 December 2021, and having reviewed and considered precedent established by this Court, the North Carolina Code of Judicial Conduct, and the arguments of the parties, plaintiff's motion to disqualify the undersigned is denied.

This the 30th day of January 2024.

/s/ Riggs, J.

Allison J. Riggs
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of January 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN RE Z.A.

[385 N.C. 855 (2024)]

IN THE MATTER OF Z.A. AND M.P., MINOR CHILDREN	From N.C. Court of Appeals P23-424 From Orange 21JT3 21JT4

No. 201P23

ORDER

The petition for writ of certiorari filed by petitioner Orange County Department of Social Services is allowed for the following limited purpose. The 2 August 2023 order of the Court of Appeals granting respondent-mother's petition for writ of supersedeas is hereby vacated. *See Craver v. Craver*, 298 N.C. 231, 238 (1979) ("When an appeal of the order to which the stay of supersedeas is directed is not perfected, the stay must be dissolved.").

The temporary stay ordered by this Court 16 August 2023 is dissolved. The petition for writ of supersedeas filed by the Orange County Department of Social Services and the petition for writ of certiorari filed by the guardian ad litem are dismissed as moot.

By order of the Court in Conference, this the 20th day of March 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of March 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

HOKE COUNTY BOARD OF EDUCATION; ET AL., PLAINTIFFS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

AND

RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS

v.

STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

AND

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS

From N.C. Court of Appeals
22-86 23-788

From Wake
95CVS1158

No. 425A21-3

ORDER

Beyond question, an "unbiased, impartial decision-maker is essential to due process." *Crump v. Bd. of Educ. of the Hickory Admin. Sch. Unit*, 326 N.C. 603, 615 (1990) (citing *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)). Though "bias" has "many connotations in general usage," it has a "few specific denotations in legal terminology." *Id.* In *Crump*, this Court explored how the law identifies "bias," explaining that:

> Bias has been defined as a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction, or as

> a sort of emotion constituting untrustworthy partiality. Some sort of commitment is necessary for disqualification due to bias, even though it is less than an irrevocable one. Bias can refer to preconceptions about facts, policy or law; a person, group or object; or a personal interest in the outcome of some determination.

Id. (cleaned up).

Applying those concepts here is particularly unusual, as this Court has already decided the issues now before us. *See Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 380, 383 (2023) (Earls, J., dissenting) (explaining that this Court already "unequivocally rejected" the arguments Legislative-Intervenors seek to relitigate in this appeal). Four members of the current Court have already expressed their opinions about how this case should be decided. *See Hoke Cnty. Bd. of Educ. v. State* (*Leandro IV*), 382 N.C. 386, 469–71 (2022). Indeed,

> [t]he Legislative-Intervenors previously have raised the same jurisdictional arguments they now seek to raise in their bypass petition. There, as here, they disputed the trial court's authority to order a statewide remedy because, in their view, that court never found a statewide constitutional violation. We found those assertions untimely, distortive, and meritless.

Hoke Cnty. Bd. of Educ., 385 N.C. at 383–84 (cleaned up) (Earls, J., dissenting).

And the last time this case was before us, Legislative-Intervenors sought my recusal on the same grounds they do now. I addressed their arguments and denied their request. *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 694 (2022) (Earls, J.) (order examining Legislative-Intervenors' motion and explaining why recusal was not warranted under Canon 3(C)(1)(b) of the North Carolina Code of Judicial Conduct). Therefore, the facts, precedent, and reasoning which explained my decision to hear *Leandro IV* apply with equal force to rehearing the same issues here.

Legislative-Intervenors have nonetheless suggested again that I cannot hear this case. Their motion is based on the trial court's *sua sponte* action to invite participation by the Penn-Intervenors on remedial proceedings related to statewide claims eleven years after I withdrew from any representation of that party on an entirely different claim. In the interest of transparent and reasoned decision-making, I examine and

now respond to Legislative-Intervenors' motion. To do so, I explain the legal standard for recusal, chart the relevant procedural history of this case, and assess the Legislative-Intervenors' arguments. After carefully considering Canon 3(C)(1)(b) and precedent applying it, I again conclude that recusal is unwarranted here because I never represented Penn-Intervenors "in the matter in controversy currently pending before this Court." *Id.* at 695.

Almost twenty years ago, I was one of several attorneys to sign two complaints on behalf of Penn-Intervenors—a group of public-school students, their parents, and the Charlotte Branch of the NAACP. In essence, Penn-Intervenors sued the Charlotte-Mecklenburg School District (CMS) as part of the *Leandro* litigation. Specifically, they challenged how CMS assigned students to schools, arguing that the district divvied students up by wealth and created "many 'high poverty' and low-performing schools."

Because Penn-Intervenors are parties to the appeal before us, Legislative-Intervenors cite the 2005 complaints as grounds for my recusal. But though I joined my colleagues in signing Penn-Intervenors' complaints against an individual school district in 2005, that suit is not before us. Moreover, I did not personally participate in that case, appear in court for Penn-Intervenors, or make any important decisions about the litigation. In these circumstances, Canon 3(C)(1)(b) does not require recusal. And I am confident that my work with an organization that represented Penn-Intervenors in a distinct matter almost twenty years ago will not impair my ability to impartially decide this appeal.

That conclusion holds whether one takes the view, as the prior majority of the Court did, that this litigation properly involves statewide claims or whether one agrees with Legislative-Intervenors that this case only involves Hoke County. Legislative-Intervenors' request for my recusal is directly undercut by their contention that this suit only implicates one county. Logically, they cannot be right that this is a statewide case for purposes of disqualifying me but only a Hoke County case for purposes of the Court's jurisdiction.

I. The Legal Standard for Recusal Under Canon 3(C)(1)(b)

North Carolina's Code of Judicial Conduct instructs judges to recuse themselves when they "served as [a] lawyer in the matter in controversy." N.C. Code of Jud. Conduct, Canon 3(C)(1)(b). Under that canon, a judge should withdraw from a case if "substantial evidence" shows that she is "unable to rule impartially" because of a "personal bias, prejudice or interest." *State v. Scott*, 343 N.C. 313, 325 (1996) (quoting *State*

v. Fie, 320 N.C. 626, 627 (1987)). The "standard is whether grounds for disqualification actually exist." *Lange v. Lange*, 357 N.C. 645, 649 (2003) (cleaned up). To that end, this Court has instructed judges to base recusal decisions on concrete facts, not "inferred perception[s]." *Id.*

In applying Canon 3, our courts have found that a judge's mere connection to a litigant or issue does not mandate recusal. *See, e.g.*, *State v. Pemberton*, 221 N.C. App. 671, 729 S.E.2d 128 (2012) (unpublished) (judge was not disqualified from a case even though he was the district attorney while his office investigated the defendant); *State v. Mitchell*, 220 N.C. App. 161, 723 S.E.2d 584 (2012) (unpublished) (slip op. at 8-9) (judge's "prior representation of a party adverse to defendant" four years earlier in an unrelated matter did not bar him from hearing her criminal case).

By contrast, a judge may not hear a case if he "initiated the criminal process against" the defendant. *See Fie*, 320 N.C. at 628. In *Fie*, for instance, a judge wrote a district attorney "requesting that the grand jury be asked to consider" specific charges against two defendants. *Id.* at 626. The judge "based his letter on testimony he had heard" in a separate trial "over which he had presided." *Id.* The district attorney acted on the judge's suggestion, charged the defendants with several crimes, and secured indictments from a grand jury. *Id.* For their trial, the defendants were assigned to the very judge who solicited their charges. *Id.* But the judge did not recuse. *See id.*

We said that was error. *Id.* at 628. Because the judge "initiated the criminal process against" the defendants, he was directly and personally involved in their case. *Id.* His letter to the district attorney created the "reasonable perception" that the Judge believed the defendants "were guilty of the crimes with which they were charged." *See id.* at 628. Because of the judge's direct involvement with the defendants' criminal case and his demonstrated "preconception of the validity of the charges against" them, this Court held that recusal was proper. *Id.* at 628–29.

In applying Canon 3(C)(1)(b), I draw guidance from that precedent. Though a judge should recuse when she has served "as [a] lawyer in the matter in controversy," courts construing that canon have disclaimed recusal based on a judge's "remote connection" to a case or litigant. *Pemberton*, slip op. at 5 (quoting N.C. Code of Jud. Conduct, Canon 3(C)(1)(b)). Even when a judge once represented an adverse party, Canon 3(C)(1)(b) does not automatically bar her from later hearing a distinct matter. Instead, recusal turns on the nature of a judge's prior representation, the time elapsed, and the parallels between the

judge's past work and the matter now before her. *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned*," 14 Geo. J. Legal Ethics 55, 83 (2000) (providing criteria for recusal decisions when a "judge is presiding over the case of a prior client").

II. Background and Procedural History

The legal framework in focus, I again explain the procedural history of this case and my connection to Penn-Intervenors.

A. Penn-Intervenors' 2005 Claim Against CMS

In 2005, I worked as an attorney at UNC's Center for Civil Rights. There, I joined my colleagues in signing two complaints on behalf of Penn-Intervenors against the school district where they lived. Those complaints sought a "limited intervention" in the *Leandro* litigation. Intervening Complaint, at 3, *Hoke Cnty. Bd. of Educ. v. Charlotte-Mecklenburg Bd. of Educ.*, No. 95CVS1158 (Wake Cnty. Super. Ct. Feb. 9, 2005). And Penn-Intervenors focused on a limited issue—their suit centered on changes to CMS's "student assignment patterns during the past five years." *Id.* at 3.

The trial court allowed Penn-Intervenors to intervene on just one claim: That CMS's policies had failed "to provide sufficient human, fiscal, and educational resources to its central city and high poverty schools." *See* Order re: Motion to Intervene, at 4, Hoke County Bd. of Educ., et al., v. State of North Carolina et al., No. 95 CVS 1158, Wake Co. Superior Ct., (Aug. 19, 2005).[1] To focus Penn-Intervenors' role in the litigation, the trial court severed their claim from the "pending matters that are on-going in the remedial phase of this case." *Id.* at 5. To that end, the court ordered that the suit against CMS "be pursued separately from the other claims pending in this action." *Id.* at 10. It also mandated that "pre-trial discovery and trial, if necessary, will go forward separately on the intervening claim." *Id.* And to underscore Penn-Intervenors' limited involvement, the court emphasized that the suit against CMS would not "interfere with the remedial process and proceedings of this case in other school systems throughout the State." *Id.*

I did not personally work on the case—before or after the trial court allowed the limited intervention against an individual school district.

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1. The trial court's 2005 Order re: Motion to Intervene is appended to my previous Order denying Legislative-Intervenor's Motion and Suggestion of Removal. *See Hoke Cnty. Bd. of Educ.*, 382 N.C. at 695 n.2 & 700-08.

And when I left the Center for Civil Rights in 2007, I ended my already minimal ties to Penn-Intervenors' suit against CMS. In the seventeen years since, I have not rekindled those connections or worked on Penn-Intervenors' claim against their school district.

B. Penn-Intervenors' 2018 Participation in Statewide Remedial Proceedings

This case stems from separate statewide litigation that Penn-Intervenors joined in 2018. That year, the trial court in the *Leandro* suit decided that the State had not complied with this Court's decisions. It scheduled proceedings to craft a remedy for that statewide constitutional violation. And at its own behest, the court invited Penn-Intervenors to participate in the statewide suit. Penn-Intervenors accepted the court's invitation and joined the 7 March 2018 Consent Order Appointing Consultant.

Since then, Penn-Intervenors have remained involved in the statewide remedial proceedings. That litigation against the State produced the Comprehensive Remedial Plan we examined in *Leandro IV*. And in this case, we consider the trial court's 17 April 2023 order calculating the State's funding obligations under that remedial plan. In other words, this appeal stems from Penn-Intervenors' role in the statewide proceedings that started in 2018. The 2005 claim against CMS is not—and has never been—before us.

III. Discussion

Legislative-Intervenors make two arguments for recusal. First, they contend that "recusal is still warranted in this appeal" for the same reasons they raised in *Leandro IV*. There, as here, Legislative-Intervenors urged me to withdraw because I signed Penn-Intervenors' complaints almost two decades ago.

But here, as there, Legislative-Intervenors omit key "factual and legal context that is relevant to the application of Canon 3(C)(1)(b) under these circumstances." *Hoke Cnty. Bd. of Educ.*, 382 N.C. at 695. Most critically, the motion lumps Penn-Intervenors' 2005 suit against CMS into the 2018 litigation against the State. But as explained above, those matters are distinct—factually, temporally, procedurally, and legally.

Those distinctions bear on Canon 3(C)(1)(b) and the need for recusal. My employer organization *only* represented Penn-Intervenors in their 2005 suit against CMS. That claim was "severed from the underlying case" and is not at issue in this appeal. *Id.* at 696. Instead, this case deals only with the litigation against the State. Penn-Intervenors joined the statewide proceedings in 2018—over a decade after I left

the organization representing them against CMS. The statewide litigation produced the statewide remedial orders at issue in *Leandro IV* and before us now. Because my involvement with Penn-Intervenors ended long before they embarked on *this* appeal involving the State, I never represented Penn-Intervenors "in the matter in controversy" before this Court. *See* N.C. Code of Jud. Conduct, Canon 3(C)(1)(b).

I underscore, too, how little involvement I had in Penn-Intervenors' 2005 claim against CMS. I did not personally work on that suit. I do not remember "ever appearing in court" for Penn-Intervenors. *Hoke Cnty. Bd. of Educ.*, 382 N.C. at 696. I "did not receive any direct compensation for the pro bono representation." *Id.* at 698. And I did not participate in "any critical decisions on behalf of the parties that shaped the course of the litigation." *Id.* at 699 (cleaned up).

Second, Legislative-Intervenors urge me to disqualify because "this new appeal" raises issues that *Leandro IV* did not. In this case, we agreed to reconsider the trial court's subject matter jurisdiction to issue its 17 April 2023 order. In disputing jurisdiction, the parties challenge Penn-Intervenors' standing to seek statewide relief. So according to Legislative-Intervenors, "Penn-Intervenors' pleadings"—including those I signed in 2005—"are now before this Court."

That is wrong. Penn-Intervenors' standing to seek *statewide* relief is a question raised by the *statewide* litigation. And again, Penn-Intervenors joined the suit against the State in 2018—eleven years after I ended any professional ties. In other words, this appeal, like *Leandro IV*, flows from a statewide action seeking statewide relief, not Penn-Intervenors' 2005 claim against the Charlotte-Mecklenburg Board of Education concerning the alleged failure of CMS to provide sufficient resources to its central city and high-poverty schools.

Since we decided *Leandro IV* less than two years ago, nothing about the parties or issues has changed to mandate my recusal in this case but not the earlier one involving the same issues. Here—as there—Penn-Intervenors' 2005 claim against CMS was a different suit based on different facts that raised different legal questions than this appeal. And so here—as there—Canon 3(C)(1)(b) does not require my recusal, as I have not represented Penn-Intervenors "in the matter in controversy" before us.

For these reasons, I conclude that recusal is not warranted. Consistent with the Code of Judicial Conduct and precedent applying it, I am confident in my ability to "rule impartially" and without "personal

bias, prejudice or interest." *Scott*, 343 N.C. at 325 (quoting *Fie*, 320 N.C. at 627). Legislative-Intervenors' motion is denied.

This the 31st day of January 2024.

/s/ Earls, J.
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31st day of January 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

HOKE COUNTY BOARD OF EDUCATION; ET AL., PLAINTIFFS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

AND

RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS

v.

STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

AND

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS

From N.C. Court of Appeals
22-86 23-788

From Wake
95CVS1158

No. 425A21-3

ORDER

Through counsel, plaintiffs moved the undersigned and this Court to consider whether recusal is required in a motion filed November 21, 2023. The motion contains an argument identical in substance, and similar in terms of structure and verbiage, to a motion filed herein by the same plaintiffs' counsel on July 15, 2022. The previous motion was denied in a special order entered on August 19, 2022.

Plaintiffs' counsel has not alleged that there has been a change in circumstances, the law, the Code of Judicial Conduct, or the administrative

orders of this Court since denial of the previous motion that would warrant a different outcome here. Nor has plaintiffs' counsel alleged that the jurisdictional issue now squarely before the Court in any way implicates participation by the undersigned due to prior service as an attorney, personal knowledge of disputed facts, or fiduciary relationship or financial interest.

The undersigned is of the opinion that the substance of this motion was previously addressed. However, members of this Court should strive to fortify public trust, and unilateral action in this matter could undermine public confidence. Erring on the side of prudence, and because it appears the filing may violate Rule 34(a) of the Rules of Appellate Procedure, the undersigned refers this motion to the Court for resolution.

This the 5th day of February, 2024.

s/Berger, J.

Philip E. Berger, Jr.,
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of February 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

HOKE COUNTY BOARD OF EDUCATION; ET AL., PLAINTIFFS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

AND

RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS

v.

STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

AND

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS

From N.C. Court of Appeals
22-86 23-788

From Wake
95CVS1158

No. 425A21-3

ORDER

Plaintiffs' motion and suggestion of recusal was referred to the Court by a special order entered by Justice Berger on 5 February 2024. In entering the special order, Justice Berger acted pursuant to this Court's order of 23 December 2021 ("Recusal Procedure Order"), which establishes a procedure for the disposition of motions seeking the recusal or disqualification of a Justice from a matter pending before the Court. 379 N.C. 693 (2021). Under the Recusal Procedure Order, a Justice may either (1) rule on the recusal or disqualification motion or (2) refer the motion to the Court. *Id*. This is the second case in which Justice Berger

has referred a motion to the Court for disposition. *See also Holmes v. Moore*, 384 N.C. 191, 191 (2023) (dismissing unanimously a disqualification motion referred to the Court by Justice Berger). The motion in the other case requested Justice Berger's disqualification on grounds similar to those raised here.

Plaintiffs' pending motion essentially restates an earlier motion filed by plaintiffs in this case that sought Justice Berger's recusal based on his familial relationship to intervenor-defendant Senator Philip E. Berger, who is a party to this litigation solely in his official capacity as President Pro Tempore of the Senate. Justice Berger denied plaintiffs' first recusal motion in a special order entered on 19 August 2022. *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 692, 692 (2022). The order cites legal authorities including N.C.G.S. § 1-72.2, which provides that the President Pro Tempore of the Senate and the Speaker of the House of Representatives act as "agents of the State" and not in their individual capacities when they intervene in lawsuits challenging state laws. *Id.*; *see also NAACP v. Moore*, 380 N.C. 263, 264 (2022) (explaining that Justice Berger was not required to recuse when Senator Berger was sued purely in his official capacity because "a reasonable person would understand that a suit against a government official in his or her official capacity is not a suit against the individual."). Senator Berger thus remains an intervenor-defendant in this case simply by virtue of his continued service as President Pro Tempore of the Senate. *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 731 (2022) (substituting the Acting State Controller for the retiring State Controller in appellate proceedings).

Because it offers no new grounds for recusal, plaintiffs' pending recusal motion amounts to an impermissible challenge to Justice Berger's denial of their first motion. Under the Recusal Procedure Order, when a Justice rules on a recusal or disqualification motion, "[t]hat determination shall be final." 379 N.C. at 693. The motion is therefore dismissed.

By order of the Court in Conference, this the 16th day of February 2024.

/s/ Allen, J.
For the Court

Justice Berger did not participate in the consideration of this motion.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of February 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice RIGGS dissenting.

Impartiality—maintained in fact as well as for appearances—is central to the functioning of our state's courts. *N.C. Nat. Bank v. Gillespie*, 291 N.C. 303, 311 (1976). And this Court has historically observed this objective principle in *every* case, great or small. *See*, *e.g.*, *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 103 (1984) ("It is axiomatic, of course, that it is the lawful right of every litigant to expect utter impartiality and neutrality in the judge who tries his case . . . . This right can neither be denied nor abridged.")).

Recently, in the face of recusal motions in a number of politically-charged cases, this Court decided, pursuant to an administrative order entered by this Court on 23 December 2021 after extensive briefing from multiple parties and amici, that when a motion is "filed with the Court under Rule 37 of the North Carolina Rules of Appellate Procedure seeking the recusal or disqualification of a Justice from participation in the deliberation and decision of a matter pending before the Court, the Court shall assign the motion to the Justice who is the subject of the motion for their determination. That determination shall be final." *Order Concerning Recusal Motions*, 379 N.C. 693 (2021). The order provided that, in the alternative, the subject Justice may refer the motion to the full court, but this Court neither required that nor suggested that there was anything improper about a subject Justice exercising the right to decide on recusal motions targeting him or her. *Id.*

In this instance, Justice Berger has opted for the alternative approach, referring the motion to the entire Court because "members of this Court should strive to fortify public trust, and unilateral action in this matter could undermine public confidence." *Referral Order*, No. 425A21-3 (Berger, J.) (N.C. Feb. 5, 2024). In my view, this unnecessary commentary itself undermines public confidence in the Court. This Court decided in 2021 that it was appropriate for an individual Justice to decide, with finality, motions requesting his or her recusal. To suggest

that following that procedure, expressly approved by this Court, "could undermine public confidence,"—particularly when, mere days earlier, Justice Earls issued a detailed opinion explaining her decision to deny a recusal motion filed by Senator Philip E. Berger, Sr., and the other legislative defendants targeting her in this same case—can only serve to fuel public attacks on a Justice who followed the proscribed administrative rules for addressing recusal motions. Since the entry of that 2021 administrative order, Justice Berger took unilateral action on recusal motions in at least three matters. *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 692 (Berger, J.) (2022); *Harper v. Hall*, 380 N.C. 272 (Berger, J.) (2022); *N.C. NAACP v. Moore*, 380 N.C. 263 (Berger, J.) (2022). Why would it "undermine public confidence" here and not in those cases?

In his order, Justice Berger also expresses the opinion that "the substance of this motion has already been decided" and further suggests the filing is sanctionable. *Referral Order*, No. 425A21-3 (Berger, J.) (N.C. Feb. 5, 2024). Signaling to one's colleagues what action should be taken and how one would vote, before then referring the motion to one's colleagues, makes the decision to refer to the entire Court seem performative rather than substantive. And Justice Berger has clearly found a receptive audience in the majority, which dismisses the recusal motion without even purporting to independently decide the question presented.

Regardless, because this matter was referred to the entire Court by Justice Berger's own choice, my conscience requires addressing the merits of the motion—as a constitutional officer, I cannot ignore the merits of a motion presented to me. Beyond the generalities common to all cases, it seems uncontroversial that impartiality concerns weigh particularly heavy in those disputes where our State's highest court—our Supreme Court—seeks to apply its highest legal authority—the North Carolina Constitution—to review the actions of a co-equal branch state government—the General Assembly. In fact, worries of undue judicial interference help form one of the very bases of our jurisprudence concerning review of legislative acts. *See State v. Revis*, 193 N.C. 192, 195 (1927) ("[C]ourts do not undertake to say what the law ought to be; they only declare what it is. . . . It can make no difference whether the judges, as individuals, think ill or well of the manner in which the Legislature has dealt with a given subject."); *cf. Corum v. Univ. of North Carolina*, 330 N.C. 761, 784 (1992) ("[I]n exercising that power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong."). Little wonder, then, that the glare

of public scrutiny is particularly focused on this Court when it deliberates on a case implicating the constitutional rights of *every child in the State*.[1]

Just as a case of almost universal constitutional magnitude invites closer inspection and graver concern for impartiality, so, too, does the nature of the relationship at issue in this recusal motion. Few bonds are closer and more enduring than that between a loving parent and child. "The tender ties of love and sympathy existing between . . . parent and child are the common knowledge of the human race, as they are the holiest instincts of the human heart." *Cashion v. Western Union Telegraph Co.*, 123 N.C. 267, 274 (1898). So strong are those familial ties that the law itself defaults to those connections to do the greatest justice in myriad circumstances. *See*, *e.g.*, N.C.G.S. § 29-15 (2023) (providing for a child's inheritance by intestacy); N.C.G.S. § 7B-906.2(b) (2023) (generally requiring family reunification as a primary or secondary permanent plan in abuse, neglect, and dependency cases); *Peterson v. Rogers*, 337 N.C. 397, 400-05 (1994) (recognizing a presumption at law favoring parents over other relations in child custody disputes).

In a feat of inescapable common sense, our canons of judicial conduct recognize this reality, and provide that judges should not decide cases where their parents or children are parties. *See* N.C. Code of Judicial Conduct, Canon 3.C.(1)(d) (providing that the participation of a judge's child or parent as a litigant, lawyer, or interested party is an "instance[ ]" wherein "the judge's impartiality may reasonably be questioned" such that recusal is warranted). Decisions from other jurisdictions reaffirm this straightforward notion. *See*, *e.g.*, *Comm'n on Judicial Performance v. Bowen*, 123 So.3d 381, 384 (Miss. 2013) (holding a trial judge's failure to recuse from asbestos litigation was judicial misconduct where his parents had previously sued and settled asbestos exposure claims against the defendants "because a reasonable person, knowing all the circumstances, would have doubts regarding [the

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1. *See*, *e.g.*, T. Keung Hui, *NC Supreme Court schedules Leandro school funding case. Here's when it will be heard.*, The News & Observer (Dec. 21, 2023), https://www.newsobserver.com/news/local/education/article283389133.html; *Long-running North Carolina education case will return before the state Supreme Court in February*, The Coastland Times (Dec. 30, 2023), https://www.thecoastlandtimes.com/2023/12/30/long-running-north-carolina-education-case-will-return-before-the-state-supreme-court-in-february/; *Berger submits Leandro recusal request to full Supreme Court*, The Carolina Journal (Feb. 5, 2024), https://www.carolinajournal.com/berger-submits-leandro-recusal-request-to-full-supreme-court/; Greg Childress, *North Carolina Supreme Court hearing scheduled for Leandro school funding case*, NC Newsline (Dec. 22, 2023, 5:00 PM), https://ncnewsline.com/briefs/north-carolina-supreme-court-hearing-scheduled-for-leandro-school-funding-case/.

judge's] impartiality in the case"); *In re Griego*, 181 P.3d 690, 694 (N.M. 2008) (disciplining a judge who gave family members favorable dispositions in traffic court because impartiality concerns "required [the judge] to recuse himself in cases involving family members").

I recognize that these concerns might not arise in every case where the State, writ-large, is hauled into court by an individual's suit challenging governmental action. *See N.C. NAACP*, 380 N.C. at 263 (Berger, J.) (declining to recuse from a suit against the State because "my father's name appears in the caption only as a matter of procedure" as a necessary defendant). But that is not the circumstance we have here; the Legislative-Intervenors, including Senator Philip E. Berger, Sr., maintain in this appeal—rightly or wrongly—that they have not historically been defendants in this litigation. Justice Berger (and two justices voting in the majority to dismiss this motion) has previously agreed with this conception of the case. *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 506 (Berger, J., with Newby, C.J., and Barringer, J., dissenting) ("[T]he General Assembly was never joined as a necessary party[.]"). *But see Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 635 (2004) ("[B]y the State we mean the legislative and executive branches which are constitutionally responsible for public education . . . ."). In their own view, Legislative-Intervenors—again, the lead Senator being the father of Justice Berger—have affirmatively inserted themselves into this lawsuit. Whatever the rationale for avoiding recusal, it cannot be because this is simply a "suit against a government official in his or her official capacity." *N.C. NAACP*, 380 N.C. at 264 (Berger, J.). Indeed, one could reasonably conclude that Legislative-Intervenor's injection of themselves into this litigation in pursuit of positive relief *heightens*, rather than diminishes, the appearance of impropriety here.

Other disquieting facts appear on the face of the record and undercut assertions that this is a suit in which Senator Berger appears in his "official capacity" only as a matter of procedure rather than as the result of a substantive policy choice with personal consequences. In addition to the mere fact of the parent-child relationship, our canons identify impropriety where a parent of the judge "[is] known to have an interest that could be substantially affected by the outcome of the proceeding." N.C. Code of Judicial Conduct, Canon 3.C.(1)(d)(iii). Here, Justice Berger's father, as one of the named Legislative-Intervenors and leader of the majority party in the Senate, has repeatedly tied his policy objectives to the maintenance of a multi-billion-dollar surplus. *See, e.g.*, Colin Campbell, *If GOP gets its way, budget surplus will lead to more tax cuts*, WUNC (Feb. 27, 2023, 4:56 PM), https://www.wunc.org/

politics/2023-02-27/if-gop-gets-its-way-budget-surplus-will-lead-to-more-tax-cuts. Indeed, he is presently campaigning on it individually and as leader of his caucus. *Budget*, Phil Berger: North Carolina Senate, https://www.philberger.org/budget (last accessed Feb. 6, 2024). Any opinion from this Court reversing or setting aside the trial court's order drawing down funds against that surplus necessarily bears upon Senator Berger's ability to deliver on his policy objectives and the campaign promises he has made to voters in seeking to maintain his elected office. Put bluntly, a son's vote to deliver his father a campaign "win" *in an election year* substantially affects the latter's personal and financial interests.[2]

Nor am I convinced that this motion is inappropriate because circumstances have not changed.[3] In the fifteen months since our last decision in this case, the American public has taken a magnifying glass to the conduct of our country's most powerful jurists. *See Friends of the Court*, ProPublica, https://www.propublica.org/series/supreme-court-scotus (last accessed Feb. 5, 2023). One U.S. Supreme Court justice took to the op-ed pages of a paper of record to address these concerns. Samuel Alito, *Justice Samuel Alito: ProPublica Misleads Its Readers*, The Wall Street Journal (June 20, 2023), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda?mod=opinion_lead_pos5. And the country's highest court saw fit to adopt a formal code of conduct for the first time in its history. Code of Conduct for Justices of the Supreme Court of the United States (Nov. 13, 2023).[4] Now, more than ever, it is vital that our courts "not

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2. That Justice Berger was himself popularly elected does little to dispel any appearance of impropriety. *See N.C. NAACP*, 380 N.C. at 264 (Berger, J.) ("More than 2.7 million North Carolinians, knowing or at least having information available to them concerning my fathers service in the Legislature, elected me to consider and resolve significant constitutional questions."). Voters also expect elected judges and justices to recuse themselves when their connection with litigants causes their impartiality to be reasonably questioned. N. C. Code of Judicial Conduct, Canon 3.C.(1)(d); *see also N.C. Nat. Bank*, 291 N.C. at 311 ("[E]very man should know that he has had a fair and impartial trial, or, at least, that he should have no just ground for the suspicion that he has not had such a trial." (cleaned up)).

3. I note that nothing in our appellate rules requires a party to assert different facts than those previously raised in a recusal motion in an earlier appeal when pursuing a recusal motion in a *new* appeal from a different trial court order, particularly when that prior motion was denied without expressing a substantive rationale. *See Order*, *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 692 (2022) (Berger, J.).

4. Not coincidentally, that code of conduct also identifies parent/child relationships between judges and litigants as circumstances "in which the Justice's impartiality might reasonably be questioned" such that recusal is proper due to "doubt that the Justice could fairly discharge his or her duties." *Id.*, Canon 3.B.(2).

only be impartial in the controversies submitted to them but shall give *assurances* that they *are* impartial, free . . . from any bias or prejudice . . . , [and thus] shall also *appear* to be impartial." *Ponder v. Davis*, 233 N.C. 699, 705 (1951) (cleaned up) (emphasis added).

In sum, given the legal significance of this case and the undeniably and uniquely close relationship between Legislative-Intervenor Senator Philip E. Berger, Sr.—who seeks to have this Court overturn its previous ruling forcing the State to comply with the State Constitution—and the subject justice, Associate Justice Philip E. Berger, Jr.—the author of the dissent decrying this Court's decision to require the legislative branch (including his father) to fully fund public education, *Hoke Cnty.*, 382 N.C. at 477 (Berger, J., with Newby, C.J., and Barringer, J., dissenting)—I would vote to allow this motion to ensure that the fundamentally necessary appearance of impartiality can be maintained in this case. *N.C. Nat. Bank*, 291 N.C. at 311. As difficult as it may be, "judges must bear the primary responsibility for requiring appropriate judicial behavior. . . . The same is true for justices." Code of Conduct for Justices of the Supreme Court of the United States, cmt. 13–14 (cleaned up). Common sense dictates that some bonds are simply too close, and some circumstances simply too pointed, for any judicial order of this Court—short of allowing plaintiffs' motion—to exorcise the specter of doubt lingering in the minds of the public in this case. Recusal is the sole sacrament, and I would solemnly invoke it here. I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

HOKE COUNTY BOARD OF EDUCATION; ET AL., PLAINTIFFS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

AND

RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS

v.

STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

AND

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS

From N.C. Court of Appeals
22-86 23-788

From Wake
95CVS1158

No. 425A21-3

ORDER

The parties' Consent Motion to Extend Time Limit for Oral Argument is denied; however, the Court on its own motion extends the appellants' argument by ten minutes and the appellees' argument by ten minutes for a total argument time of forty minutes per side.

By order of the Court in Conference, this the 16th day of February 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of February 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

LINKER v. LINKER

[385 N.C. 876 (2024)]

LAURA LEIGH LINKER

v.

TIMOTHY LYON LINKER

v.

NANCY LYON BOLING, INTERVENOR

From N.C. Court of Appeals
23-328

From Guilford
14CVD359

No. 345P23

ORDER

The Court construes the Petition for Writ of Mandamus as a Motion for Temporary Stay and allows the stay of the 21 November 2023 decision of the Court of Appeals of North Carolina in *Linker v. Linker, et al.*, COA23-328, and of the hearing calendared for 26 January 2023 in District Court, Guilford County, pending the Court's ruling on petitioner's Petition for Discretionary Review.

By order of the Court in Conference, this 9th day of January 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of January 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

LINKER v. LINKER

[385 N.C. 877 (2024)]

LAURA LEIGH LINKER

v.

TIMOTHY LYON LINKER

v.

NANCY LYON BOLING, INTERVENOR

From N.C. Court of Appeals
23-328

From Guilford
14CVD359

No. 345P23

ORDER

On 21 December 2023 plaintiff filed a Petition for Writ of Mandamus. On 9 January 2024, the Court entered an order construing the Petition for Writ of Mandamus as a Motion for Temporary Stay, and allowed the stay of the 21 November 2023 decision of the Court of Appeals.

The Court denies the Petition for Discretionary Review and now dissolves the Motion for Temporary Stay.

By order of the Court in Conference, this the 6th day of February 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of February 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

ALVIN MITCHELL v. THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS	From N.C. Court of Appeals 21-639 From Forsyth 19CVS3758

No. 121A23

ORDER

The petition for discretionary review as to additional issues filed by petitioner on 9 May 2023 is allowed as to the first issue only.

By order of the Court in Conference, this the 20th day of March 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of March 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.

v.

KYRIE JAMAL MEBANE AND ALISHA MEBANE

From N.C. Court of Appeals
22-708

From Wake
21CVS7683

No. 106P23

ORDER

Plaintiff's petition for discretionary review is decided as follows: The Court allows plaintiff's petition for discretionary review for the limited purpose of vacating the opinion of the Court of Appeals and remanding this case to the Court Appeals for further consideration in light of this Court's decision in *North Carolina Farm Bureau Mutual Insurance Co. v. Hebert*, No. 281A22 (N.C. March 22, 2024).

By order of the Court in Conference, this the 20th day of March 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of March 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

SANU SILWAL, GITA DEVI SILWAL AND GS2017 RE, LLC

v.

AKSHAR LENOIR, INC.

From N.C. Court of Appeals
23-589

From Caldwell
22CVD1171

No. 53P24

ORDER

The Court allows defendant's Motion for Temporary Stay, upon condition that defendant reinstate and comply with the terms of the appeal bond entered 4 January 2023. *See* N.C.G.S. § 1-269 (2023).

By order of the Court in Conference, this the 7th day of March 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of March 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

22 MARCH 2024

1P24	In the Matter of T.P.	1. Respondent-Mother's Motion for Temporary Stay (COA23-469) 2. Respondent-Mother's Petition for Writ of Supersedeas 3. Respondent-Mother's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/04/2024** Dissolved **02/06/2024** 2. Denied **02/06/2024** 3. Denied **02/06/2024**
3P23-5	State v. Joseph Edwards Teague, III	Def's Pro Se Motion to Rehear Via Ex Parte Hearing Before the Full Court	Dismissed
3P24	In the Matter of E.P.	1. Respondent-Father's Motion for Temporary Stay (COA22-873) 2. Respondent-Father's Petition for Writ of Supersedeas 3. Respondent-Father's PDR Under N.C.G.S. § 7A-31	1. Denied **01/03/2024** 2. 3.
4P24	Crystal Michelle Jordan v. Gingko Fieldbrook Townhomes d/b/a Fieldbrook Townhomes	1. Plt's Pro Se Motion for Stay Pending Appeal (COAP24-4) 2. Plt's Pro Se Motion in the Alternative to Strike Setting New Trial 3. Plt's Pro Se Petition for Writ of Certiorari	1. Dismissed **01/05/2024** 2. Dismissed **01/05/2024** 3. Dismissed **01/05/2024**
5P24	State v. C.K.D.	1. State's Motion for Temporary Stay (COA23-204) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/08/2024** 2. 3.
6P24	State v. William Jocoby Singletary	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-175)	Denied
7P24	In the Matter of I.G., P.G., S.G., B.G., L.G.	1. Respondent-Mother's Motion for Temporary Stay (COA23-445) 2. Respondent-Mother's Petition for Writ of Supersedeas 3. Respondent-Mother's Motion for Temporary Stay 4. Respondent-Mother's Petition for Writ of Supersedeas 5. Respondent-Mother's PDR Under N.C.G.S. § 7A-31	1. Dismissed as moot **01/09/2024** 2. Denied **01/09/2024** 3. Dismissed as moot **01/22/2024** 4. Denied **01/22/2024** 5. Denied **01/22/2024**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

22 MARCH 2024

10P24	State v. Ronald Wayne Macon, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA23-357)	Allowed
12P24	State v. Steven Zachary Alva	1. Def's Pro Se Motion for Temporary Stay (COA22-1062) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA 4. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed as moot **01/12/2024** 2. Dismissed as moot **01/12/2024** 3. Denied **01/12/2024** 4. Denied **01/12/2024**
16P24	Halley Anne Berry Marie Washington v. Doctors, Nurses, Staff	1. Plt's Pro Se Motion for Temporary Stay 2. Plt's Pro Se Petition for Writ of Supersedeas 3. Plt's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed **01/23/2024** 2. Dismissed **01/23/2024** 3. Dismissed **01/23/2024**
17P24	State v. Dino Lamont Thompson	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-1036) 2. Def's Pro Se Motion to Appoint Counsel	1. Denied 2. Dismissed as moot
20P24	State v. Terahn Larry Blue	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-450)	Denied
21P24	State v. Robbie Eugene Shumate	1. Def's Pro Se Motion for Review (COA23-256) 2. Def's Pro Se Motion for Extension of Time to File PDR	1. Dismissed 2. Dismissed
24P23-2	SCGVIII-Lakepointe, LLC v. Vibha Men's Clothing, LLC; Kalishwar Das	Def's Pro Se Motion for Reconsideration of Denied Certiorari	Dismissed **Dietz, J., recused**
25P23-2	Kalishwar Das v. SCGVIII Lakepointe, LLC in c/o Mr. John F. Morgan, Jr.	Plt's Pro Se Motion for Reconsideration of Denied Certiorari	Dismissed **Dietz, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

22 MARCH 2024

27P24	Elite Home Health Care, Inc., and Elite Too Home Health Care, Inc. v. N.C. Department of Health and Human Services, Division of Medical Assistance, Division of Health Benefits	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA23-122)	Denied
29A24	Smith Debnam Narron Drake Saintsing & Myers, LLP v. Paul Muntjan	1. Plt's Motion for Temporary Stay (COA23-324) 2. Plt's Petition for Writ of Supersedeas 3. Plt's Notice of Appeal Based Upon a Dissent	1. Dismissed as moot **02/01/2024** 2. Allowed **02/01/2024** 3. ---
30P24	In re Shamika Dominique Crudup	1. Def's Pro Se Motion for Petition for Rehearing 2. Def's Pro Se Motion for En Banc and Unethical Misconduct Cases 23CR396996, 23CR404306, and 23CR404316	1. Dismissed 2. Dismissed
31A24	State v. Scott Everett Ford	1. Def's Motion for Temporary Stay (COA23-374) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent 4. Def's PDR as to Additional Issues	1. Dismissed as moot **02/07/2024** 2. Allowed **02/07/2024** 3. --- 4.
37P24	State v. Marion Tavares Ellerbe	Def's Pro Se Motion for PDR (COA23-60)	Dismissed
38A24	State of North Carolina, *ex rel.* Joshua H. Stein, Attorney General v. MV Realty PBC, LLC, MV Realty of North Carolina, LLC, MV Brokerage of North Carolina, LLC, Amanda Zachman, Antony Mitchell, David Manchester, and Darryl Cook	1. Defs' Motion for Temporary Stay 2. Defs' Petition for Writ of Supersedeas 3. Defs' Petition for Writ of Certiorari to Review Order of Business Court	1. Allowed **03/07/2024** 2. 3.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

22 MARCH 2024

39A24	Chauncey Peele v. Melba Hodges Peele	Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-614)	Dismissed
46P24	State v. Cornell Dwayne Haugabook, Jr.	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **02/23/2024**
47P17-2	State v. Avery Joe Lail, Jr.	Def's Pro Se Motion for Notice of Appeal (COAP23-582)	Dismissed
49A24	State v. James Fredrick Bowman	1. State's Motion for Temporary Stay (COA23-82) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **02/26/2024** 2. Allowed **03/14/2024** 3. ---
53P24	Sanu Silwal, Gita Devi Silwal and GS2017 RE, LLC v. Akshar Lenoir, Inc.	1. Def's Motion for Temporary Stay (COA23-589) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Special Order **03/07/2024** 2. 3.
54P24	Stephen Matthew Lassiter, Employee v. Robeson County Sheriff's Department, Alleged-Employer, Synergy Coverage Solutions, Alleged-Carrier, and Truesdell Corporation, Alleged-Employer, The Phoenix Insurance Co., Alleged-Carrier	1. Defs' (Truesdell Corporation and The Phoenix Insurance Company) Motion for Temporary Stay (COA23-267) 2. Defs' (Truesdell Corporation and The Phoenix Insurance Company) Petition for Writ of Supersedeas 3. Defs' (Truesdell Corporation and The Phoenix Insurance Company) PDR Under N.C.G.S. § 7A-31	1. Allowed **03/11/2024** 2. 3.
56P24	State v. Eric Ramond Chambers	1. State's Motion for Temporary Stay (COA22-1063) 2. State's Petition for Writ of Supersedeas	1. Allowed **03/07/2024** 2.
57P24	State v. Chad Coffey	1. State's Motion for Temporary Stay (COA22-883) 2. State's Petition for Writ of Supersedeas	1. Allowed **03/08/2024** 2.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

22 MARCH 2024

64P24	State v. Damarlo Jamon Perry	1. State's Motion for Temporary Stay (COA23-375) 2. State's Petition for Writ of Supersedeas 3. State's Motion to Amend Petition for Writ of Supersedeas and Motion for Temporary Stay	1. Allowed **03/15/2024** 2. 3. Allowed **03/15/2024**
73P23-3	State v. Tyrone Sequine Reynolds	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **12/20/2023**
89PA22	Fearrington, et al. v. City of Greenville	Plts' Motion to Supplement Record on Appeal (COA20-877)	Denied **02/06/2024** **Dietz, J., recused**
102P19-6	State v. Christopher Lee Neal	1. Def's Pros Se Petition for Writ of Certiorari to Review Order of the COA (COAP22-142) 2. Def's Pro Se Motion for Writ of Error *Coram Nobis*	1. Denied 2. Denied
104P23-2	State v. Markus Odon McCormick	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-690) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Pro Se Motion for Appropriate Relief 4. Def's Pro Se Motion to Amend or Correct Record on Appeal 5. Def's Pro Se Motion to Compel Appellate Counsel to Surrender Complete Case File 6. Def's Pro Se Motion to Add Issues Presented in Appeal Involving Substantial Constitutional Questions 7. Def's Pro Se Petition for Writ of Habeas Corpus 8. Def's Pro Se Motion for Speedy Appeal 9. Def's Pro Se Motion to Dismiss Indictments on Grounds of Lack of Subject Matter Jurisdiction	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed 4. Dismissed as moot 5. Dismissed as moot 6. Dismissed as moot 7. Denied **09/26/2023** 8. Dismissed as moot 9. Dismissed

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106P23	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Kyrie Jamal Mebane and Alisha Mebane	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA22-708) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Special Order 2. Dismissed as moot
109P23	State v. Keylan Johnson	1. Def's Motion for Temporary Stay (COA22-363) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/26/2023** Dissolved 2. Denied 3. Denied
109PA22-2	Dustin Michael McKinney, George Jermey McKinney, and James Robert Tate, Plaintiffs, State of North Carolina, Intervenor v. Gary Scott Goins and the Gaston County Board of Education, Defendants	1. Def's (Gaston County Board of Education) Notice of Appeal Based Upon a Dissent (COA22-261) 2. Def's (Gaston County Board of Education) Notice of Appeal Based Upon a Constitutional Question 3. Def's (Gaston County Board of Education) Notice of Appeal Based Upon a Dissent 4. Def's (Gaston County Board of Education) Notice of Appeal Based Upon a Constitutional Question	1. --- 2. Dismissed *ex mero motu* 3. Dismissed as moot 4. Dismissed as moot **Riggs, J., recused**
112P22-2	State v. Grant P. Dalton	Def's Pro Se Motion for PDR (COAP23-626)	Denied **01/16/2024**
121A23	Alvin Mitchell v. The University of North Carolina Board of Governors	1. Petitioner's Notice of Appeal Based Upon a Dissent (COA21-639) 2. Petitioner's Notice of Appeal Based Upon a Constitutional Question 3. Petitioner's PDR as to Additional Issues 4. John Locke Foundation's Motion for Leave to File Amicus Brief in Support of Petition for Discretionary Review 5. Respondent's Motion to Dismiss Appeal	1. --- 2. --- 3. Special Order 4. Allowed 5. Allowed
131P16-29	State v. Somchai Noonsab	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **01/29/2024**
131P16-30	State v. Somchai Noonsab	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/18/2024**

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139PA23	Brewer, Employee v. Rent-A-Center, et al.	1. Defs' Motion for Temporary Stay (COA22-296) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Plt's Motion for Reconsideration of Temporary Stay 5. Plt's Conditional PDR Under N.C.G.S. § 7A-31 6. Parties' Joint Motion to Withdraw Appeal	1. Allowed **06/08/2023** 2. Allowed **12/13/2023** 3. Allowed **12/13/2023** 4. Special Order **06/19/2023** 5. Allowed **12/13/2023** 6. Special Order **02/01/2024**
155PA22	State v. Travis Lamont Davenport	Def's Motion to Postpone Oral Argument (COA20-628)	Allowed **12/20/2023** **Dietz, J., recused**
163P23-2	Jasmine E. Golden v. Amazon	Plt's Pro Se Motion for PDR (COAP23-105)	Dismissed
165P23-2	State v. Drew C. Hartley	Def's Pro Se Motion for Petition for Mandamus/Certiorari	Dismissed
169A09-2	State v. Kahlil Jacobs	1. Def's Pro Se Motion for PDR (COA08-564) 2. Def's Pro Se Motion for PDR	1. Dismissed 2. Dismissed
169P23-2	State v. Christopher L. Minor	Def's Pro Se Motion for Extension of Time to File Notice of Appeal	Dismissed
173PA23	Southland National Insurance Corporation v. Lindberg	1. Defs' Motion for Temporary Stay (COA22-1049) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Universal Life Insurance Company's Conditional Motion for Leave to File Amicus Brief 5. Plts' Motion to Expedite Petition for Writ of Supersedeas and PDR 6. Universal Life Insurance Company's Motion to Withdraw Request to File Amicus Curiae Brief	1. Allowed **07/13/2023** 2. Allowed **12/13/2023** 3. Special Order **12/13/2023** 4. Dismissed as moot **12/13/2023** 5. Dismissed as moot **12/13/2023** 6. Allowed **12/13/2023**

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		7. Plts' Motion for Clarification 8. Defs' Motion to Strike	7. Dismissed 8. Dismissed as moot
177P23	Richard C. Semelka, M.D. v. The University of North Carolina, a body politic and corporate institution of the State of North Carolina; The University of North Carolina at Chapel Hill, a constituent institution of the University of North Carolina; Carol L. Folt, sued in her individual and official capacities, James Warren Dean, Jr., sued in his individual and official Capacities; William L. Roper, sued in his individual and official capacities; Arvil Wesley Burks, Jr., sued in his official and individual Capacities; and Matthew A. Mauro, sued in his individual and official capacities	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-831)	Denied **Dietz, J., recused**
183P23-2	Weijun Luo v. Ursula R. Neal, Adam C. Neal, Sr.	Plt's Pro Se Motion for Reconsideration	Dismissed
187P23	John Reints v. WB Towing Inc.	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-1031)	Denied **Riggs, J., recused**
194A23	In the Matter of A.H.	Respondent-Father's Motion to Amend Record on Appeal (COA22-683)	Allowed **02/16/2024** **Riggs, J., recused**
195P23	State v. Steven Jarrel McCarty	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-388) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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197P23	Celeste Evelyn Smith v. Piedmont Triad Anesthesia, P.A. Celeste Evelyn Smith v. Novant Health, Inc. and Medical Park Hospital, Inc., d/b/a Novant Health Medical Park Hospital; Hawthorne OB/GYN Associates, P.A.; and Anthony L. Masciello, MD	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-464)	Denied
199P23	State v. Scott St. John Painter	Def's PDR Under N.C.G.S. § 7A-31 (COA22-864)	Denied
200P07-13	State v. Kenneth E. Robinson	Def's Pro Se Motion for Permission to Apply to Trial Court for Writ of Error *Coram Nobis*	Dismissed
200P23	State v. Derrick Brandon Stokes	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-898) 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. Denied 4. Allowed
201P23	In the Matter of Z.A. and M.P.	1. Petitioner's Motion for Temporary Stay (COAP23-424) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's Petition for Writ of Certiorari to Review Order of District Court, Orange County 4. Guardian ad Litem's Petition for Writ of Certiorari to Review Order of the COA	1. Allowed **08/16/2023** Dissolved 2. Special Order 3. Special Order 4. Special Order
203P23	State v. Jamarkus Meshawn Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA22-880)	Denied **Riggs, J., recused**
206PA21	Town of Apex v. Beverly L. Rubin	1. Parties' Joint Motion to Consolidate Appeals (COA20-305) 2. Parties' Joint Motion to Set a Briefing Schedule	1. Allowed **12/20/2023** 2. Allowed **12/20/2023**

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209P23-3	State v. Travis Baxter	Def's Pro Se Motion to Set Aside Judgment	Dismissed
212P22-4	Andrew C. Davis v. Central Regional Hospital, et al.	1. Plt's Pro Se Petition for Writ of Certiorari 2. Plt's Pro Se Petition for Writ of Certiorari	1. Dismissed 2. Dismissed
218P23	Olschner v. Goines, et al.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-944)	Denied
220P22	Kimberly Bossian v. Dennis Bossian	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-483) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of District Court, Wake County	1. Denied **12/13/2023** 2. Denied
221P23	GreaseOutlet.com, LLC v. MK South II, LLC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA22-648) 2. Plt's Motion to Withdraw and Dismiss as Moot PDR	1. — **01/03/2024** 2. Allowed **01/03/2024**
225P23	State v. Di'Keynian T. Floyd	Def's Pro Se Motion to Dismiss/Impeach Evidence	Dismissed
225PA21-2	North State Deli, LLC v. The Cincinnati Insurance Company, et al.	1. United Policyholders and National Independent Venue Association's Motion to Admit Tyler Weinblatt Pro Hac Vice (COA21-293) 2. United Policyholders and National Independent Venue Association's Motion to Admit Rukesh A. Korde Pro Hac Vice 3. Cities of Charlotte and Durham's Motion to Admit Rhonda D. Orin Pro Hac Vice 4. Cities of Charlotte and Durham's Motion to Admit Madilynne R. Lee Pro Hac Vice 5. Cities of Charlotte and Durham's Motion to Admit Marshall Gilinsky Pro Hac Vice 6. United Policyholders and National Independent Venue Association's Amended Motion to Admit Tyler Weinblatt Pro Hac Vice 7. United Policyholders and National Independent Venue Association's Amended Motion to Admit Rukesh A. Korde Pro Hac Vice	1. Dismissed as moot 2. Dismissed as moot 3. Allowed 4. Allowed 5. Allowed 6. Allowed 7. Allowed

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		8. Defs' Motion to Admit Daniel G. Litchfield Pro Hac Vice 9. Defs' Motion to Admit Alan I. Becker Pro Hac Vice	8. Allowed 9. Allowed
227P23-2	Jasmine E. Golden v. North Carolina Agricultural and Technical State University	1. Plt's Pro Se Motion for PDR 2. Def's Motion for Sanctions 3. Plt's Pro Se Motion for Petition to Proceed as an Indigent	1. Dismissed 2. Denied 3. Allowed
230P21-4	State v. Jordan Nathaniel Mitchell	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-270)	Denied
233P23	James Henry Conley v. Superior Court Judge James Gregory Bell	1. Plt's Pro Se Motion for PDR 2. Plt's Pro Se Motion for Minutes and Transcripts of Proceedings Before the Judicial Standards Commission 3. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed
236P23	State v. Bridgette Lee Richard a/k/a Bridgette Lee Richards	Def's PDR Under N.C.G.S. § 7A-31 (COA22-357)	Denied
241P23	State v. Travis R. Overcash	1. Def's Pro Se Motion for Discretionary Review (COA23-426) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
243P23	State v. Taiquan Rodgers	Def's PDR Under N.C.G.S. § 7A-31 (COA22-632)	Denied
247P23	Whitne Robinson v. Deborah Whitfield, Bonnie Monroe	Petitioner's Pro Se Petition for Writ of Mandamus	Denied
248P23	Whitne Robinson v. Wendy Maynard	Petitioner's Pro Se Petition for Writ of Mandamus	Denied
261P23	James Marecic v. Joanna Baker	1. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-38) 2. Def's Motion for Sanctions	1. Denied 2. Denied
265P22-3	State v. Sherman Lane Smith	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Rockingham County (COAP23-825)	Dismissed

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267P22	State v. Anthony Lamar Johnson	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-573) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
271P23	State v. Priscilla Yvonne Tillman	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-630) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Riggs, J., recused**
272P15-2	In the Matter of E.J.V.	1. Respondent's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-911) 2. Respondent's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
278A23	Gregory Cohane v. The Home Missioners of America d/b/a Glenmary Home Missioners, Roman Catholic Diocese of Charlotte, NC, and Al Behm	1. Defs' (The Home Missioners of America d/b/a Glenmary Home Missioners and the Roman Catholic Diocese of Charlotte, NC) Notice of Appeal Based Upon a Dissent (COA22-143) 2. Defs' (The Home Missioners of America d/b/a Glenmary Home Missioners and the Roman Catholic Diocese of Charlotte, NC) Notice of Appeal Based Upon a Constitutional Question 3. Defs' (The Home Missioners of America d/b/a Glenmary Home Missioners and the Roman Catholic Diocese of Charlotte, NC) PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Dismiss Appeal 5. Plt's Motion to Amend Previously Filed Motion to Dismiss Appeal to Include Additional Authority 6. Defs' (The Home Missioners of America d/b/a Glenmary Home Missioners and the Roman Catholic Diocese of Charlotte, NC) Motion to Amend Previously Filed Response to Motion to Dismiss Appeal to Include Additional Authority	1. --- 2. --- 3. Allowed 4. Allowed 5. Allowed 6. Allowed

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		7. Defs' (The Home Missioners of America d/b/a Glenmary Home Missioners and the Roman Catholic Diocese of Charlotte, NC) Motion to Amend Response and Motion to Amend Previously Filed Response to Motion to Dismiss Appeal to Include Additional Authority	7. Allowed **Riggs, J., recused**
281A22	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Matthew Bryan Hebert	Plt's Motion for Expedited Hearing (COA22-82)	Dismissed as moot **12/19/2023** **Dietz, J., recused**
281P06-16	Joseph E. Teague, Jr., P.E., C.M. v. NC Department of Transportation, J.E. Boyette, Secretary	Plt's Pro Se Motion to Rehear	Dismissed
284P23	Stephanie Messick, Employee v. Walmart Stores, Inc., Employer, New Hampshire Insurance Company, Carrier (Claims Management Incorporated, Third-Party Administrator)	1. Defs' Motion for Temporary Stay (COA22-1069) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Defs' Motion to Withdraw PDR	1. Allowed **10/24/2023** Dissolved 2. Dismissed as moot 3. --- 4. Allowed
289P23	State v. Kaylore Fenner	Def's PDR Under N.C.G.S. § 7A-31 (COA23-6)	Allowed
290P23	State v. Clarence Daley	Def's PDR Under N.C.G.S. § 7A-31 (COA23-7)	Denied
291P23-2	State v. Darnell W. King	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/07/2024**
297P23-2	Shannon Steger/T. Steger v. NCDHHS/ State of NC/ Robeson County DSS/County of Robeson	1. Petitioner's Pro Se Motion to Reconsider/Vacate Dismissal of Appellant's Notice of Appeal 2. Petitioner's Pro Se Motion to Proceed as Indigent	1. Dismissed 2. Allowed

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297P23-3	Shannon Steger/T. Steger v. NCDHHS/ State of NC/ Robeson County DSS/County of Robeson/Brandon Ivey	1. Plt's Pro Se Motion for Temporary Stay (COAP23-662) 2. Plt's Pro Se Petition for Writ of Supersedeas 3. Plt's Pro Se Motion to Dismiss Action 4. Plt's Pro Se Motion to Dismiss Def's Motion 5. Plt's Pro Se Motion for Continuance 6. Plt's Pro Se Motion for Recusal of Judge Thelma Surgeon 7. Plt's Pro Se Motion to Proceed as an Indigent 8. Plt's Pro Se Motion to Include Judicial Notice	1. Dismissed **01/19/2024** 2. Dismissed **01/19/2024** 3. Dismissed **01/19/2024** 4. Dismissed **01/19/2024** 5. Dismissed **01/19/2024** 6. Dismissed **01/19/2024** 7. Allowed **01/19/2024** 8. Allowed **01/19/2024**
298P21-2	State v. David Myron Dover	Def's PDR Under N.C.G.S. § 7A-31 (COA20-362-2)	Denied
299P22-2	Shaunesi DeBerry v. Tinita DeBerry, Reginald DeBerry, Larry DeBerry Jr. as Administrator of the Estate of Larry DeBerry Sr.	Petitioner's Pro Se Emergency Motion to Affirm December 19, 2023, Dismissals of Justice Allison Riggs and Justice Curtis Allen III	Dismissed **Riggs, J., recused**
301P23	State v. Anton M. Lebedev	1. Def's Pro Se Motion for Temporary Stay (COA23-249) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Motion for Consideration of Attached Materials 4. Def's Pro Se Motion to Reconsider Denial of Temporary Stay 5. Def's Pro Se PDR Under N.C.G.S. § 7A-31 36. Def's Pro Se Motion to Take Judicial Notice	1. Denied **11/09/2023** 2. Denied 3. Denied 4. Denied **11/14/2023** 5. Denied 6. Denied
302P23	State v. Terrell Jermaine Parker	Def's PDR Under N.C.G.S. § 7A-31 (COA23-90)	Denied
303P23	State v. David Adams, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA23-132)	Denied

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308P23	Mark Anthony Hall v. Judge Ridgeway; District Attorney; Deontae L. Thomas	Petitioner's Pro Se Petition for Writ of Mandamus	Dismissed
310P23	State v. Rocky J. Bryant	1. Def's Pro Se Motion for Appeal 2. Def's Pro Se Petition for Writ of Mandamus	1. Dismissed 2. Dismissed **Riggs, J., recused**
312A19-2	Nung Ha and Nhiem Tran v. Nationwide General Insurance Company	Amicus Curiae's Motion for Leave to Participate in Oral Argument	Allowed **03/05/2024**
312P23	State v. Mark Anthony Nieves	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-993)	Denied
313P23	William Braxton, Betty Ferguson, Marcille Baker, George A. Braxton, Robert L. Braxton, Graves Braxton, and Kay B. Troxler, Being All of the Heirs of Mary Braxton Allred v. Ocean View Landing Property Owners Association	Plt's (William Braxton) PDR Under N.C.G.S. § 7A-31 (COA23-177)	Denied
314PA21	Paul Steven Wynn v. Rex Frederick, in his official capacity as a Magistrate, and Great American Insurance Company	Plt's Petition for Rehearing (COA20-472)	Denied **01/26/2024** **Dietz, J., recused** **Allen, J., recused**
317P23	Jamaal Gittens v. Department of Transportation	Petitioner's Pro Se Petition for Writ of Certiorari	Dismissed
320P23	State v. Elijah Rashad Dobson	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-288)	Denied
321P23	State v. Ray Shawn Daniels	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-22)	Dismissed
323P23-2	Betty Lou Tebib v. Hamza Tebib	Def's Pro Se Motion for Reconsideration	Dismissed

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326P23-2	In the Matter of D.T.P. & B.M.P.	Respondent-Parents' Pro Se Motion to Stay the Mandate Pending Writ of Certiorari to the Supreme Court of the United States (COA23-29)	Denied **12/14/2023**
326P23-3	In the Matter of D.T.P. & B.M.P.	1. Respondent-Parents' Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-29) 2. Respondent-Parents' Pro Se Motion to Stay the Mandate 3. Respondent-Parents' Pro Se Motion for Notice of Appeal of Right 4. Respondent-Parents' Pro Se Motion for Appointment of Court Appointed Counsel	1. Denied **01/11/2024** 2. Denied **01/11/2024** 3. Dismissed *ex mero motu* **01/11/2024** 4. Dismissed as moot **01/11/2024**
326P23-4	In the Matter of D.T.P. & B.M.P.	Respondent-Parents' Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-29)	Dismissed
327P23	State v. Norman Jermaine Nobles	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COAP23-291) 2. State's Motion for Extension of Time to File Response 3. State's Motion for Extension of Time to File Response	1. Denied 2. Allowed **12/14/2023** 3. Allowed **01/17/2024** **Riggs, J., recused**
328P23	State v. Shonda Monique Powe	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Anson County	Denied
329A09-6	State v. Martinez Orlando Black	1. Def's Pro Se Motion for Appeal (COAP22-663) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Dismissed **Riggs, J., recused**
329P23	Ricky L. Hefner v. Kimberly Orcutt	Plt's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Jackson County	Dismissed
333P23	In the Matter of L.L.	1. Petitioners' Motion for Temporary Stay (COA22-1045) 2. Petitioners' Petition for Writ of Supersedeas 3. Petitioners' PDR Under N.C.G.S. § 7A-31	1. Allowed **12/12/2023** 2. Allowed 3. Allowed

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335P23	State v. Robert Wayne Simpson	1. Def's Pro Se Motion for Extension of Time to File Motion for Discretionary Review (COA23-35) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed as moot 2. Denied
336P22-3	William D. Woolens v. Charlene D. Cliborne	Plt's Pro Se Motion for Supreme Court Case	Dismissed
336P23	In re Sorrell	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA23-183) 2. Appellee's (U.S. Bank Trust, N.A.) Motion to Admit Aaron R. Goldstein Pro Hac Vice	1. Denied 2. Allowed
340P23	State v. Lewis Victor Branche, III	Def's PDR Under N.C.G.S. § 7A-31 (COA22-768)	Denied
341P23	State v. Kim Y. Fraley	1. State's Motion for Temporary Stay (COAP23-513) 2. Def's Motion to Dismiss the Petition for Writ of Certiorari as Moot and to Deny the Application for Temporary Stay 3. Def's Motion for Extension of Time to File Response to Petition for Writ of Certiorari 4. State's Petition for Writ of Supersedeas 5. State's Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed as moot **12/15/2023** 2. Dismissed as moot **02/13/2024** 3. Dismissed as moot **02/13/2024** 4. Denied **12/15/2023** 5. Denied **12/15/2023**
342P23	State v. Laketta Hussain	1. Def's Pro Se Motion for Temporary Stay (COA22-1024) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se PDR Under N.C.G.S. § 7A-31 4. Def's Pro Se Petition for Writ of Certiorari 5. Def's Pro Se Motion for Extended Time to File Briefs 6. Def's Pro Se Motion to Waive Fees Associated with this Review	1. Denied **12/18/2023** 2. Denied 3. Denied 4. Denied 5. Dismissed as moot 6. Allowed
343P23	Robert Terrell, III v. Siler City Police Department	Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COA23-716)	Denied

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344P23	Universal Life Insurance Company v. Greg E. Lindberg	1. Plt's Motion for Temporary Stay (COA23-274) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/22/2023** 2. 3.
345P23	Laura Leigh Linker v. Timothy Lyon Linker v. Nancy Lyon Boling, Intervenor	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA23-328) 2. Plt's Petition for Writ of Mandamus	1. Special Order **02/06/2024** 2. Special Order **01/09/2024**
348P23	State v. Donat Caleb Porter	1. Def's Motion for Temporary Stay (COA22-516) 2. Def's Petition for Writ of Supersedeas 3. Def's Pro Se PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Withdraw Appellate Counsel	1. Allowed **01/03/2024** 2. 3. 4.
349P23	State v. Jeremy Thomas Stevens	Def's PDR Under N.C.G.S. § 7A-31 (COA22-1057)	Denied
350P23	Abdolhossain Motealleh v. Duke Health Facilities (Duke Primary Care, Duke Specialty Clinics, and the Others 1 Through 100)	Plt's Pro Se Motion for Appeal	Dismissed
351P23	In re Hedgepeth	1. Respondents' Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-226) 2. Respondents' Pro Se PDR Under N.C.G.S. § 7A-31 3. Petitioner's Motion to Dismiss Appeal 4. Respondents' Pro Se Motion for Consolidation of Actions 5. Respondents' Pro Se Motion for Temporary Stay 6. Respondents' Pro Se Petition for Writ of Supersedeas 7. Respondents' Pro Se Motion in the Cause	1. --- 2. Denied 3. Allowed 4. Dismissed as moot 5. Allowed **01/19/2024** Dissolved 6. Denied 7. Dismissed as moot

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352P23	Ronnie C. Hedgepeth, Jr., and Shira Hedgepeth v. Smoky Mountain Country Club, SMCC Clubhouse, LLC, Conleys Creek Limited Partnership, and Smoky Mountain Country Club Property Owners Association, Inc., a North Carolina Corporation	1. Plts' Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-222) 2. Plts' Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Plts' Pro Se Motion for Consolidation of Actions	1. --- 2. Denied 3. Allowed 4. Dismissed as moot
360A09	State v. Hasson Jamaal Bacote	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's Petition for Writ of Certiorari to Review Order of Superior Court, Johnston County 4. State's Motion for Expedited Consideration	1. Denied **02/01/2024** 2. 3. 4.
362P02-4	Rickey Allen Bright v. Chris Wood, Warden III	Petitioner's Pro Se Petition for Writ of Habeas Corpus (COAP23-516)	Denied **01/08/2024**
370P04-21	State v. Anthony Leon Hoover	1. Def's Pro Se Petition for Writ of Habeas Corpus (COA05-64) 2. Def's Pro Se Petition for Writ of Mandamus	1. Denied **12/20/2023** 2. Denied **12/20/2023**
381P22-4	Matthew Safrit v. Todd Ishee and Drew Stanley	1. Petitioner's Pro Se Motion for PDR 2. Petitioner's Pro Se Motion to Proceed as Indigent	1. Denied **01/11/2024** 2. Allowed **01/11/2024** **Riggs, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

22 MARCH 2024

403PA21	Louis M. Bouvier, Jr., Karen Andrea Niehans, Samuel R. Niehans, and Joseph D. Golden v. William Clark Porter, IV, Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund	Defs' (Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund) Motion to Recuse (COA20-441)	Special Order **03/04/2024** **Earls, J., recused** **Riggs, J., recused**
410PA18-2	Town of Apex v. Beverly L. Rubin	1. Parties' Joint Motion to Consolidate Appeals 2. Parties' Joint Motion to Set a Briefing Schedule	1. Allowed **12/20/2023** 2. Allowed **12/20/2023**
412P13-8	Henry Clifford Byrd, Sr. v. Superintendent John Sapper	Petitioner's Pro Se Motion to Vacate Court's Order (COA17-288)	Dismissed **01/02/2024**
412P13-9	Henry Clifford Byrd, Sr. v. Superintendent John Sapper	Petitioner's Pro Se Motion for Justice Riggs Recusal for Conflict of Interest and Judicial Bias (COA17-288)	Special Order **01/30/2024**
415P17-2	Michael Scott Davis v. Pia Law	1. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COAP17-848) 2. Plt's Pro Se Motion for Leave to Amend PDR	1. Denied 2. Dismissed as moot
425A21-3	Hoke County Board of Education et al. v. State of North Carolina, et al.	1. Legislative-Intervenors' Motion and Suggestion of Recusal (COA22-86 23-788) 2. Plts' Motion and Suggestion of Recusal 3. Appellees' Consent Motion to Extend Time Limit for Oral Argument	1. Special Order **01/31/2024** 2. Special Order **02/16/2024** 3. Special Order **02/16/2024**
426A18-2	Elizabeth Zander and Evan Galloway v. Orange County, NC and the Town of Chapel Hill	1. Plts' Notice of Appeal Based Upon a Dissent (COA22-691) 2. Plt's' PDR as to Additional Issues	1. --- 2. Denied **Riggs, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

22 MARCH 2024

469P09-2	State v. James Edward Downey	Def's Pro Se Motion for Appeal	Dismissed
514PA11-4	State v. Harry Sharod James	Def's Pro Se Motion for PDR	Denied **03/13/2024**
516P09-3	Dennis Alexander Player v. David Cassidy, Warden of Caswell Correctional Center; Todd Ishee, Secretary of the Department of Adult Corrections, et al.	Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA	Denied **12/14/2023**

IN RE SOUTHEASTERN EYE CENTER - PENDING MATTERS	From N.C. Business Court 12CVS11322 15CVS1648
_____	From Guilford 12CVS11322
IN RE SOUTHEASTERN EYE CENTER - JUDGMENTS	From Wake 15CVS1648

No. 358A16-2

ORDER

Appellants have failed to demonstrate grounds for appellate review under N.C.G.S. 7A-27(a)(3) (2021). The appeals in this matter are therefore dismissed.

By order of the Court in Conference, this the 12th day of October 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of October 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. MV REALTY PBC, LLC

[385 N.C. 903 (2024)]

STATE OF NORTH CAROLINA	From N.C. Business Court 23CV006408-910
v.	From Wake
MV REALTY PBC, LLC	23CV006408-910

No. 38A24

ORDER

The following order has been entered on the motion filed on the 22nd of February 2024 by Defendants for Temporary Stay:

"Motion Allowed by order of the Court in conference, this the 7th of March 2024."

s/ Allen, J.
For the Court

Justice Riggs dissents, joined by Justice Earls, as explained in the attachment.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of March 2024.

Grant E. Buckner
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney

M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

Justice RIGGS dissenting.

The Court allows MV Realty's motion for temporary stay, but I write to note my dissent because I am concerned that the Court's allowance of the stay in this matter, and more broadly the manner in which this Court is allowing temporary stays, does not comport with the requirement for showing good cause. N.C. R. App. P. 23(e) ("The Court for good cause shown in such a petition for temporary stay may issue such an order ex parte."). The practice of granting near-automatic stays creates numerous problems, I worry, including masking the unconstrained discretion

exercised by this Court, creating confusion for litigants as to the proper standard for stays, and incentivizing parties to pursue inappropriate interlocutory appeals. I dissent because MV Realty's motion does not show good cause for a temporary stay.

At its core, this case is about the ability of homeowners to enjoy the rights to their property. "The fundamental right to property is as old as our state." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 852 (2016) (citing N.C. Const. of 1776, Declaration of Rights § XII; *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 9 (1787)) (additional citations omitted). "The word 'property' extends to every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value" and includes "the right to possess, use, enjoy and dispose of it . . . ." *Hildebrand v. Telegraph Co.*, 219 N.C. 402, 408 (1941). Ambiguities in real property contracts should be resolved "in favor of the natural right to the free use and enjoyment of property and against restrictions." *Davis v. Robinson*, 189 N.C. 589, 597 (1925). Currently, over two thousand North Carolina homeowners do not enjoy free and unrestricted use of their property because MV Realty's enjoined "agreements" are clouding the title on their property. Because of this stay, it appears these homeowners are in the untenable situation of paying a potentially illegal fee to sell, refinance, or even transfer their property upon death; alternatively, they are forced to use MV Realty, an alleged unresponsive realtor, to list the property.

In my view, the interlocutory appeal here arguably is not appropriate because MV Realty has not shown that the trial court's preliminary injunction implicates a substantial right. N.C.G.S. § 7A-27 (2023). It is also unclear that MV Realty has established that it will suffer any irreparable harm if a stay is not allowed, since money damages remain available to it on contract grounds. This Court should either make clear through a written opinion as binding precedent or amend Rule 23(e) of the North Carolina Rules of Appellate Procedure to explain that the well-established standards for stays apply to motions for a temporary stay. Doing so would enable the appellate bar and the public to better assess this Court's rigor and consistency when ruling on temporary stays, particularly of interlocutory orders. Such transparency and accountability are central to equal justice and the rule of law.

We should further expressly articulate that the burden is on the party seeking the stay to establish that grounds exist to justify it. Our rules and supporting materials request that parties address whether they will experience irreparable harm when seeking a temporary stay. *See* N.C. R. App. P. app. D ("In support of this Application, movant shows

. . . the legal and factual arguments for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas[ ]."). Balancing the equities in this matter and after careful review of all the factors relevant to issuance of a stay, I would deny the temporary stay.

Justice EARLS joins in this dissent.

APPENDIXES

JUDICIAL STANDARDS FORMAL ADVISORY OPINION, 2023-01

JUDICIAL STANDARDS FORMAL ADVISORY OPINION, 2023-02

RULES OF APPELLATE PROCEDURE

DISCIPLINE AND DISABILITY OF ATTORNEYS

CONTINUING LEGAL EDUCATION

LEGAL SPECIALIZATION

BOARD OF LAW EXAMINERS

DISCIPLINE AND DISABILITY OF ATTORNEYS

CONTINUING LEGAL EDUCATION

STATE BAR OFFICERS

CERTIFICATION STANDARDS FOR EMPLOYMENT LAW SPECIALTY

PROCEDURES FOR AUTHORIZED PRACTICE COMMITTEE

FEE DISPUTE RESOLUTION

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2023-01

October 13, 2023

QUESTION:

This opinion addresses frequently asked questions from new judges.

ANSWERS AND DISCUSSIONS:

Winding Up Law Practice

Q: When do new judges become subject to the Code of Judicial Conduct?

The Code applies to a new judge upon the administration of the judge's oath of office.

Q: May you still receive payment from your office or file fee applications and accept payment for court-appointed work?

Yes. Canon 5F prohibits judges from practicing law and you may not provide any legal services, paid or pro bono, after you take the oath of judicial office. However, you are entitled to collect fees earned before that time, including contingent fees and payment for court-appointed work. In addition, the Code's Note on Scope and Effective Date of Compliance provides, *inter alia*, that "it shall be permissible for a newly installed judge to facilitate or assist in the transfer of the judge's prior duties as legal counsel but the judge may not be compensated therefor." Thus, even if you are assisting with the transfer of your cases, you may not be compensated for such work performed after becoming a judge.

Q: Do you have to complete winding up your law practice before taking your oath of office?

No. The Commission understands that some aspects of closing down a practice take more than a few months. There is not any specific date by which you must wind down your former practice, but you should take action to ensure that your matters are wrapped up within a reasonable amount of time. So long as you are taking reasonable steps to facilitate the immediate wind up of your law practice, and/or dissolution of the firm, and that the actual dissolution takes place within a reasonable time, the Commission would likely recognize your best efforts as compliance with the Code.

Q: Can you sell your practice/office space to an attorney in your district?

Yes. A judge may advertise the sale of his/her former practice, and/or business assets (furniture, etc.), but should not mention his/her judicial title in the advertisement. If your practice/property is bought by another attorney, you would need to disclose that transaction if the lawyer(s) appeared before you. Typically, we recommend disclosing such a relationship for at least 6 months after the transaction has been completed.

Q: Can you rent or lease office space to an attorney in your district?

Yes, but Canon 5C(1) cautions judges against engaging in financial or business dealings with lawyers or persons likely to come before the court on which the judge serves. At the same time, the Commission acknowledges the realities of real estate markets and that the most likely lessees of law office space are going to be lawyers. If an attorney rents or leases your office space, you would need to disqualify yourself from proceedings in which your tenant appears before you. The duty to disqualify would be ongoing for the duration of the business relationship (lease/rental) and for a 6-month period after the relationship ends. To avoid disqualification, you could carefully follow the requirements for remittal of the conflict under Canon 3D. For specific advice on renting office space to local attorneys and the disqualification issues that may arise, you are encouraged to contact the Commission staff.

Q: May I refer my clients to other attorneys?

Yes. You may recommend other attorneys to your former clients. When doing so, please remember that under Canon 2B, a judge should not lend the prestige of the judicial office to advance the private interests of others. To that end, and to avoid the appearance that you are steering clients to a particular attorney who would benefit from the prestige of your reference, the Commission recommends that you provide former clients with the names of several attorneys they may contact, and these attorneys should not be informed of your referral unless absolutely necessary.

Conflicts of Interest

Q: Is there a general rule for when you need to recuse from hearing certain cases?

Disqualification and recusal questions are both common and complicated, and always turn on the unique facts of each situation. Generally speaking, however, Canon 3C requires that a judge must

recuse where he or she has a personal connection to the case that reasonably could affect the judge's decision on the merits. These conflicts include familial or other personal connections to the people involved in the case (the parties, the lawyers, the witnesses, the jurors), personal knowledge of the facts learned outside your role as the presiding judge, previous involvement in the matter as a lawyer, or a direct financial interest in the outcome of the case. Canon 3C not only identifies the specific grounds for mandatory disqualification, but also states the general provision that disqualification is required where the judge's impartiality in deciding the case "may reasonably be questioned." At the same time, judges have a duty to hear and decide the cases before them, and disqualification should only occur when warranted by the facts of the particular case. Because of the fact specific nature of disqualification questions, you may also Commission staff for advice.

Q: If you're coming to the bench from the District Attorney's or Public Defender's Offices, can you hear cases in criminal court?

No. Pursuant to FAO 2009-02, a new judge who was formerly employed as an assistant district attorney must disqualify himself or herself from presiding over criminal district court cases where the judge: (1) was involved in the matter's investigation or prosecution, (2) has personal knowledge of disputed evidentiary facts, or (3) when the judge believes he/she cannot be impartial. See also FAO 2009-07 (relating to defense counsel). Generally, the Commission also advised in FAO 2009-002 that the best practice is for judges to follow a "Six Month Rule' whereby newly installed judges, for a minimum of 6 months after taking judicial office, refrain from presiding over any adjudicatory proceeding wherein an attorney associated with the judge's prior employer provides legal representation to a party in the proceeding. Specific circumstances may necessitate a deviation from the "Six Month Rule."

Q: What if any obligations do you have when a family member appears before you as a lawyer in a case?

Disqualification of the judge is required in matters in which a spouse or child living within the judge's household represents a litigant or has contributed to the preparation of the matter for hearing. In 2015, the Commission issued FAO 2015-03 to guide judges through disqualification based on familial connections, including when a family member's employer appears before you, and what to do in cases involving more distant family relationships.

Q: Do I have to disqualify if someone complains about me to the Judicial Standards Commission?

Generally, no. To avoid judge shopping through the filing of complaints with the Commission, the Commission in FAO 2014-02 explained that disqualification would only be required if the judge has been notified of the initiation of a formal investigation, received a private letter of caution, or has been served with a statement of charges. Of course, circumstances could exist where the judge has developed a demonstrated and actual bias against a litigant for filing a complaint, and these facts may warrant disqualification.

Charitable, Civic and Bar-Related Activities

Q. I serve on the board of a local non-profit. Do I have to step down now that I'm a judge?

It depends. Generally speaking, judges may continue to engage in a wide range of charitable and civic activities pursuant to Canons 4 and 5. Canon 4C specifically allow judges to serve in a quasi-judicial capacity as an officer or board member of an organization or governmental agency relating to the legal, economic, educational or governmental system, or those that relate to the administration of justice. Similarly, Canon 5B permits judges to serve as an officer or board member of educational, religious, charitable, fraternal or other civic organizations. The caveats for service on such boards are as follows: (1) the judge is strictly prohibited from assisting the organization with fundraising, which includes prohibitions on being listed as a host or sponsor of a fundraising event (see FAO 2013-02); (2) the judge should not provide legal advice to the organization (Canon 5F); (3) the service should not interfere with the judge's official duties (Canon 5B); (4) association with the organization should not reflect adversely on the judge's impartiality (Canon 5B); and (5) the organization should not be one that regularly appears before you as a judge (Canon 5B).

Q. Can I continue to be involved with my local bar association?

Yes. In FAO 2014-01, the Commission opined that "a judge may maintain membership in a voluntary bar association so long as the organization promotes the bar in general and the legal profession as a whole, and is not essentially a law-related special interest group which promotes issues pertaining to the representation of a particular group of clients, such as criminal defendants, personal injury plaintiffs, criminal prosecution, insurance defense" or other similarly interest-focused advocacy groups.

Q. Can I fill out a Certificate of Moral Character for the Board of Law Examiners for someone I know who is taking the bar?

Yes. Normally, a judge may not voluntarily provide character evidence regarding an individual, as per Canon 2B. In an exception to this rule, the Commission found in FAO 2007-03 that it would be appropriate for judges to complete the North Carolina Board of Law Examiner's Certificate of Moral Character on behalf of an applicant seeking admission to practice law in North Carolina.

Business and Financial Activities

Q: Now that I'm a judge, what sort of involvement may I have in for profit businesses?

The relevant portion of Canon 5C(2) states judges "... should not serve as an officer, director or manager of any business." This language precludes judges from serving in an official capacity for any business concern. The Code also does not contain any exception for a wholly owned or closely held family business.

Q: May I still manage my family's financial and real property interests?

Yes. Canon 5C(2) provides that "a judge may hold and manage the judge's own personal investments or those of the judge's spouse, children, or parents, including real estate investments, and may engage in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business."

Gift and Income Reporting Requirements

Q: What is the Canon 6 financial disclosure and do you have to fill it out?

Judges are required to file annual gift and income reports by May 15 each year on forms provided by the Commission. These reports must identify sources of outside income over $2,000 and certain gifts you received where the value exceeds $500. Reports from superior and district court judges are to be filed with the Clerk of Superior Court of the county in which the judge resides. Please note that this form is entirely distinct from the required Statement of Economic Interest (SEI) forms you must file each year by April 15 with the State Ethics Commission and you should contact them for filing requirements and advice on SEIs.

References:

- Code of Judicial Conduct: Canons 2B, 3C, 3D, 4C, 5B, 5C(1), 5C(2), 5F, 6, Scope and Effective Date of Compliance
- Formal Advisory Opinions: 2007-03, 2009-01, 2009-02, 2009-07, 2013-02, 2014-01, 2014-02, 2015-03

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2023-02

October 13, 2023

QUESTION:

This opinion addresses frequently asked questions regarding judges' use of their official letterhead and title.

ANSWERS & DISCUSSIONS:

Use of Official Letterhead Generally

The North Carolina Code of Judicial Conduct does not provide any specific rules relating to the use of official letterhead, although Canon 2B does generally warn that a "judge should not lend the prestige of the judge's office to advance the private interest of others; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge . . . ." Particular concern over the use of official letterhead arises when a judge uses official letterhead in personal affairs (such as personal business or family matters, campaigns, etc.) or when a judge uses official letterhead to influence a decision-maker on issues that have no relation to the judge's official or professional activities or the administration of justice. Building on these prohibitions, the advice from the Judicial Standards Commission regarding the use of official letterhead generally falls into a few common scenarios:

(1) providing recommendations or serving as personal references for ***individuals the judge knows*** – official letterhead is generally permitted for recommendations based on the judge's observations of the individual made in the scope of the judge's official duties and professional judicial activities; personal stationery should be used for recommendations based on knowledge formed and maintained outside the judicial role.

(2) providing thank you notes or letters of ***appreciation/commendation*** – official letterhead is generally permitted when it is done as a civic matter, such as a sign of appreciation for outstanding civic conduct in the community, congratulations on a professional achievement relating to the legal profession, thanks for attending events related to the administration of justice, and the like (in these circumstances in particular, since the letter is not to be used in any decision-making or to confer any benefit, the risk of misuse of the prestige of the office is minimized).

(3) providing recommendations to grant-making organizations to fund ***specific programs*** –official letterhead is permitted when the recommendation is offered to demonstrate specific benefits of the program to the judge's court (in the case of the Chief Justice, to the courts generally).

(4) providing ***information to government officials***, such as communications with legislators, recommendations to the Governor's office on judicial appointees, references and letters to the State Bar for admissions or other official business, communications with other state agencies/offices that interact with the courts and so forth – official letterhead is appropriate when providing information to official bodies related to the administration of justice or other legal or governmental functions.

Use of Official Letterhead for Recommendations of Individuals for Jobs, Awards, School Admission, Etc.

Canon 2B provides that "A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation." The use of official letterhead to provide a letter of recommendation generally turns on whether the judge's personal knowledge of the individual's skills and capabilities arises from the course of the judge's judicial activities (official or professional) or whether the personal knowledge stems from the judge's personal life or professional activities before becoming a judge. Thus, to justify the use of official letterhead, there must be some direct correlation between the judge's professional duties/activities as a judge and the basis for the recommendation.

Since 2007, however, the Commission staff has clarified in numerous informal opinions that there are many other situations where official letterhead may be used in written recommendations. The ***general rule*** that has emerged is that ***so long as the recommendation or reference is based upon personal knowledge obtained within the scope of a judge's official duties, then official stationery may be used***. The term knowledge gained "within the scope of a judge's official duties" has typically meant that the judge knows the person through exercising his or her official duties in the courthouse or through other

1. In 2007, the ABA amended the Model Code of Judicial Conduct to add new comments to clarify that in the context of providing recommendations, previous strict limits on the use of judicial letterhead should be relaxed and that a judge may use official letterhead for recommendations if the judge indicates that it is a personal recommendation (i.e., not made on behalf of the court) and there is no reasonable likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure on the recipient by reason of the judicial office. Per an article by Cindy Gray of the Center for Judicial Ethics at the National Center for State Courts, as of 2015, 18 states had adopted the new comment to the model rule on the use of official letterhead.

professional activities related directly to the judicial role (such as work with official commissions, task forces or bar associations). As such, official letterhead is appropriate when referencing individuals (1) who have worked under the judge's supervision and control or with whom the judge has day to day contact through his or her official duties (i.e. courtroom clerks, probation officers, judicial administrative staff, etc.) or (2) who have worked directly with the judge during the exercise of the judge's quasi-judicial professional activities that are permitted under Canon 4 (activities related to the administration of justice, etc.). If the judge's personal knowledge of the individual arose only from non-judicial extracurricular community or avocational activities (as permitted under Canon 5) or through purely personal or family relationships, then the judge can still make the recommendation, but should use personal stationery. When using personal stationery, the recommendation should only reference the judge's title and position if it is relevant to explain the basis for the recommendation.

The following is a summary of appropriate use of official letterhead when making recommendations on behalf of someone the judge knows:

- Recommendations to the Governor or federal officials regarding judicial appointments.
- Recommendations on behalf of judicial employees with whom the judge works on a regular basis (law clerks, judicial assistants, etc.) – can be recommendations for jobs, school admissions, scholarships, awards, etc.
- Recommendations on behalf of attorneys when the recommendation is based on the judge's observations and knowledge of the attorney's abilities because the attorney has appeared before the judge or where the attorney has worked with the judge in some official capacity (such as serving on commissions or committees together where the judge is serving as in his or her capacity as a judge) (this would not extend to situations where the judge and the attorney serve on committees and boards arising from purely avocational or civic engagement unrelated to the administration of justice).
- Nominations of individuals for professional recognition or awards relating to the administration of justice (so long as the knowledge of that individual's achievements is gained through the judge's role as a judge).
- Other written communications with federal, state or local officials or agencies when offered in your official capacity (such as where the agency requires letters from judges, e.g., State

Bar admissions letters, State Bar specialization questionnaires, recommendations for JAG Corps, DA's offices, PD's offices, etc.).

Based on past advice, personal stationery should be used whenever the judge's knowledge of the individual arises from connections and relationships formed outside the judicial role (such as through family, friends, community and religious activities and prior employment). For example purposes, personal stationery should be used in the following situations:

- Recommendations for former colleagues and employees from the judge's time before becoming a judge.
- Letters to the NC Parole Commission or other criminal justice agencies regarding specific inmates where the letter is based on knowledge the judge gained prior to becoming a judge or in a personal capacity.
- Letters written on behalf of attorneys who are close, personal friends who do not appear before or interact with the judge in the judge's official capacity.

Letters written as part of a judge's service on a civic/charitable board.

References:

- North Carolina Code of Judicial Conduct: Canons 2B, 4, 5
- Formal Advisory Opinions 2007-02
- ABA Model Code of Judicial Conduct Rule 1.3 Comment 2

ORDER AMENDING THE RULES OF APPELLATE PROCEDURE

Pursuant to Article IV, Section 13(2), of the Constitution of North Carolina, the Court hereby amends the North Carolina Rules of Appellate Procedure. This order affects Rules 15, 21, 22, 23, 28, 28.1 (new), and 31.

* * *

Rule 15. Discretionary Review on Certification by Supreme Court under N.C.G.S. § 7A-31

(a) **Petition of Party**. Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in N.C.G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under Article 89 of Chapter 15A of the General Statutes, or in valuation of exempt property under Chapter 1C of the General Statutes.

(b) **Petition of Party—Filing and Service**. A petition for review prior to determination by the Court of Appeals shall be filed with the clerk of the Supreme Court and served on all other parties within fifteen days after the appeal is docketed in the Court of Appeals. For cases that arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. A petition for review following determination by the Court of Appeals shall be similarly filed and served within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within ten days after the first petition for review was filed.

(c) **Petition of Party—Content**. The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under N.C.G.S. § 7A-31 for discretionary review. The petition shall state each issue for which review is sought and shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required, but supporting authorities may be set forth briefly in the petition.

(d) **Response**. A response to the petition may be filed by any other party within ten days after service of the petition upon that party. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present issues in addition to those presented by the petitioner, those additional issues shall be stated in the response. A motion for extension of time is not permitted.

(e) **Certification by Supreme Court—How Determined and Ordered**.

(1) **On Petition of a Party**. The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition ~~and,~~ any response thereto, and any briefs filed under Rule 28.1, and is made without oral argument.

(2) **On Initiative of the Court**. The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to N.C.G.S. § 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders; Filing and Service**. Any determination to certify for review and any determination not to certify made in response to a petition will be recorded by the Supreme Court in a written order. The clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the clerk of the Supreme Court.

(f) **Record on Appeal**.

(1) **Composition**. The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal

and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies**. When an order of certification is filed with the clerk of the Court of Appeals, he or she will forthwith transmit the original record on appeal to the clerk of the Supreme Court. The clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the clerk may require a deposit by the petitioner to cover the costs thereof.

(g) **Filing and Service of Briefs**.

(1) **Cases Certified Before Determination by Court of Appeals**. When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed its brief in the Court of Appeals and served copies before the case is certified, the clerk of the Court of Appeals shall forthwith transmit to the clerk of the Supreme Court the original brief and any copies already reproduced for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed its brief in the Court of Appeals and served copies before the case is certified, the party shall file its brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determination**s. When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within thirty days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within thirty days after a copy of appellant's brief is served upon the appellee. An appellant may file and serve a reply brief as provided in Rule 28(h).

(3) **Copies**. The clerk of the Supreme Court will reproduce copies of the briefs for distribution as directed by the

Supreme Court. The clerk may require a deposit by any party to cover the costs of reproducing copies of its brief. In civil appeals *in forma pauperis* a party need not pay the deposit for reproducing copies.

(4) **Failure to File or Serve**. If an appellant fails to file and serve its brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve its brief within the time allowed by this Rule 15, it may not be heard in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders**. An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined**. As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee" means a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means the party aggrieved by the determination of the Court of Appeals; "appellee" means the opposing party; provided that, in its order of certification, the Supreme Court may designate either party an appellant or appellee for purposes of proceeding under this Rule 15.

* * *

Rule 21. Certiorari

(a) **Scope of the Writ**.

(1) **Review of the Judgments and Orders of Trial Tribunals**. The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit

review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

(2) **Review of the Judgments and Orders of the Court of Appeals**. The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action, or for review of orders of the Court of Appeals when no right of appeal exists.

(b) **Petition for Writ—to Which Appellate Court Addressed**. Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) **Petition for Writ—Filing and Service; Content**. The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) **Response; Determination by Court**. Within ten days after service of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, ~~and~~ any supporting items, and any briefs filed under Rule 28.1. Except as provided by Rule 28.1, no~~No~~ briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Petition for Writ in Post-conviction Matters—to Which Appellate Court Addressed**. Petitions for writ of certiorari to review

orders of the trial court denying motions for appropriate relief upon grounds listed in N.C.G.S. § 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals, and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases. In the event the petitioner unreasonably delays in filing the petition or otherwise fails to comply with a rule of procedure, the petition shall be dismissed by the court. If the petition is without merit, it shall be denied by the court.

(f) **Petition for Writ in Post-conviction Matters—Death Penalty Cases**. A petition for writ of certiorari to review orders of the trial court on motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within sixty days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within thirty days of service of the petition.

* * *

Rule 22. Mandamus and Prohibition

(a) **Petition for Writ—to Which Appellate Court Addressed**. Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) **Petition for Writ—Filing and Service; Content**. The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record that may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) **Response; Determination by Court**. Within ten days after service of the petition the respondent or any party may file a response

thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, ~~and~~ any supporting items, and any briefs filed under Rule 28.1. Except as provided by Rule 28.1, no~~N~~o briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

* * *

Rule 23. Supersedeas

(a) **Pending Review of Trial Tribunal Judgments and Orders**.

(1) **Application—When Appropriate**. Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken, or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (1) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (2) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) **Application—How and to Which Appellate Court Made**. Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except when an appeal from a superior court is initially docketed in the Supreme Court, no petition will be entertained by the Supreme Court unless application has been made first to the Court of Appeals and denied by that court.

(b) **Pending Review by Supreme Court of Court of Appeals Decisions**. Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order, or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by

certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) **Petition for Writ—Filing and Service; Content**. The petition shall be filed with the clerk of the court to which application is being made and shall be accompanied by proof of service upon all other parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and denied or vacated by that court, or shall contain facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under N.C.G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus, or prohibition.

(d) **Response; Determination by Court**. Within ten days after service of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, ~~and~~ any supporting items, and any briefs filed under Rule 28.1. Except as provided by Rule 28.1, no~~No~~ briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Temporary Stay**. Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by a separate filing, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by a separate filing, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte. In capital cases, such stay, if granted, shall remain in effect until the period for filing a petition for certiorari in the United States Supreme Court has passed without a petition being filed, or until certiorari on a timely filed petition has been denied by that Court. At that time, the stay shall automatically dissolve.

* * *

Rule 28. Briefs—Function and Content

(a) **Function**. The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned. Similarly, issues properly presented for review in the Court of Appeals, but not then stated in the notice of appeal or the petition accepted by the Supreme Court for review and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court, are deemed abandoned.

(b) **Content of Appellant's Brief**. An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities as required by Rule 26(g).

(2) A statement of the issues presented for review. The proposed issues on appeal listed in the printed record shall not limit the scope of the issues that an appellant may argue in its brief.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to

understand all issues presented for review, supported by references to pages in the record on appeal.

(6) An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.

The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, post office address, telephone number, State Bar number, and e-mail address.

(9) The proof of service required by Rule 26(d).

(10) Any appendix required or allowed by this Rule 28.

(c) **Content of Appellee's Brief; Presentation of Additional Issues.** An appellee's brief shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel, and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix required or allowed by this Rule 28. It does not need to contain a statement of the issues presented, procedural history of the case, grounds for appellate review, the facts, or the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present issues in addition to those stated by the appellant.

Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Without having taken appeal or listing proposed issues as permitted by Rule 10(c), an

appellee may also argue on appeal whether a new trial should be granted to the appellee rather than a judgment notwithstanding the verdict awarded to the appellant when the latter relief is sought on appeal by the appellant. If the appellee presents issues in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new issues supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional issues.

An appellee may supplement the record with any materials pertinent to the issues presented on appeal, as provided in Rule 9(b)(5).

(d) **Appendixes to Briefs**. Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced in order to understand any issue presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when an issue presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief;

d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement, the study of which are required to determine issues presented in the brief.

(2) **When Appendixes to Appellant's Brief Are Not Required.** Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an issue presented:

a. whenever the portion of the transcript necessary to understand an issue presented in the brief is reproduced in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript

where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand an issue presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required**. An appellee must reproduce appendixes to its brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement it believes to be necessary to understand the issue.

b. Whenever the appellee presents a new or additional issue in its brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement as if it were the appellant with respect to each such new or additional issue.

(4) **Format of Appendixes**. The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of copies of transcript pages that have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered, and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record on Appeal**. References in the briefs to parts of the printed record, transcripts, documents included in the record on appeal pursuant to Rule 9(d), or supplements shall be to the pages in such filings where those portions appear.

(f) **Joinder of Multiple Parties in Briefs**. Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief even though they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities**. Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving

copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs or in such a memorandum may not be cited and discussed in oral argument.

(h) **Reply Briefs.** Within fourteen days after an appellee's brief has been served on an appellant, the appellant may file and serve a reply brief, subject to the length limitations set forth in Rule 28(j). Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief. Upon motion of the appellant, the Court may extend the length limitations on such a reply brief to permit the appellant to address new or additional issues presented for the first time in the appellee's brief. Otherwise, motions to extend reply brief length limitations or to extend the time to file a reply brief are disfavored.

(i) [Reserved]~~**Amicus Curiae Briefs**. An amicus curiae may file a brief with the permission of the appellate court in which the appeal is docketed.~~

~~(1) **Motion**. To obtain the court's permission to file a brief, amicus curiae shall file a motion with the court that states concisely the nature of amicus curiae's interest, the reasons why the brief is desirable, the issues of law to be addressed in the brief, and the position of amicus curiae on those issues.~~

~~(2) **Brief**. The motion must be accompanied by amicus curiae's brief. The amicus curiae brief shall contain, in a footnote on the first page, a statement that identifies any person or entity—other than amicus curiae, its members, or its counsel—who, directly or indirectly, either wrote the brief or contributed money for its preparation.~~

~~(3) **Time for Filing**. If the amicus curiae brief is in support of a party to the appeal, then amicus curiae shall file its motion and brief within the time allowed for filing that party's principal brief. If amicus curiae's brief does not support either party, then amicus curiae shall file its motion and proposed brief within the time allowed for filing appellee's principal brief.~~

~~(4) **Service on Parties**. When amicus curiae files its motion and brief, it must serve a copy of its motion and brief on all parties to the appeal.~~

~~(5) **Action by Court**. Unless the court orders otherwise, it will decide amicus curiae's motion without responses or argument. An amicus motion filed by an individual on his or her own behalf will be disfavored.~~

~~(6) **Reply Briefs**. A party to the appeal may file and serve a reply brief that responds to an amicus curiae brief no later than thirty days after having been served with the amicus curiae brief. A party's reply brief to an amicus curiae brief shall be limited to a concise rebuttal of arguments set out in the amicus curiae brief and shall not reiterate or rebut arguments set forth in the party's principal brief. The court will not accept a reply brief from an amicus curiae.~~

~~(7) **Oral Argument**. The court will allow a motion of an amicus curiae requesting permission to participate in oral argument only for extraordinary reasons.~~

(j) **Word-Count Limitations Applicable to Briefs Filed in the Court of Appeals**. ~~Each brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be set in font as set forth in Rule 26(g)(1) and described in Appendix B to these rules.~~ A principal brief filed in the Court of Appeals may contain no more than 8,750 words. A reply brief filed in the Court of Appeals may contain no more than 3,750 words. ~~An amicus curiae brief may contain no more than 3,750 words.~~

(1) **Portions of Brief Included in Word Count**. Footnotes and citations in the body of the brief must be included in the word count. Covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes do not count against these word-count limits.

(2) **Certificate of Compliance**. Parties shall submit with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

* * *

Rule 28.1. Amicus Curiae

(a) **Overview**. An amicus curiae may file a motion asking the court for permission to submit a brief about whether a petition should be allowed or about an issue on appeal. An amicus who has been permitted to submit a brief about an issue on appeal may also file a motion asking for permission to participate in oral argument. The court will not accept responses to the motions described in this rule.

(b) **Submitting an Amicus Brief.**

(1) **Motion and Brief Filed Contemporaneously**. An amicus curiae must file its motion and proposed brief contemporaneously as separate documents.

(2) **Content of Motion**. An amicus curiae's motion asking for permission to submit a brief must state the nature of the amicus's interest, the reasons why the brief would be beneficial to the court, the issues that are addressed in the brief, and the amicus's position on those issues.

(3) **Content of Brief**.

a. **Organization**. An amicus brief should be organized as follows: a cover page, a subject index and table of authorities under Rule 26(g)(2), a statement about the nature of the amicus curiae's interest, a list of the issues addressed in the brief, an argument, a conclusion stating the outcome sought, an identification of counsel under Rule 26(g)(3), and a proof of service under Rule 26(d).

b. **Argument**. An amicus curiae's argument should focus on the question before the court. Therefore, an amicus brief about a petition should address whether the grounds to allow the petition are satisfied, and an amicus brief about one or more of the issues on appeal should address those issues.

c. **Disclosure Footnote**. An amicus brief must contain a statement that either (i) identifies every person or entity (other than the amicus curiae, its members, or its counsel) who helped write the brief or who contributed money for its preparation, or (ii) specifies that there is no such person or entity. The statement must appear in a footnote on the first page of the amicus brief.

d. **Word-Count Limitation at the Court of Appeals**. An amicus brief filed in the Court

of Appeals may contain no more than 3,750 words. An amicus curiae must follow Rule 28(j)(1) to determine the portions of its brief that are included in the word count and must submit with the brief a certificate of compliance as described in Rule 28(j)(2).

(4) **Time for Filing**. If an amicus brief supports a party, then the amicus curiae must file its motion and proposed brief no later than seven days after that party's petition, response to a petition, or principal brief is filed. If an amicus brief does not support any party, then the amicus must file its motion and proposed brief no later than seven days after the response is filed when the amicus brief is about a petition and no later than seven days after the appellee brief is filed when the amicus brief is about an issue on appeal.

(5) **Service on Parties.** When an amicus curiae files its motion and proposed brief, it must serve a copy of both documents on the parties.

(6) **Reply Briefs of Parties**. A party may file a reply brief that is limited to a rebuttal of the arguments set out in the amicus brief. The reply brief must be filed no later than ten days after having been served with an amicus brief about a petition and no later than thirty days after having been served with an amicus brief about an issue on appeal. The court will not accept a reply brief from an amicus curiae.

(c) **Participating in Oral Argument.**

(1) **Standard.** The court will permit an amicus curiae to participate in oral argument only for good cause shown.

(2) **Content of Motion**. An amicus curiae's motion asking for permission to participate in oral argument must include:

a. a description of how the amicus curiae's participation would aid the court's decision-making process; and

b. a statement that indicates whether a party has agreed to yield time to the amicus curiae.

(3) **Time for Filing**. An amicus curiae must file its motion no later than seven days after the clerk sends notice that the appeal has been calendared for oral argument.

(4) **Service on Parties**. When an amicus curiae files its motion, it must serve a copy of the motion on the parties.

(d) **Identification of Amicus Curiae**. The title of an amicus motion and the title of an amicus brief shall identify the names of all individuals or legal entities joining the motion or brief. If there are so many amici that listing each name is not practical, then the amici may instead list a smaller number of names followed by "et al." in the title of the document and include a full list of the amici in an appendix. For the purpose of this rule, the phrase "individuals or legal entities" does not include assumed names, aliases, and unincorporated associations.

* * *

Rule 31. Petition for Rehearing

(a) **Time for Filing; Content**. A petition for rehearing may be filed in a civil action within fifteen days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years, respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) **How Addressed; Filed**. A petition for rehearing shall be addressed to the court that issued the opinion sought to be reconsidered.

(c) **How Determined**. Within thirty days after the petition is filed, the court will either grant or deny the petition. A determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party, no amicus briefs will be received, and no oral argument ~~by any party~~ will be heard. Determination by the court is final. The rehearing may be granted as to all or fewer than all points suggested in the petition. When the petition is denied, the clerk shall forthwith notify all parties.

(d) **Procedure When Granted**. Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted. The case will be reconsidered solely upon the record on appeal, the petition to rehear, new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to

the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within thirty days after the case is certified for rehearing, and the opposing party's brief, within thirty days after petitioner's brief is served. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13. No reply brief shall be received on rehearing. If the court has ordered oral argument, the clerk shall give notice of the time set therefor, which time shall be not less than thirty days after the filing of the petitioner's brief on rehearing.

(e) **Stay of Execution**. When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided by Rule 8 of these rules for stays pending appeal.

(f) **Waiver by Appeal from Court of Appeals**. The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) **No Petition in Criminal Cases**. The courts will not entertain petitions for rehearing in criminal actions.

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These amendments to the North Carolina Rules of Appellate Procedure become effective on 20 November 2023.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 18th day of October 2023.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 2023.

Grant E. Buckner
Clerk of the Supreme Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01B, Section .0100, *Discipline and Disability of Attorneys*, be amended as shown in the following attachment:

ATTACHMENT 1: 27 N.C.A.C. 01B, Section .0100, Rule .0113, *Proceedings Before the Grievance Committee*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 22, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 18th day of October, 2023.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 18th day of October, 2023.

s/Riggs, J.
For the Court

SUBCHAPTER 1B – DISCIPLINE AND DISABILITY RULES

SECTION .0100 – DISCIPLINE AND DISABILITY OF ATTORNEYS

27 NCAC 01B .0113 PROCEEDINGS BEFORE THE GRIEVANCE COMMITTEE

(a) Probable Cause . . . .

. . .

(j) Letters of Warning

(1) . . . .

. . .

(3) Service of Process:

(A) If valid service upon the respondent has previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the letter of warning may be served upon the respondent by mailing a copy of the letter of warning to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(B) If valid service upon the respondent has not previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the letter of warning shall be served upon the respondent by certified mail or personal service. If diligent efforts to serve the respondent by certified mail and by personal service are unsuccessful, the letter of warning shall be served by mailing a copy of the letter of warning to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. ~~Within 15 days after service, the respondent may refuse the letter of warning and request a hearing before the commission~~

~~to determine whether the respondent violated the Rules of Professional Conduct. Such refusal and request will be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If the respondent does not serve a refusal and request within 15 days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.~~

(4) Within 15 days after service, the respondent may refuse the letter of warning and request a hearing before the commission to determine whether the respondent violated the Rules of Professional Conduct. Such refusal and request will be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If the respondent does not serve a refusal and request within 15 days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(45) In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent at the commission.

(k) Admonitions, Reprimands, and Censures

. . . .

. . . .

History Note: *Authority G.S. 84-23; 84-28;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court:
March 3, 1999; February 3, 2000; October 8, 2009;
March 27, 2019; September 25, 2020;
October 18, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachments:

ATTACHMENT 2-A: 27 N.C.A.C. 01D, Section .1500, Rule .1517, *Exemptions*

ATTACHMENT 2-B: 27 N.C.A.C. 01D, Section .1500, Rule .1520, *Requirements for Program Approval*

ATTACHMENT 2-C: 27 N.C.A.C. 01D, Section .1500, Rule .1522, *Registered Sponsors*

ATTACHMENT 2-D: 27 N.C.A.C. 01D, Section .1500, Rule .1525, *Professionalism Requirement for New Members (PNA)*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 22, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council

of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 18th day of October, 2023.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 18th day of October, 2023.

s/Riggs, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1517 EXEMPTIONS

(a) Notification of Board. To qualify for an exemption ~~for a particular calendar year~~, a member shall notify the ~~board~~Board of the exemption ~~in~~during the annual membership renewal process or in another manner as directed by the Board. ~~report for that calendar year sent to the member pursuant to Rule .1522 of this subchapter.~~ All active members who are exempt are encouraged to attend and participate in legal education programs.

(b) Government Officials and Members of Armed Forces. The governor, the lieutenant governor, and all members of the council of state, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly, full-time principal chiefs and vice-chiefs of any Indian tribe officially recognized by the United States or North Carolina state governments, and members of the United States Armed Forces on full-time active duty are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such capacity.

(c) Judiciary and Clerks. Members of the state judiciary who are required by virtue of their judicial offices to take ~~an average of (twelve) 12 or more hours of~~ continuing judicial or other legal education ~~annually~~ and all members of the federal judiciary are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such judicial capacities. Additionally, ~~A~~a full-time law clerk for a member of the federal or state judiciary is exempt from the requirements of these rules for any calendar year in which the clerk serves some portion thereof in such capacity.~~, provided, however, that~~

~~(1) the exemption shall not exceed two consecutive calendar years; and, further provided, that~~

~~(2) the clerkship begins within one year after the clerk graduates from law school or passes the bar examination for admission to the North Carolina State Bar whichever occurs later.~~

(d) Nonresidents. The Board may exempt an active member from the continuing legal education requirements if, for at least six consecutive

months immediately prior to requesting an exemption, (i) the member resides outside of North Carolina, (ii) the member does not practice law in North Carolina, and (iii) the member does not represent North Carolina clients on matters governed by North Carolina law. ~~Any active member residing outside of North Carolina who does not practice in North Carolina for at least six (6) consecutive months and does not represent North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules.~~

(e) Law Teachers and General Assembly Employees. An exemption from the requirements of these rules shall be given to any active member who does not practice in North Carolina or represent North Carolina clients on matters governed by North Carolina law and who is:

(1) A full-time teacher at the School of Government ~~(formerly the Institute of Government)~~ of the University of North Carolina;

(2) A full-time teacher at a law school in North Carolina that is accredited by the American Bar Association; ~~or~~

(3) A full-time teacher of law-related courses at a graduate level professional school accredited by its respective professional accrediting agency~~.~~; or

(4) A full-time employee of the North Carolina General Assembly.

(f) Special Circumstances Exemptions. The ~~board~~Board may exempt an active member from the continuing legal education requirements for a period of not more than one year at a time upon a finding by the ~~board~~Board of special circumstances unique to that member constituting undue hardship or other reasonable basis for exemption.~~exemption, or for a longer period upon a finding of a permanent disability.~~

(g) Pro Hac Vice Admission. Nonresident ~~attorneys~~lawyers from other jurisdictions who are temporarily admitted to practice in a particular case or proceeding pursuant to the provisions of G.S. 84-4.1 shall not be subject to the requirements of these rules.

(h) Senior ~~Status~~ Exemption. The ~~board~~Board may exempt an active member from the continuing legal education requirements if

(1) the member is ~~sixty-five~~ 65 years of age or older; and

(2) the member does not render legal advice to or represent a client unless ~~the member associates with~~under the supervision of another active member who assumes responsibility for the advice or representation.

(i) Bar Examiners. Members of the North Carolina Board of Law Examiners are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such capacity. ~~CLE Record During Exemption Period. During a calendar year in which the records of the board indicate that an active member is exempt from the requirements of these rules, the board shall not maintain a record of such member's attendance at accredited continuing legal education programs. Upon the termination of the member's exemption, the member may request carry over credit up to a maximum of twelve (12) credits for any accredited continuing legal education program attended during the calendar year immediately preceding the year of the termination of the exemption. Appropriate documentation of attendance at such programs will be required by the board.~~

~~(j) Permanent Disability. Attorneys who have a permanent disability that makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The board shall review and approve or disapprove such plans on an individual basis and without delay.~~

(~~k~~j) Application for Substitute Compliance and Exemptions. Other requests for substitute compliance, partial waivers, and/or other exemptions for hardship or extenuating circumstances may be granted by the ~~board~~Board on an annual ~~yearly~~ basis upon written application of the ~~attorney~~ member.

~~(l) Bar Examiners. Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.~~

(k) Effect of Annual Exemption on CLE Requirements. Exemptions are granted on an annual basis and must be claimed each year. An exempt member's new reporting period will begin on March 1 of the year for which an exemption is not granted. No credit from prior years may be carried forward following an exemption.

(l) Exemptions from Professionalism Requirement for New Members.

(1) Licensed in Another Jurisdiction. A newly admitted member who is licensed by a United States jurisdiction other than North Carolina for five or more years prior to admission to practice in North Carolina is exempt from

the PNA program requirement and must notify the Board of the exemption during the annual membership renewal process or in another manner as directed by the Board.

(2) Inactive Status. A newly admitted member who is transferred to inactive status in the year of admission to the North Carolina State Bar is exempt from the PNA program requirement but, upon the entry of an order transferring the member back to active status, must complete the PNA program in the reporting period that the member is subject to the requirements set forth in Rule .1518(b) unless the member qualifies for another exemption in this rule.

(3) Other Rule .1517 Exemptions. A newly admitted active member who qualifies for an exemption under Rules .1517(a) through (i) of this subchapter shall be exempt from the PNA program requirement during the period of the Rule .1517 exemption. The member shall notify the Board of the exemption during the annual membership renewal process or in another manner as directed by the Board. The member must complete the PNA program in the reporting period the member no longer qualifies for the Rule .1517 exemption.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 12, 1997; October 1, 2003; March 3, 2005; October 7, 2010; October 2, 2014; June 9, 2016; September 22, 2016; September 25, 2019; October 18, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1520 REQUIREMENTS FOR PROGRAM APPROVAL

(a) . . . .

(b) Program Application Deadlines and Fee Schedule.

(1) Program Application and Processing Fees. Program applications submitted by sponsors shall comply with the deadlines and Fee Schedule set by the Board and approved by the Council, including any additional processing fees for late or expedited applications.

(2) Free Programs. Sponsors offering programs without charge to all attendees, including non-members of any membership organization, shall pay a reduced application fee.

(3) Member Applications. Members may submit a program application for a previously unapproved out of state, in-person program after the program is completed, accompanied by a reduced application fee. On-demand program applications must be submitted by the program sponsor.

(4) On-Demand CLE Programs. Approved on-demand programs are valid for three years. During this initial three-year term, sponsors shall pay an annual renewal fee each year in the amount set by the Board. After the initial three-year term, programs may be ~~renewed~~ approved annually in a manner approved by the Board that includes a certification that the program content continues to meet the accreditation standards in Rule .1519 and the payment of a program ~~renewal~~ recertification fee.

(5) Repeat Programs. Sponsors seeking approval for a ~~repeat~~ program, or portion of a program, that was previously approved by the Board within the same CLE year (March 1 through the end of February) shall pay a reduced application fee.

(c) . . . .

. . . .

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 27, 2003; March 3, 2005; October 7, 2010; March 6, 2014; April 5, 2018; September 25, 2019; June 14, 2023; October 18, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D.1522 ~~Reserved~~ REGISTERED SPONSORS

(a) Registered Sponsor Status. Notwithstanding the requirements of Rule .1520(b), the following rules apply to registered sponsors:

(1) Presumptive Approval of Programs. Once an organization is approved as a registered sponsor, the continuing legal education programs sponsored by that organization are presumptively approved for credit; however, application must still be made to the board for approval of each program pursuant to Rule .1520(a). The Board will provide notice of its decision on CLE program approval requests pursuant to the schedule set by the Board and approved by the Council. A program will be deemed approved if the notice is not timely provided by the Board pursuant to the schedule. The registered sponsor may request reconsideration of an unfavorable accreditation decision by submitting a letter of appeal to the Board within 15 days of receipt of the notice of disapproval. The decision by the Board on an appeal is final.

(2) Professionalism for New Admittees (PNA) Programs. Registered sponsors shall be permitted to provide PNA programs approved pursuant to Rule .1525 of this subchapter.

(3) Other services provided by the Board. The CLE Board may, in its discretion, provide additional services and adjustments to registered sponsors, including but not limited to reduced program application fees, different application deadlines, and optional payment structures. However, all registered sponsors shall be treated uniformly.

(b) Eligibility Standards. The Board may, in its sole discretion, register a sponsor if it meets the following requirements:

(1) The sponsor shall submit an application in the manner directed by the Board;

(2) The application shall contain all information requested by the Board and include payment of an application fee in an amount set by the Board;

(3) The sponsor must have had at least 20 programs approved for credit in the year prior to applying for Registered Sponsor status; and

(4) The sponsor shall suitably demonstrate a history of consistent compliance with the rules of this subchapter.

(c) Annual Renewal. Registered Sponsors must renew their status annually in the time and manner directed by the Board, including the payment of an annual renewal fee in an amount set by the Board.

(d) Revocation of Registered Sponsor Status. The Board may, at any time and in its sole discretion, revoke the registration of a registered sponsor for failure to satisfy the requirements of this subchapter. A sponsor who has its status revoked may re-apply for Registered Sponsor Status pursuant to Paragraph (b) of this rule.

(e) Previously Registered Sponsors. A sponsor that was previously designated by the board as a registered sponsor prior to the effective date of this revised rule shall maintain its registered sponsor status for the duration of the CLE year in which this rule becomes effective but shall be required to renew its status annually subject to the revised eligibility requirements in Paragraph (b) of this rule.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 7, 1996; March 6, 1997; February 3, 2000; March 3, 2005; September 25, 2019; June 14, 2023; October 18, 2023;
Rule transferred from 27 N.C. Admin. Code 1D .1524 on June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1525 PROFESSIONALISM REQUIREMENT FOR NEW MEMBERS (PNA)

(a) Content and Accreditation. The State Bar PNA program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional responsibility, professionalism, and law office management. The chairs of the Ethics and Grievance Committees, in consultation with the chief counsel to those committees, shall annually establish the content of the program and shall publish any changes to the required content on or before January 1 of each year. PNA programs may only be provided by sponsors registered under Rule .1522 of this subchapter or judicial district bars specifically approved by the Board to offer PNA programs. To be approved as a PNA program, the program must satisfy the annual content requirements, and a sponsor must submit a detailed description of the program to the Board for approval. A sponsor may not advertise a PNA program until approved by the Board. PNA programs shall be specially designated by the Board and no program that is not so designated shall satisfy the PNA program requirement for new members.

(b) . . . .

. . . .

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 3, 1999; June 14, 2023; October 18, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE SPECIALIZATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1700, *The Plan of Legal Specialization*, and Section .3400, *Certification Standards for the Child Welfare Specialty*, be amended as shown in the following attachments:

ATTACHMENT 3-A: 27 N.C.A.C. 01D, Section .1700, Rule .1723, *Revocation or Suspension of a Certification of a Specialist*

ATTACHMENT 3-B: 27 N.C.A.C. 01D, Section .1700, Rule .1725, *Areas of Specialty*

ATTACHMENT 3-C: **[NEW]** 27 N.C.A.C. 01D, Section .3400, Rule .3407, *Applicability of Other Requirements*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 22, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 18th day of October, 2023.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 18th day of October, 2023.

s/Riggs, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1700 – THE PLAN OF LEGAL SPECIALIZATION

27 NCAC 01D .1723 REVOCATION OR SUSPENSION OF CERTIFICATION AS A SPECIALIST

(a) . . . .

(b) Discretionary Revocation or Suspension. The board may revoke its certification of a lawyer as a specialist if the specialty is terminated or may suspend or revoke such certification if it is determined, upon the board's own initiative or upon recommendation of the appropriate specialty committee and after hearing before the board as provided in Rule .1802 and Rule .1803, that

(1) . . . ;

. . .

(6) the lawyer certified as a specialist received ~~public~~ professional discipline from the North Carolina State Bar ~~on or after the effective date of this provision,~~ other than suspension or disbarment from practice and the board finds that the conduct for which the professional discipline was received reflects adversely on the specialization program and the lawyer's qualification as a specialist; ~~or~~

(7) the lawyer certified as a specialist ~~was sanctioned or~~ received ~~public~~ professional discipline ~~on or after the effective date of this provision~~ from any state or federal court or tribunal or, if the lawyer is licensed in another jurisdiction, from the regulatory authority of that jurisdiction in the United States, or the lawyer certified as a specialist was found to have engaged in misconduct by any state or federal court or tribunal, and the board finds that the conduct for which the sanctions or professional discipline was received reflects adversely on the specialization program and the lawyer's qualification as a specialist~~.~~; or

(8) the lawyer certified as a specialist was criminally convicted by any state or federal court and the board finds that the conduct underlying the conviction reflects adversely on the specialization program and the lawyer's qualification as a specialist.

(c) Report to Board. A lawyer certified as a specialist has a duty to inform the board promptly of any professional discipline received by the lawyer, any judicial finding of misconduct, any criminal conviction, or any fact or circumstance described in Rules .1723(a) and (b) above. The board may consider a lawyer's failure to promptly report in determining whether to suspend or revoke certification.

(d) . . . .

History Note: *Authority G.S. 84-23;*
Readopted Effective December 8, 1994;
Amendments Approved by the Supreme Court: February 5, 2004; April 5, 2018; October 18, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1700 – THE PLAN OF LEGAL SPECIALIZATION

27 NCAC 01D .1725 AREAS OF SPECIALTY

There are hereby recognized the following specialties:

(1) . . . .

. . .

(5) criminal law

(a) federal ~~and state~~ criminal law

(b) state criminal law

(c) juvenile delinquency law

(6) . . . .

. . .

(14) child welfare law

History Note: *Authority G.S. 84-23;*
Readopted Effective December 8, 1994;
Amendments Approved by the Supreme Court: July 29, 1998; February 27, 2003; February 5, 2009; March 8, 2012; March 6, 2014; April 5, 2018; October 18, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .3400 – CERTIFICATION STANDARDS FOR THE CHILD WELFARE LAW SPECIALTY

27 NCAC 01D .3407 APPLICABILITY OF OTHER REQUIREMENTS

The specific standards set forth herein for certification of specialists in child welfare law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court: October 18, 2023.

AMENDMENT TO THE BOARD OF LAW EXAMINERS' RULES:

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The following amendment to the Board of Law Examiner's Rules Governing Admission to the Practice of Law in North Carolina was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Board of Law Examiners' Rules Governing Admission to the Practice of Law as set forth in the Board of Law Examiners' Rules, Section .0500, *Requirements for Applicants*, be amended as shown in the following attachment:

ATTACHMENT 5: Rule .0503, *Requirements for Military Spouse Comity Applicants*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 22, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 18th day of October, 2023.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming

volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 18th day of October, 2023.

s/Riggs, J.
For the Court

BOARD OF LAW EXAMINERS' RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

SECTION .0500

RULE .0501 REQUIREMENTS FOR MILITARY SPOUSE COMITY APPLICANTS

A Military Spouse Comity Applicant, upon written application may, in the discretion of the Board, be granted a license to practice law in the State of North Carolina without written examination provided that:

(1) The applicant fulfills all of the requirements of Rule .0502, except that:

(a) in lieu of the requirements of paragraph (3) of Rule .0502, a Military Spouse Comity Applicant shall certify that said applicant has read the Rules of Professional Conduct promulgated by the North Carolina State Bar and shall prove to the satisfaction of the Board that the Military Spouse Comity Applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, and that the Military Spouse Comity Applicant has been for at least four out of the last eight years immediately preceding the filing of this application with the Executive Director, actively and substantially engaged in the practice of law. Practice of law for the purposes of this rule shall be defined as it would be defined for any other comity applicant; and

(b) Paragraph (4) of Rule .0502 shall not apply to a Military Spouse Comity Applicant.

(2) Military Spouse Comity Applicant Defined. A Military Spouse Comity Applicant is any person who is

(a) An attorney at law duly admitted to practice in another state or territory of the United States, or the District of Columbia; and

(b) Identified by the Department of Defense (or, for the Coast Guard when it is not operating as a service in the Navy, by the Department of Homeland Security) as the spouse of a service member of the United States Uniformed Services; and

(c) Is residing or intends within the next six months to be residing, in North Carolina due to the service member's

military orders for a permanent change of station to the State of North Carolina.

(3) Procedure. In addition to the documentation required by paragraph (1) of Rule .0502, a Military Spouse Comity Applicant must file with the Board the following:

(a) A copy of the service member's military orders reflecting a permanent change of station to a military installation in North Carolina; and

(b) A military identification card which lists the Military Spouse Applicant as the spouse of the service member.

(4) Fee. ~~A Military Spouse Comity Applicant shall pay a fee of $1,500.00 in lieu of the fee required in paragraph (2) of Rule .0502. This fee shall be non-refundable.~~No application fee will be required for Military Spouse Comity Applicants.

History Note: *Amendments Approved by the Supreme Court: October 18, 2023.*

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 20, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01B, Section .0100, *Discipline and Disability of Attorneys*, be amended as shown in the following attachments:

ATTACHMENT 1 - A: 27 N.C.A.C. 01B, Section .0100, Rule .0105, *Chairperson of the Grievance Committee: Powers and Duties*

ATTACHMENT 1 - B: 27 N.C.A.C. 01B, Section .0100, Rule .0106, *Grievance Committee: Powers and Duties*

ATTACHMENT 1 - C: 27 N.C.A.C. 01B, Section .0100, Rule .0113, *Proceedings Before the Grievance Committee*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 20, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of December, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 20th day of December, 2023.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 21st day of December, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 1B – DISCIPLINE AND DISABILITY RULES

SECTION .0100 – DISCIPLINE AND DISABILITY OF ATTORNEYS

27 NCAC 01B .0105 ~~CHAIRPERSON~~CHAIR OF THE GRIEVANCE COMMITTEE: POWERS AND DUTIES

(a) The ~~chairperson~~chair of the Grievance Committee will have the power and duty

(1) to supervise the activities of the counsel;

(2) to recommend to the Grievance Committee that an investigation be initiated;

(3) to recommend to the Grievance Committee that a grievance be dismissed;

(4) to direct a letter of notice to a respondent or direct the counsel to issue letters of notice in such cases or under such circumstances as the ~~chairperson~~chair deems appropriate;

(5) to issue, at the direction and in the name of the Grievance Committee, a letter of caution, letter of warning, an admonition, a reprimand, or a censure to a member;

(6) to notify a respondent that a grievance has been dismissed, and to notify the complainant in accordance with Rule ~~.0121~~.0125 of this ~~Subchapter~~subchapter;

(7) to call meetings of the Grievance Committee;

(8) to issue subpoenas in the name of the North Carolina State Bar or direct the secretary to issue such subpoenas;

(9) to administer or direct the administration of oaths or affirmations to witnesses;

(10) to sign complaints and petitions in the name of the North Carolina State Bar;

(11) to determine whether proceedings should be instituted to activate a suspension which has been stayed;

(12) to enter orders of reciprocal discipline in the name of the Grievance Committee;

(13) to direct the counsel to institute proceedings in the appropriate forum to determine if an attorney is in violation of an order of the Grievance Committee, the commission, or the council;

(14) to rule on requests for reconsideration of decisions of the Grievance Committee regarding grievances;

(15) to tax costs of the disciplinary procedures against any defendant against whom the Grievance Committee imposes discipline, including a minimum administrative cost of fifty dollars ($50.00);

(16) to dismiss a grievance upon request of the complainant, where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct and where counsel consents to the dismissal;

(17) to dismiss a grievance where it appears that the grievance has not been filed within the time period set out in Rule ~~.0111(e);~~.0111(f)(4);

(18) to dismiss a grievance where it appears that the complaint, even if true, fails to state a violation of the ~~Revised~~ Rules of Professional Conduct and where counsel consents to the dismissal;

(19) to dismiss a grievance where it appears that there is no probable cause to believe that the respondent has violated the ~~Revised~~ Rules of Professional Conduct and where counsel and a member of the Grievance Committee designated by the committee consent to the dismissal;

(20) to appoint a subcommittee to make recommendations to the council for such amendments to the Discipline and Disability Rules as the subcommittee deems necessary or ~~appropriate.~~appropriate;

(21) to appoint the members of a grievance review panel; and

(22) to perform such other duties as the council may direct.

(b) Absence of ~~Chairperson~~Chair and Delegation of Duties. The president, vice-~~chairperson~~chair, or a member of the Grievance Committee designated by the president or the ~~chairperson~~chair or vice-~~chairperson~~chair of the committee may perform the functions, exercise the power, and discharge the duties of the ~~chairperson~~chair or any vice-~~chairperson~~chair when the ~~chairperson~~chair or a vice-~~chairperson~~chair is absent or disqualified.

(c) Delegation of Authority. The ~~chairperson~~chair may delegate his or her authority to the president, the vice-~~chairperson~~chair of the committee, or a member of the Grievance Committee.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 20, 1995; March 6, 1997; October 2, 1997; December 30, 1998; March 3, 1999; February 3, 2000; March 10, 2011; August 23, 2012; December 20, 2023.

SUBCHAPTER 1B – DISCIPLINE AND DISABILITY RULES

SECTION .0100 – DISCIPLINE AND DISABILITY OF ATTORNEYS

27 NCAC 01B .0106 GRIEVANCE COMMITTEE: POWERS AND DUTIES

The Grievance Committee will have the power and duty

(1) to direct the counsel to investigate any alleged misconduct or disability of a member of the North Carolina State Bar coming to its attention;

. . .

(5) to issue a letter of warning to a respondent in cases wherein no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct. The letter of warning will advise the ~~attorney~~respondent that he or she may be subject to discipline if such conduct is continued or repeated. The warning will specify in one or more ways the conduct or practice for which the respondent is being warned. A copy of the letter of warning will be maintained in the office of the counsel for three years subject to the confidentiality provisions of Rule ~~.0129~~.0133 of this subchapter;

(6) to issue an admonition in cases wherein the ~~defendant~~ respondent has committed a minor violation of the Rules of Professional Conduct;

(7) to issue a reprimand in cases wherein the ~~defendant~~ respondent has violated one or more provisions of the Rules of Professional Conduct, and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure;

(8) to issue a censure in cases wherein the ~~defendant~~respondent has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the ~~defendant's~~respondent's license;

. . .

(10) to include in any order of admonition, reprimand, or censure a provision requiring the ~~defendant~~respondent to complete a reasonable amount of continuing legal education in addition to the minimum amount required by the North Carolina Supreme Court;

(11) in its discretion, to refer grievances primarily attributable to unsound law office management to a program of law office management training approved by the State Bar in accordance with Rule .0112(i) of this ~~subchapter.~~ subchapter;

(12) in its discretion, to refer grievances primarily attributable to the respondent's substance abuse or mental health problem to the Lawyer Assistance Program in accordance with Rule .0112(j) of this ~~subchapter.~~subchapter;

(13) in its ~~discretion~~discretion, to refer grievances primarily attributable to the respondent's failure to employ sound trust accounting techniques to the trust account supervisory program in accordance with Rule .0112(k) of this ~~subchapter.~~subchapter;

(14) to operate the Attorney Client Assistance Program (ACAP). Functions of ACAP can include without limitation:

(a) assisting clients and ~~attorneys~~lawyers in resolving issues arising in the ~~client/attorney~~client/lawyer relationship that might be resolved without the need to open grievance files; and

(b) operating the Fee Dispute Resolution ~~Program.~~ Program;

(15) to consider and decide whether to follow the recommendation of a grievance review panel; and

(16) to perform such other duties as the council may direct.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 3, 1999; December 20, 2000; August 23, 2012; September 25, 2019; December 20, 2023.

SUBCHAPTER 1B – DISCIPLINE AND DISABILITY RULES

SECTION .0100 – DISCIPLINE AND DISABILITY OF ATTORNEYS

27 NCAC 01B .0113 PROCEEDINGS BEFORE THE GRIEVANCE COMMITTEE

(a) Probable Cause - The Grievance Committee or any of its panels acting as the Grievance Committee with respect to grievances referred to it by the ~~chairperson~~chair of the Grievance Committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. . . . The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the ~~chairperson~~chair of the Grievance Committee. . . . .

(b) Oaths and Affirmations - The ~~chairperson~~chair of the Grievance Committee will have the power to administer oaths and affirmations.

(c) Record of Grievance Committee's Determination - The ~~chairperson~~ chair will keep a record of the Grievance Committee's determination concerning each grievance and file the record with the secretary.

(d) Subpoenas - The ~~chairperson~~chair will have the power to subpoena witnesses, to compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The ~~chairperson~~chair may designate the secretary to issue such subpoenas.

. . .

(g) Quorum Requirement - . . . The ~~chairperson~~chair will not be counted for quorum purposes and will be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(h) Results of Grievance Committee Deliberations - If probable cause is found and the committee determines that a hearing is necessary, the ~~chairperson~~chair will direct the counsel to prepare and file a complaint against the respondent. If the committee finds probable cause but determines that no hearing is necessary, it will direct the counsel to prepare for the ~~chairperson's~~chair's signature an admonition, reprimand, or censure. . . . .

. . .

(k) Admonitions, Reprimands, and Censures

(1) . . . .

. . .

(3) Factors that shall be considered in determining whether the violation of the Rules is minor and warrants issuance of an admonition include, but are not limited to, the following:

(A) . . . ;

. . .

(J) imposition of admonition appropriately acknowledges the minor nature of the violation(s) of the ~~Revised~~ Rules of Professional Conduct;

. . . .

(l) Procedures for Admonitions, Reprimands, and Censures

(1) . . .

. . .

(4) . . . An extension of time may be granted by the ~~chairperson~~chair of the Grievance Committee for good cause shown. . . . .

. . .

(m) There shall be a grievance review panel of the Grievance Committee. For each review conducted, the chair shall appoint a panel consisting of the chair, two vice-chairs, and two other members of the Grievance Committee, including one public member. The panel shall not include any member who serves on the subcommittee that was assigned to address the underlying grievance file. The chair shall serve as the chair of the panel. If the chair or either of the two vice-chairs from the other subcommittees served on the subcommittee that issued the discipline or are otherwise unable to serve on the review panel, the chair may appoint a substitute member or members of the committee to serve on the review panel in the place of the chair or in the place of such vice-chair or vice-chairs.

(1) The panel shall have the following powers and duties:

(A) Upon a timely-filed written request by a grievance respondent, to review an order of public discipline issued to the respondent by the Grievance Committee.

(i) A written request for review must be filed with the secretary of the State Bar within 15 days of service of the public discipline upon the respondent.

(ii) The written request shall contain the grounds upon which the respondent believes review is warranted and may include supporting documentary evidence that has not previously been submitted to the Grievance Committee.

(iii) The respondent shall be entitled to be represented by legal counsel at the respondent's expense. The respondent or the respondent's legal counsel and legal counsel for the State Bar shall be entitled to appear and to present oral arguments to the panel. The panel's review shall be conducted upon the written record and oral arguments. Neither the respondent nor the State Bar may present live testimony or compel the production of books, papers, and other writings and documents in connection with a request for review. The panel may, in its discretion, question the respondent, legal counsel for the respondent, and legal counsel for the State Bar.

(iv) The panel shall consider the request for review, any documentation submitted in support of the request for review, and all materials that were before the Grievance Committee when it made its decision. The respondent shall be entitled to receive all material considered by the panel other than attorney-client privileged communications of the Office of Counsel and work product of the Office of Counsel. The panel shall determine whether the public discipline issued by the Grievance Committee is appropriate in light of all material considered by the panel.

(a) After considering the request for review, oral arguments, and the documentary record, the panel may, by majority vote, either concur in the public discipline issued by the Grievance Committee or remand the grievance file to the Grievance

Committee with its recommendation for a different disposition.

(b) The panel shall prepare a memorandum communicating its determination to the respondent and to the Office of Counsel. The memorandum will not constitute an order and will not contain findings of fact, conclusions of law, or the rationale for the panel's determination.

(c) The Grievance Committee shall act upon a remand at its next regularly scheduled meeting.

(d) Upon remand, the Grievance Committee may affirm the public discipline that it issued or may reach a different disposition of the grievance file.

(e) The decision of the Grievance Committee upon remand is final, and its decision is not subject to further consideration by the Grievance Committee.

(f) Within 15 days after service upon the respondent of (i) the panel's memorandum concurring in the original public discipline issued by the Grievance Committee, or (ii) the Grievance Committee's final decision upon remand after review, the respondent may refuse the public discipline imposed by the Grievance Committee and request a hearing before the commission. Such refusal and request shall be in writing, addressed to the Grievance Committee, and served upon the secretary of the State Bar by certified mail, return receipt requested.

(v) Second or subsequent requests for review of Grievance Committee action in the same file will not be considered.

(vi) A request for review is in addition to and not in derogation of all procedural and substantive rights contained in the Discipline and Disability Rules of the State Bar.

(2) All proceedings and deliberations of the panel shall be conducted in a manner and at a time and location to be determined by the chair of the Grievance Committee. Reviews may be conducted by videoconference in the discretion of the chair.

(3) All proceedings of the panel are closed to the public. Neither the respondent nor legal counsel for the respondent and the State Bar shall be privy to deliberations of the panel. All documents, papers, letters, recordings, electronic records, or other documentary materials, regardless of physical form or characteristic, in the possession of the panel are confidential and are not public records within the meaning of Chapter 132 of the General Statutes.

(~~mm~~n) Disciplinary Hearing Commission Complaints - Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the ~~chairperson~~chair of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the ~~chairperson~~chair of the Grievance Committee.

History Note: *Authority G.S. 84-23; 84-28;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 3, 1999; February 3, 2000; October 8, 2009; March 27, 2019; September 25, 2020; October 18, 2023; December 20, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachment:

ATTACHMENT 2: 27 N.C.A.C. 01D, Section .1500, Rule .1501, *Scope, Purpose and Definitions*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 27, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of December, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 20th day of December, 2023.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of December, 2023.

s/Riggs, J.
For the Court

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1501 SCOPE, PURPOSE AND DEFINITIONS

(a) Scope

. . . .

(b) Purpose

The purpose of these continuing legal education rules is to assist lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve. The North Carolina State Bar, under Chapter 84 of the General Statutes of North Carolina, is charged with the responsibility of providing rules of professional conduct and with disciplining ~~attorneys~~ lawyers who do not comply with such rules. The ~~Revised~~ Rules of Professional Conduct adopted by the North Carolina State Bar and approved by the Supreme Court of North Carolina require that lawyers adhere to important ethical standards, including that of rendering competent legal services in the representation of their clients.

. . .

~~It has also become clear that in order to render legal services in a professionally responsible manner, a lawyer must be able to manage his or her law practice competently. Sound management practices enable lawyers to concentrate on their clients' affairs while avoiding the ethical problems which can be caused by disorganization.~~

It is in response to such considerations that the North Carolina State Bar has adopted these minimum continuing legal education requirements. The purpose of these minimum continuing legal education requirements is the same as the purpose of the ~~Revised~~ Rules of Professional Conduct themselves—to ensure that the public at large is served by lawyers who are competent and maintain high ethical standards.

(c) Definitions

(1) "Active member" . . . .

. . .

(5) "Continuing legal education" or "CLE" is any legal, judicial or other educational program accredited by the ~~board.~~Board. Generally, CLE will include educational

programs designed principally to maintain or advance the professional competence of lawyers and/or to expand an appreciation and understanding of the professional responsibilities of lawyers.

. . .

(7) "Credit hour" . . . .

(8) "Ethics" shall mean programs or segments of programs devoted to (i) professional responsibility, or (ii) professionalism as defined in Rules .1501(c)(14) and (15) below.

(~~8~~9) "Inactive member" . . . .

(~~9~~10) "In-house continuing legal education" shall mean courses or programs offered or conducted by law firms, either individually or in connection with other law firms, corporate legal departments, or similar entities primarily for the education of their members. ~~The board may exempt from this definition those programs which it finds~~

~~(A) to be conducted by public or quasi-public organizations or associations for the education of their employees or members;~~

~~(B) to be concerned with areas of legal education not generally offered by sponsors of programs attended by lawyers engaged in the private practice of law.~~

(~~10~~11) A "newly admitted active member" is one who becomes an active member of the North Carolina State Bar for the first ~~time, has been reinstated, or has changed from inactive to active status.~~time.

(~~11~~12) "On demand" . . . .

(~~12~~13) "Online" program . . . .

~~(13) "Participatory CLE" shall mean programs or segments of programs that encourage the participation of attendees in the educational experience through, for example, the analysis of hypothetical situations, role playing, mock trials, roundtable discussions, or debates.~~

(14) "Professional responsibility" shall mean those programs or segments of programs devoted to ~~a)~~ (i) the substance, underlying rationale, and practical application of the Rules of Professional Conduct; ~~b~~ (ii) the professional obligations of the lawyer to the client, the court, the public, and other lawyers; or ~~c)~~ (iii) moral philosophy and

ethical decision-making in the context of the practice of ~~law;~~law. ~~and d) the effects of stress, substance abuse and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities and the prevention, detection, treatment, and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions. This definition shall be interpreted consistent with the provisions of Rule .1501(c)(4) or (6) above.~~

(15) "Professionalism" . . . .

~~(16) "Registered sponsor" shall mean an organization that is registered by the board after demonstrating compliance with the accreditation standards for continuing legal education programs as well as the requirements for reporting attendance and remitting sponsor fees for continuing legal education programs.~~

(~~17~~16) "Rules" shall mean the provisions of the continuing legal education rules established by the Supreme Court of North Carolina ~~(Section .1500 of this subchapter)~~.

(~~18~~17) "Sponsor" is any person or entity presenting or offering to present one or more continuing legal education ~~programs, whether or not an accredited sponsor.~~programs.

(18) "Professional well-being" (PWB) is a program focused on the relationship between stressors inherent in the profession, competence, professionalism, and fitness to practice. Topics may include the prevention, detection, treatment, and etiology of a range of substance use and mental health conditions, as well as resources available for assistance and strategies for improving resilience and well-being. Experiential exercises, practices, or demonstrations of tools for improving resilience and well-being are permitted provided they do not exceed a combined total of 20 minutes in any 60-minute presentation.

(19) "Technology training" shall mean a program, or a segment of a program, devoted to education on information technology (IT) or cybersecurity (*see* N.C. Gen. Stat. §_143B-1320(a)(11), or successor statutory provision, for a definition of "information technology"), including education on an information technology product, device, platform, application, or other tool, process, or ~~methodology.~~methodology that is specific or uniquely suited to the practice of law. A technology training program must

have the primary objective of enhancing a lawyer's proficiency as a lawyer. ~~To be eligible for CLE accreditation as a technology training program, the program must satisfy the accreditation standards in Rule .1519 and the course content requirements in Rule .1602(e) of this subchapter.~~

~~(20) "Year" shall mean calendar year.~~

(20) "Registered Sponsor" shall mean an organization that is registered by the Board after meeting the eligibility standards in Rule .1522(b).

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 6, 1997; March 3, 1999; June 7, 2001; March 3, 2005; March 8, 2007; October 9, 2008; August 25, 2011; April 5, 2018; September 20, 2018; September 25, 2019; December 20, 2023.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ORGANIZATION OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 19, 2024.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01A, Section .0400, *Election, Succession, and Duties of Officers*, be amended as shown in the following attachments:

ATTACHMENT 1 - A: 27 N.C.A.C. 01A, Section .0400, Rule .0406, *Vacancies and Succession*

ATTACHMENT 1 - B: 27 N.C.A.C. 01A, Section .0400, Rule .0411, *Secretary*

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 January 19, 2024.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of February, 2024.

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 is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 20th day of March, 2024.

s/Paul Newby
Paul Newby, 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 20th day of March, 2024.

s/Riggs, J.
For the Court

TITLE 27 - THE NORTH CAROLINA STATE BAR

CHAPTER 1 - RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

SUBCHAPTER 1A - ORGANIZATION OF THE NORTH CAROLINA STATE BAR

SECTION .0400 - ELECTION, SUCCESSION, AND DUTIES OF OFFICERS

27 NCAC 01A .0406 VACANCIES AND SUCCESSION

(a) Succession Upon Mid-term Vacancy in Office. Officer vacancies shall be filled as follows:

. . .

. . .

(d) Temporary Inability of Secretary to Perform Duties. If the secretary is absent or is otherwise temporarily unable to perform the duties of office, the assistant director and director for management, finance, and communications shall perform those duties until the secretary returns or becomes able to resume the duties. If the assistant director and director for management, finance, and communications is absent or is otherwise unable to perform those duties, the counsel of the State Bar shall perform those duties until the secretary returns or becomes able to resume the duties. If neither the assistant director and director for management, finance, and communications nor the counsel are able to perform those duties, then the president may select a member of the State Bar staff to perform those duties for the period of the secretary's absence or inability. Notwithstanding the foregoing, the secretary may delegate any ministerial task to any employee of the North Carolina State Bar.

History Note: *Authority G.S. 84-23;*
Readopted Effective December 8, 1994;
Amendments Approved by the Supreme Court: September 24, 2015; September 20, 2018; March 20, 2024.

TITLE 27 - THE NORTH CAROLINA STATE BAR

CHAPTER 1 - RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

SUBCHAPTER 1A - ORGANIZATION OF THE NORTH CAROLINA STATE BAR

SECTION .0400 - ELECTION, SUCCESSION, AND DUTIES OF OFFICERS

27 NCAC 01A .0411 SECRETARY

The secretary shall attend all meetings of the council and of the North Carolina State Bar, and shall record the proceedings of all such meetings. The secretary shall, with the president, president-elect or vice-president, execute all contracts ordered by the council. He or she shall have custody of the seal of the North Carolina State Bar, and shall affix it to all documents executed on behalf of the council or certified as emanating from the council. The secretary shall take charge of all funds paid into the North Carolina State Bar and deposit them in some bank selected by the council; he or she shall cause books of accounts to be kept, which shall be the property of the North Carolina State Bar and which shall be open to the inspection of any officer, committee or member of the North Carolina State Bar during usual business hours. At each January meeting of the council, the secretary shall make a full report of receipts and disbursements since the previous annual report, together with a list of all outstanding obligations of the North Carolina State Bar. The books of accounts shall be audited as of December 31 of each year and the secretary shall publish same in the annual reports as referred to above. He or she shall perform such other duties as may be imposed upon him or her, and shall give bond for the faithful performance of his or her duties in an amount to be fixed by the council with surety to be approved by the council. The secretary may delegate any ministerial task to any employee of the North Carolina State Bar.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: September 24, 2015, March 20, 2024.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE SPECIALIZATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that a new section be added to the Rules and Regulations of the North Carolina State Bar to be set forth in 27 N.C.A.C. 01D, Section .3500, *Certification Standards for the Employment Law Specialty*, as shown in the following attachments:

ATTACHMENT 2 - A: 27 N.C.A.C. 01D, Section .3500, Rule .3501, *Establishment of Specialty Field*

ATTACHMENT 2 - B: 27 N.C.A.C. 01D, Section .3500, Rule .3502, *Definition of Specialty*

ATTACHMENT 2 - C: 27 N.C.A.C. 01D, Section .3500, Rule .3503, *Recognition as a Specialist in Employment Law*

ATTACHMENT 2 - D: 27 N.C.A.C. 01D, Section .3500, Rule .3504, *Applicability of Provisions of the North Carolina Plan of Legal Specialization*

ATTACHMENT 2 - E: 27 N.C.A.C. 01D, Section .3500, Rule .3505, *Standards for Certification as a Specialist in Employment Law*

ATTACHMENT 2 - F: 27 N.C.A.C. 01D, Section .3500, Rule .3506, *Standards for Continued Certification as a Specialist*

ATTACHMENT 2 - G: 27 N.C.A.C. 01D, Section .3500, Rule .3507, *Applicability of Other Requirements*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing rules, to be added to the Rules and Regulations of the North Carolina State Bar, were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 20, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of February, 2024.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing rules, to be added 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 20th day of March, 2024.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing rules, to be added to the Rules and Regulations of the North Carolina State Bar, were entered upon the minutes of the Supreme Court. The rules shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of March, 2024.

s/Riggs, J.
For the Court

THE FOLLOWING IS AN ENTIRELY NEW SECTION (.3500) OF 27 NCAC 1D

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY

27 NCAC 01D .3501 ESTABLISHMENT OF SPECIALTY FIELD

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates Employment Law as a specialty for which certification of specialists under the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) is permitted.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court March 20, 2024.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY

27 NCAC 01D .3502 DEFINITION OF SPECIALTY

The specialty of Employment Law, in general, involves the practice of law as it applies to employers and employees (public and private) and their respective rights and obligations in accordance with myriad federal and state laws. The practice, more specifically, involves the counseling and representation of employers, employees, and independent contractors regarding the evolving array of torts, contractual issues, and federal and North Carolina statutes pertaining to employment relationships, including but not limited to: the Family and Medical Leave Act ("FMLA"); Americans with Disabilities Act ("ADA"); Section 504 of the Rehabilitation Act of 1973; Title VII of the Civil Rights Act; the Age Discrimination in Employment Act; Older Worker Benefits Protection Act; National Labor Relations Act ("NLRA") (insofar as it pertains to "protected concerted" activity and related unfair labor practices); Fair Labor Standards Act ("FLSA"); Occupational Safety and Health Act ("OSHA") (insofar as it pertains to obligations arising under the "General Duty Clause"); Worker Adjustment and Retraining Notification Act ("WARN"); Pregnancy Discrimination Act; the Uniformed Services Employment and Reemployment Rights Act ("USERRA"); Section 1981 of the Civil Rights Act of 1866; the North Carolina Wage and Hour Act ("WHA"), North Carolina Retaliatory Employment Discrimination Act ("REDA"); North Carolina Employment Security law; North Carolina Persons With Disabilities Protection Act; North Carolina State Human Resources Act ("HRA") (insofar as the last pertains to coverage of the HRA and deadlines by which relevant claims must be made); North Carolina law regarding restrictive covenants (non-competition, non-solicitation, and non-disclosure); and related regulations and developing common law. The specialty does not encompass matters arising under the North Carolina Workers' Compensation Act (other than proficient familiarity with the circumstances in which the Act may apply) or the practice of employee benefits law (such as but not limited to federal and North Carolina laws regulating group health insurance plans and tax-qualified retirement plans).

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court March 20, 2024.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY

27 NCAC 01D .3503 RECOGNITION AS A SPECIALIST IN EMPLOYMENT LAW

If a lawyer qualifies as a specialist in Employment Law by meeting the standards set for the specialty, then the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Employment Law."

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court March 20, 2024.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY

27 NCAC 01D .3504 APPLICABILITY OF PROVISIONS OF THE NORTH CAROLINA PLAN OF LEGAL SPECIALIZATION

Certification and continued certification of specialists in Employment Law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court March 20, 2024.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY

27 NCAC 01D .3505 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN EMPLOYMENT LAW

Each applicant for certification as a specialist in Employment Law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet following standards for certification in Employment Law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the Board that the applicant has experience through substantial involvement in Employment Law.

(1) Substantial involvement shall mean that, during the 5 years immediately preceding the application, the applicant devoted an average of at least 700 hours a year to the practice of Employment Law but not fewer than 400 hours in any 1 year.

(2) Practice shall mean substantive legal work in Employment Law done primarily for the purpose of providing legal advice or representation, including the activities described in paragraph (3) below, or a practice equivalent as described in paragraph (4) below.

(3) Substantive legal work in Employment Law focuses on the practice of law as it applies to employers and employees and their respective rights and obligations to one another in accordance with myriad federal and state laws. The practice requires proficiency in federal and North Carolina statutes and related regulations, including but not limited to those laws listed above in ".3502 Definition of Specialty" as well as common law pertaining to employer and employee rights.

The specialist must be able to competently advise and represent clients in counseling and before administrative agencies or in court-based litigation (provided, that proficiency in civil

litigation is not required); recognize employment laws and spot related issues and risks that are or may be presented by the client's circumstances; know when the laws of states other than those of North Carolina may apply; know when the advice of lawyers who are conversant with other legal fields (such as taxation, business law and professional licensing requirements) may be required; and recognize ethical issues that can arise in the course of relationship with the client.

(4) "Practice equivalent" shall mean: Service as a law professor concentrating in the teaching of Employment Law for up to three years during the five years prior to application may be substituted for an equivalent number of years of experience necessary to meet the five-year requirement set forth in Rule .3505(b)(1).

(c) Continuing Legal Education - To be certified as a specialist in Employment Law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in Employment Law and related fields during the three years preceding application. The 36 hours must include at least 27 hours in Employment Law; the remaining 9 hours may be in related-field CLE. Related fields include contract law; administrative law; alternative dispute-resolution; workers' compensation law; the law of trade secrets and data privacy; business law/corporate governance law; employment benefits; tax law as regards compensation of employees; employment-related investigations; and civil litigation/trial advocacy. The applicant may request recognition of an additional field as related to Employment Law practice for the purpose of meeting the CLE standard.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of 10 lawyers and/or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination - An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of Employment Law to justify the representation of special competence to the legal profession and the public.

(1) Terms - The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge and application of Employment Law as defined and described in "Section .3502 Definition of Specialty", including but not limited to the following:

(A) Fair Labor Standards Act

(B) Family and Medical Leave Act

(C) Americans with Disabilities Act

(D) Title VII of the Civil Rights Act

(E) Equal Pay Act

(F) Genetic Information Nondiscrimination Act

(G) Section 504 of the Rehabilitation Act of 1973

(H) Age Discrimination in Employment Act

(I) Older Workers' Benefits Protection Act

(J) Worker Adjustment and Retraining Notification Act

(K) Pregnancy Discrimination Act

(L) Occupational Safety and Health Act (only as regards scope of "general duty" clause)

(M) National Labor Relations Act (only as regards employees' right to engage in Section 7 protected "concerted activity" and related unfair labor practices)

(N) Uniformed Services Employment and Reemployment Rights Act

(O) Section 1981 of the Civil Rights Act of 1866

(P) North Carolina Retaliatory Employment Discrimination Act

(Q) North Carolina Wage and Hour Act

(R) North Carolina statutes and common law regarding restrictive covenants (*e.g.*, non-competition, non-solicitation, and non-disclosure agreements)

(S) North Carolina Persons With Disabilities Protection Act

(T) North Carolina State Human Resources Act

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court March 20, 2024.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY

27 NCAC 01D .3506 STANDARDS FOR CONTINUED CERTIFICATION AS A SPECIALIST

The period of certification is five years. Before the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .3506(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3505(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in Employment Law and related fields during the five years preceding application for continuing certification. Of the 60 hours of CLE, at least 42 hours shall be in Employment Law, and the balance of 18 hours may be in related-field CLE (including but not necessarily limited to the related fields set forth in Rule .3505(c) of this subchapter). A list of the topics that qualify as related-field CLE shall be maintained by the board on its official website.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers and/or judges, all of whom are licensed and currently in good standing to practice law in North Carolina. 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 Rule .3505(d) of this subchapter apply to this standard.

(d) Time for Application - Application for continued certification shall be made not more than 180 days nor fewer than 90 days before the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such a lapse, recertification will require compliance with all requirements of Rule .3505 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification was suspended or revoked during a period of certification, then the application shall be treated as if it were for initial certification under Rule .3505 of this subchapter.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court March 20, 2024.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY

27 NCAC 01D .3507 APPLICABILITY OF OTHER REQUIREMENTS

The specific standards set forth herein for certification of specialists in Employment Law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court March 20, 2024.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE AUTHORIZED PRACTICE COMMITTEE

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 19, 2024.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .0200, *Procedures for the Authorized Practice Committee*, be amended as shown in the following attachments:

ATTACHMENT 3 - A: 27 N.C.A.C. 01D, Section .0200, Rule .0201, *General Provisions*

ATTACHMENT 3 - B: 27 N.C.A.C. 01D, Section .0200, Rule .0202, *Procedure*

ATTACHMENT 3 - C: 27 N.C.A.C. 01D, Section .0200, Rule .0203, *Definitions*

ATTACHMENT 3 - D: 27 N.C.A.C. 01D, Section .0200, Rule .0204, *State Bar Council - Powers and Duties*

ATTACHMENT 3 - E: 27 N.C.A.C. 01D, Section .0200, Rule .0205, *Chairperson of the Authorized Practice Committee - Powers and Duties*

ATTACHMENT 3 - F: 27 N.C.A.C. 01D, Section .0200, Rule .0206, *Authorized Practice Committee - Powers and Duties*

ATTACHMENT 3 - G: 27 N.C.A.C. 01D, Section .0200, Rule .0207, *Counsel - Powers and Duties*

ATTACHMENT 3 - H: 27 N.C.A.C. 01D, Section .0200, Rule .0208, *Suing for Injunctive Relief*

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 January 19, 2024.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of February, 2024.

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 is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 20th day of March, 2024.

s/Paul Newby
Paul Newby, 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 20th day of March, 2024.

s/Riggs, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0200 – PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

27 NCAC 01D .0201 GENERAL PROVISIONS

(a) The Authorized Practice Committee is a standing committee of the council. The committee is comprised of councilors and advisory members appointed by the president. All members may vote on all matters coming before the committee unless prohibited by other rules of the State Bar.

(b) The purpose of the ~~committee on the authorized practice of law~~ Authorized Practice Committee is to protect the public from ~~being unlawfully advised and represented in legal matters by unqualified persons.~~ the unauthorized or unlawful practice of law by investigating information received about the possible unauthorized practice of law, by seeking compliance with the law, and by seeking enforcement of the law when necessary.

(c) The Authorized Practice Committee may issue advisory opinions concerning questions of significant interest to the public, the bar, and the courts on what constitutes the unauthorized practice of law.

(d) The Authorized Practice Committee oversees the counsel's administration of the rules for registration of prepaid legal services plans and for online document providers, and directs the counsel to take such action as is necessary to enforce those rules.

History Note: *Authority G.S. 84-37;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 3, 2000, March 20, 2024.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0200 – PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

27 NCAC 01D .0202 PROCEDURE

The Authorized Practice Committee operates under the procedures set forth in these rules.

~~(a) The procedure to prevent and restrain the unauthorized practice of law shall be in accordance with the provisions hereinafter set forth.~~

~~(b) District bars shall not conduct separate proceedings into unauthorized practice of law matters but shall assist and cooperate with the North Carolina State Bar in reporting and investigating matters of alleged unauthorized practice of law.~~

History Note: *Authority G.S. 84-37;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 20, 2024.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0200 – PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

27 NCAC 01D .0203 DEFINITIONS

Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, have the meanings set forth in this Rule, unless the context clearly indicates otherwise.

~~(1) Appellate division - the appellate division of the General Court of Justice.~~

(~~2~~1) ~~Chairperson of the Authorized Practice Committee~~Chair - the councilor appointed by the president to serve as ~~chairperson~~ chair of the Authorized Practice Committee of the North Carolina State Bar.

(~~3~~2) Complainant~~ or the complaining witness~~ - any person who has complained~~ of~~ to the North Carolina State Bar alleging that the conduct of any person, ~~firm~~firm, or corporation ~~as relates to alleged~~ constitutes the unauthorized practice of ~~law.~~law in North Carolina.

(~~4~~3) Complaint - ~~a formal pleading filed in the name of~~information submitted to the North Carolina State Bar~~ in the superior court against a person, firm or corporation after a finding of probable cause.~~ alleging the unauthorized practice of law.

(~~5~~4) Council - the Council of the North Carolina State Bar.

(~~6~~5) Councilor - a member of the Council of the North Carolina State Bar.

(~~7~~6) Counsel - the counsel of the North Carolina State Bar ~~appointed by the council.~~ or any attorney appointed by the counsel to provide legal services to the North Carolina State Bar.

(~~8~~7) Court or courts of this state - a court authorized and established by the Constitution or laws of the ~~state~~State of North Carolina.

~~(9) Defendant - any person, firm or corporation against whom a complaint is filed after a finding of probable cause.~~

(~~10~~8) Investigation - the gathering of information with respect to ~~alleged unauthorized practice of law.~~a complaint.

(~~11~~9) Investigator - any person designated by the committee or the counsel to assist in the investigation of ~~alleged unauthorized practice of law.~~ a complaint.

(~~12~~10) Letter of notice - a communication sent by the committee to ~~an accused individual or corporation~~ a respondent setting forth ~~the substance~~ a summary of ~~alleged~~ conduct ~~involving~~ that is alleged to constitute the unauthorized practice of ~~law.~~law seeking a response to the allegations.

(~~13~~11) Office of the counsel - the office and staff maintained by the counsel of the North Carolina State Bar.

(~~14~~12) Office of the secretary - the office and staff maintained by the secretary of the North Carolina State Bar.

~~(15) Party - after a complaint has been filed, the North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.~~

~~(16) Plaintiff - after a complaint has been filed, the North Carolina State Bar.~~

~~(17) Preliminary Hearing - hearing by the Authorized Practice Committee to determine whether probable cause exists.~~

(~~18~~13) Probable Cause - a finding by the Authorized Practice Committee that there is reasonable cause to believe that a ~~person or corporation~~ respondent has engaged in the unauthorized practice of ~~law~~law. ~~justifying legal action against such person or corporation.~~

(14) Respondent - any person, firm, or corporation alleged to have engaged in the unauthorized practice of law.

(~~19~~15) Secretary - the secretary of the North Carolina State Bar.

~~(20) Supreme Court - the Supreme Court of North Carolina.~~

(16) Vice-chair - the councilor appointed by the president to serve as the vice-chair of the Authorized Practice Committee of the North Carolina State Bar.

History Note: *Authority G.S. 84-37;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 3, 2000; October 6, 2004; March 20, 2024.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0200 – PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

27 NCAC 01D .0204 STATE BAR COUNCIL - POWERS AND DUTIES

The Council of the North Carolina State Bar shall have the power and duty: to supervise the conduct of the Authorized Practice Committee in accordance with the provisions of this subchapter.

~~(1) to supervise the administration of the Authorized Practice Committee in accordance with the provisions of this Subchapter;~~

~~(2) to appoint a counsel. The counsel shall serve at the pleasure of the council. The counsel shall be a member of the North Carolina State Bar but shall not be permitted to engage in the private practice of law.~~

History Note: *Authority G.S. 84-37;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 3, 2000; March 20, 2024.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0200 – PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

27 NCAC 01D .0205 ~~CHAIRPERSON~~CHAIR OF THE AUTHORIZED PRACTICE COMMITTEE - POWERS AND DUTIES

(a) The ~~chairperson of the Authorized Practice Committee~~ chair shall have the power and duty:

(1) to supervise the activities of the counsel; related to the conduct of the committee;

(2) to ~~recommend to the Authorized Practice Committee that an investigation be initiated;~~ authorize the counsel to initiate investigations upon receipt of ~~a complaint;~~ information indicating the possible unauthorized practice of law in North Carolina;

~~(3) to recommend to the Authorized Practice Committee that a complaint be dismissed;~~

(3) to authorize the counsel to forego an investigation under such circumstances as the chair deems appropriate;

(4) to recommend, or authorize the counsel to recommend, an appropriate disposition of a complaint;

(~~4~~5) to direct ~~letter~~letters of notice to ~~an accused person or corporation~~ respondents or ~~direct~~ to authorize the counsel to issue letters of notice in such cases or under such circumstances as the ~~chairperson~~chair deems appropriate;

(~~5~~6) to ~~notify~~notify, ~~the accused and~~or authorize the counsel to notify, any ~~complainant that~~ complainant, and any respondent who was notified of any investigation, of the committee's disposition of a ~~complaint~~complaint; ~~has been dismissed;~~

~~(6) to call meetings of the Authorized Practice Committee for the purpose of holding preliminary hearings;~~

(7) to issue subpoenas in the name of the North Carolina State Bar or to direct the secretary to issue such subpoenas;

(8) to administer oaths or affirmations to witnesses;

(9) to ~~file and~~ verify ~~complaints and petitions in the name of~~ court pleadings filed by the North Carolina State ~~Bar.~~Bar seeking enforcement of the prohibitions on the unauthorized practice of law.

(b) The ~~president, vice-chairperson or senior council member of the Authorized Practice Committee~~ vice-chair shall perform the functions of the ~~chairperson~~chair of the committee in any matter when the ~~chairperson~~ chair ~~or vice-chairperson~~ is absent or disqualified. If both the chair and the vice-chair are absent or disqualified, a councilor designated by the president shall serve as acting chair.

History Note: *Authority G.S. 84-37;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 3, 2000; March 20, 2024.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0200 – PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

27 NCAC 01D .0206 AUTHORIZED PRACTICE COMMITTEE - POWERS AND DUTIES

The Authorized Practice Committee shall have the power and ~~duty~~duty:

(1) to direct the counsel to investigate any alleged unauthorized practice of law in this State by any person, firm, or ~~corporation~~ corporation; ~~in this State;~~

(2) to ~~hold preliminary hearings, find probable cause, and~~ recommend to the Executive Committee that ~~a complaint for injunction be filed in the name of the State Bar against respondent;~~ the counsel file a lawsuit against a respondent seeking to enjoin the unauthorized practice of law;

(3) to dismiss ~~allegations of the unauthorized practice of law upon a finding of no probable cause;~~ a complaint when there is insufficient evidence to show a violation of the law prohibiting the unauthorized practice of law;

(4) to issue a ~~letters~~letter of ~~caution,~~caution ~~which may include a demand to cease and desist,~~ to a respondent ~~respondents~~in a case ~~cases~~ in which~~where~~ the ~~Committee~~committee concludes ~~either~~ that:

(a) there is probable cause ~~established~~ to believe respondent has engaged in the unauthorized practice of law in North Carolina, but

(i) respondent has agreed to refrain from engaging in the conduct in the ~~future;~~future or the committee believes respondent will stop engaging in the conduct as a result of receiving the letter of caution;

(ii) respondent is unlikely to engage in the conduct again; or

(iii) ~~either~~neither referral to a district attorney ~~or~~nor ~~complaint for~~ injunction proceedings are~~is not~~ warranted under the circumstances; or

(b) ~~there is not~~the evidence is insufficient to establish probable cause ~~established to believe~~that respondent has engaged in the unauthorized practice of law in North Carolina, but the committee finds it appropriate to caution the respondent because the conduct could potentially lead to a violation of the law;

~~(i) the conduct of the respondent may be improper and may become the basis for injunctive relief if continued or repeated; or~~

~~(ii) the Committee otherwise finds it appropriate to caution the respondent.~~

(5) to direct the counsel to stop an investigation and take no action;

(6) to refer a matter to another regulatory or licensing authority; to a law enforcement agency, including t~~he~~a district ~~attorney~~ attorney, for criminal ~~prosecution~~prosecution; ~~and~~or to ~~other committees~~the Grievance Committee of the North Carolina State Bar; and

(7) to issue proposed advisory opinions ~~in accordance with procedures adopted~~ for adoption by the council concerning ~~as to~~ whether ~~the actual or contemplated conduct~~ identified activities of ~~nonlawyers~~significant public interest ~~would~~ constitute the unauthorized practice of law in North Carolina.

History Note: *Authority G.S. 84-37;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 20, 1995; February 3, 2000; October 6, 2004; March 20, 2024.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0200 – PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

27 NCAC 01D .0207 COUNSEL - POWERS AND DUTIES

The counsel shall have the power and duty:

(1) to initiate an investigation concerning the alleged unauthorized practice of ~~law;~~law upon receipt of a complaint or upon receiving information from any other source indicating the possible unauthorized practice of law;

(2) to direct a letter of notice to a ~~respondent~~respondent; ~~when authorized by the chairperson of the Authorized Practice Committee~~;

(3) to make a recommendation to the committee on the disposition of a complaint;

~~(3) to investigate all matters involving alleged unauthorized practice of law whether initiated by the filing of a complaint or otherwise;~~

~~(4) to recommend to the chairperson of the Authorized Practice Committee that a matter be dismissed because the complaint is frivolous or falls outside the council's jurisdiction; that a letter of notice be issued; or that the matter be considered by the Authorized Practice Committee to determine whether probable cause exists;~~

(~~5~~4) to prosecute before the courts all actions to enjoin the unauthorized practice of law ~~proceedings~~ as may be authorized by the Executive Committee or the council; ~~before the Authorized Practice Committee and the courts~~;

~~(6) to represent the State Bar in any trial or other proceedings concerned with the alleged unauthorized practice of law;~~

~~(7) to employ assistant counsel, investigators, and other administrative personnel in such numbers as the council may from time to time authorize;~~

(8~~5~~) to maintain ~~permanent~~ records of all matters processed by the counsel on behalf of the committee and of the disposition ~~of such matters;~~thereof, pursuant to the records retention policies of the North Carolina State Bar; and

(~~9~~6) to perform such other duties ~~as the council may from time to time direct.~~ incident to the operation of the committee as the president, the chair, the committee, or the council may direct.

History Note: *Authority G.S. 84-37;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 3, 2000; March 20, 2024.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0200 – PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

27 NCAC 01D .0208 SUING FOR INJUNCTIVE RELIEF

(a) ~~Upon receiving a recommendation from~~ If the Authorized Practice Committee recommends that ~~a complaint seeking~~ the North Carolina State Bar seek injunctive relief ~~be filed,~~to prevent the unauthorized practice of law, the chair will report the recommendation to the Executive ~~Committee~~Committee. ~~shall review the matter at the same quarterly meeting and determine whether the recommended action is necessary to protect the public interest and ought to be prosecuted.~~

(b) If the Executive Committee decides to ~~follow~~adopt the recommendation of the Authorized Practice Committee, ~~Committee's recommendation~~, it shall direct the counsel to prepare and file the necessary pleadings ~~as soon as practical for signature by the chairperson and filing with~~in the appropriate tribunal.

(c) If the Executive Committee decides not to ~~follow~~adopt the recommendation of the Authorized Practice Committee, ~~Committee's recommendation,~~ the ~~matter shall go before the~~ council ~~at the same quarterly meeting~~ will decide~~to determine~~ whether ~~the recommended action is necessary to protect the public interest and ought to be prosecuted.~~ to authorize prosecution of the matter.

(d) If the council decides not to ~~follow~~adopt the recommendation of the Authorized Practice Committee,~~Committee's recommendation,~~ the ~~matter~~file shall be referred back to the Authorized Practice Committee for alternative disposition.

(e) If probable cause exists to believe that a respondent is engaged in the unauthorized practice of law and the harmful nature of the conduct is such that immediate action is needed to protect the public interest before the next quarterly meeting of the Authorized Practice Committee, the ~~chairperson,~~chair, with the approval of the president, may direct the counsel to file ~~and verify~~ a complaint or petition in the name of the North Carolina State ~~Bar.~~Bar in~~with~~ the appropriate tribunal seeking such temporary, preliminary, and permanent relief as is warranted.

History Note: *Authority G.S. 84-37;*
Approved by the Supreme Court: February 3, 2000;
March 20, 2024.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

The following amendment 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 27, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .0700, *Procedures for Fee Dispute Resolution*, be amended as shown in the following attachment:

ATTACHMENT 4: 27 N.C.A.C. 01D, Section .0700, Rule .0708, *Settlement Conference Procedure*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 27, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of February, 2024.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 20th day of March, 2024.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming

volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of March, 2024.

s/Riggs, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0700 – PROCEDURES FOR FEE DISPUTE RESOLUTION

27 NCAC 01D .0708 SETTLEMENT CONFERENCE PROCEDURE

(a) . . . .

(b) The State Bar will ~~send~~serve a letter of notice ~~to~~upon the respondent lawyer. ~~lawyer by certified mail notifying the respondent that the petition was filed and notifying the respondent of the obligation to provide a written response to the letter of notice, signed by the respondent, within 15 days of service of the letter of notice upon the respondent, and enclosing copies of the petition and of any relevant materials provided by the petitioner.~~

(1) The letter of notice shall be served by one of the following methods:

(A) mailing a copy thereof by registered or certified mail, return receipt requested, to the last known address of the member contained in the records of the North Carolina State Bar or such later address as may be known to the person attempting service;

(B) mailing a copy thereof by designated delivery service (such as Federal Express or UPS), return receipt requested, to the last known address of the member contained in the records of the North Carolina State Bar or such later address as may be known to the person attempting service;

(C) personal service by the State Bar counsel or deputy counsel or by a State Bar investigator;

(D) personal service by any person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process; or

(E) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar agreeing to accept service of the letter of notice by email. Service of the letter of notice will be deemed

complete on the date that the letter of notice is sent by email.

A member who cannot, with reasonable diligence, be served by one of the methods identified in subparagraphs (A)–(E) above shall be deemed served upon publication of the notice in the State Bar *Journal.*

(2) The letter of notice shall enclose copies of the petition and of any relevant materials provided by the petitioner.

(3) The letter of notice shall notify the respondent (i) that the petition was filed and (ii) of the respondent's obligation to provide to the State Bar a written response to the letter of notice, signed by the respondent, within 15 days of service of the letter of notice.

(c) . . . .

. . .

(e) The facilitator ~~will~~may conduct a telephone settlement conference.

. . . .

(f) The facilitator will explain the following to the parties:

(1) . . . ;

. . .

(8) that any agreement reached will be reached by mutual ~~consent.~~ consent of the parties.

(g) . . . .

. . . .

History Note *Authority G.S. 84-23;*
Adopted Eff. May 4, 2000;
Amendments Approved by the Supreme Court: March 11, 2010; September 25, 2019; March 20, 2024.

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ADMINISTRATIVE LAW

Administrative law judge—standard for deciding a contested case—water pollutant permit—In a contested case that arose after the Department of Environmental Quality (DEQ) issued a permit to a construction materials supplier allowing it to discharge mining wastewater into tributaries in Blounts Creek, the administrative law judge (ALJ) properly affirmed the permit's issuance and determined that DEQ had adequately ensured the permit's compliance with the "biological integrity standard" for surface waters under the N.C. Administrative Code. Specifically, the ALJ met the standard found in N.C.G.S. § 150B-34(a) for deciding contested cases by properly: making findings of fact (unchallenged on appeal) based upon the preponderance of the evidence; determining that the biological integrity standard fell within DEQ's "specialized knowledge"; giving "due regard" to DEQ's "demonstrated knowledge and expertise" with respect to the relevant facts; determining that DEQ's interpretation of the biological integrity rules was reasonable and consistent with the rules' plain language; and applying DEQ's interpretation of the biological integrity rules to the facts surrounding the permit application. **Sound Rivers, Inc. v. N.C. Dep't of Env't Quality, 1.**

Medicaid reimbursements—prepayment review—constitutional violations alleged—no genuine issue of material fact—In a complex business case arising from the decision of the N.C. Department of Health and Human Services (DHHS) to place a medical services company on Medicaid reimbursement prepayment review for alleged overbilling practices, the trial court correctly granted summary judgment to DHHS where the company's evidentiary forecast did not demonstrate any genuine issue of material fact with regard to its substantive due process and equal protection violation claims. The agency's decision was not arbitrary and capricious where its reasons for placing the company on prepayment review were rationally related to a legitimate government interest of combating Medicaid fraud and where there was no evidence that DHHS treated the company differently from other personal care providers similarly situated. **Halikierra Cmty. Servs. LLC v. N.C. Dep't of Health & Hum. Servs., 660.**

ALIENATION OF AFFECTIONS

Criminal conversation—unidentified lover—summary judgment—evidence of post-separation dating relationship—mere conjecture—The trial court properly granted summary judgment for defendant on plaintiff's claims for alienation of affection and criminal conversation, where plaintiff's wife began a romantic relationship with defendant about three months after separating from plaintiff and over a year after admitting to plaintiff that, while they were still married, she had had sexual intercourse with an unidentified coworker. Although evidence of post-separation conduct may be used at the summary judgment phase to corroborate evidence of pre-separation conduct, plaintiff's evidence regarding the pre-separation affair between his wife and the unidentified coworker did not give rise to anything more than "mere conjecture" that defendant was that same coworker; consequently, the evidence failed to support the malice prong of plaintiff's alienation of affection claim and the sexual intercourse element of his criminal conversation claim. **Beavers v. McMican, 629.**

APPEAL AND ERROR

Appellate jurisdiction—petition for certiorari—order granting motion to suppress—no statutory mechanism for appeal to lower court—In a prosecution

APPEAL AND ERROR—Continued

for driving while impaired, where the district court preliminarily granted defendant's motion to suppress evidence from his arrest; the State appealed that ruling to the superior court, which upheld the ruling; and then the district court entered a final suppression order per the superior court's instructions, the Supreme Court properly allowed the State's petition for a writ of certiorari to review the State's appeal from the final suppression order. The State's petition met the requirements for certiorari jurisdiction under Appellate Rule 21, where the district court's final order was interlocutory and where no right of appeal from that order existed because the State lacked a statutory basis to challenge it in the superior court. **State v. Woolard, 560.**

Scope of appeal—enforcement of development ordinance—violation determined in prior appeal—binding—In the second appeal arising from a town's enforcement of its development ordinance—by filing a lawsuit for a mandatory injunction, abatement order, and collection of civil penalties from developers of a residential subdivision (defendants) who continued to violate a requirement under the ordinance to maintain roads within the subdivision until the town accepted the roads for public maintenance—the Court of Appeals correctly determined that it was bound by a different panel's earlier decision in the same case that defendants were responsible for the roads. Moreover, the question of defendants' ongoing responsibility was not before the current panel because defendants had not raised the issue in their brief. **Town of Midland v. Harrell, 365.**

Summary judgment hearing—failure to exercise discretion to allow testimony—mistake of law—remand—The Court of Appeals properly vacated the trial court's order granting plaintiff's motion for summary judgment (on plaintiff's claims for breach of a commercial lease) where the trial court had acted under a misapprehension of the law and failed to exercise its discretion when it erroneously determined that it was prevented by the Rules of Civil Procedure from receiving oral testimony (that defendant sought to introduce in support of his counterclaim for fraudulent inducement). The matter was remanded for the trial court to exercise its discretion as authorized by Civil Procedure Rule 43(e). **D.V. Shah Corp. v. VroomBrands, LLC, 402.**

CLASS ACTIONS

Class certification—inconsistent definitions of class—further issues for review on remand—In a class action lawsuit arising from an allegedly deceptive promotional flyer that a car dealership sent to plaintiffs—who were led to believe that they had won either a large cash prize or a free car when, in fact, they had won only two dollars—the trial court's class certification order was vacated because of an internal inconsistency in the order that precluded meaningful appellate review. Specifically, the court's order defined the prospective class in one way—as individuals who called the hotline listed on the flyer and then went to the car dealership to claim their prize—when analyzing the certification criteria, but then defined the class differently—as individuals who went to the car dealership to claim the prize regardless of whether they called the hotline—when certifying the class. The matter was remanded with additional instructions for the trial court to determine whether any conflicts of interest existed within the proposed class and whether any potential inefficiencies existed that would render class certification inappropriate—two issues that could only be resolved after the court settled on one definition of the class. **Surgeon v. TKO Shelby, LLC, 772.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Custodial interrogation—murder by torture of child victim—defendant's statements at hospital—extent of restraint—In defendant's capital trial for murder by torture of a child victim and related charges, the trial court correctly concluded that defendant was not in custody for purposes of *Miranda* when he made incriminating statements to law enforcement officers at the hospital where he had brought the victim. Defendant had not been restrained to the extent associated with formal arrest where, although he was grabbed by a nurse as he attempted to leave and pushed into a room and told not to leave prior to the arrival of law enforcement, he was subsequently told by officers that he was not under arrest, the door to the room was left open for part of his questioning, and he was not accused of anything or physically restrained in any manner. **State v. Richardson, 101.**

CONSPIRACY

Multiple conspiracies—sufficiency of evidence—separate and distinct agreements—In a criminal prosecution in which defendant was charged with two different conspiracies—to commit robbery with a dangerous weapon and to commit felonious breaking and entering—based on one sequence of events where the victim was threatened at gunpoint in her apartment, the trial court's denial of defendant's motion to dismiss one of the conspiracy charges was proper because the State presented sufficient evidence from which a jury could conclude that defendant formed multiple conspiracies, based on separate agreements with his co-conspirators to, first, rob the victim and, subsequently, to break and enter the victim's apartment. Therefore, the decision of the Court of Appeals vacating defendant's conviction for conspiracy to commit robbery with a dangerous weapon was reversed and the matter remanded with instructions to reinstate defendant's conviction for that offense. **State v. Beck, 435.**

CONSTITUTIONAL LAW

Effective assistance of counsel—trial counsel—right to testify at trial—appellate counsel—Anders brief—motion for appropriate relief—The denial of a criminal defendant's motion for appropriate relief (MAR) was affirmed where defendant's claims of ineffective assistance of counsel (IAC) lacked merit. With respect to his first IAC claim, the record did not support defendant's argument that his trial counsel had neither informed him of his right to testify at trial nor allowed him to testify despite his desire to do so; rather, the trial court's colloquy with defendant revealed that defendant was aware of his right to testify, and nothing in the record suggested that defendant intended to exercise that right. With respect to defendant's second IAC claim, defendant's appellate counsel—who filed an *Anders* brief in defendant's appeal—was not ineffective for declining to argue that the trial court erred in limiting the testimony of defendant's expert witness, since defendant's MAR failed to demonstrate that the court abused its discretion in limiting that testimony. **State v. Walker, 763.**

North Carolina—right to a speedy trial—convictions set aside—adequacy of remedy—Where plaintiff's criminal convictions were vacated as a remedy for the State having violated plaintiff's constitutional right to a speedy trial, plaintiff was not entitled to additional relief in the form of money damages, which he sought in a private action pursuant to *Corum v. Univ. of N.C.*, 330 N.C. 761 (1992), because *Corum* claims are reserved solely for instances in which a plaintiff has no other forum in which to seek redress for a constitutional violation. Where plaintiff had an

CONSTITUTIONAL LAW—Continued

opportunity to present and have his constitutional claim heard, and was given an adequate state remedy, the trial court properly granted summary judgment against plaintiff in his action against the State and the officials involved in his criminal prosecution. The Supreme Court modified and affirmed the Court of Appeals' decision where, although the latter court correctly upheld the trial court's order, its reliance on a federal case rather than *Corum* to reach its conclusion was expressly disavowed. **Washington v. Cline, 824.**

CONTRACTS

Breach of contract—express terms—summary judgment—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court erred by granting defendants' motion for summary judgment on plaintiffs' breach of contract claim as related to the Asset Purchase Agreement's Independent Milestone Provision, which provided that satisfaction of the criteria of one earnout milestone was not contingent on satisfaction of the criteria of any other milestone. Plaintiffs presented evidence tending to support their assertion that defendants conditioned certain milestones on the completion of others, in breach of the express terms of the contract. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

Breach of contract—implied covenant of good faith and fair dealing—contractual gap—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by granting defendants' motion for summary judgment on plaintiffs' breach of contract claims as related to certain sections of the Asset Purchase Agreement that permitted defendants to "reasonably determine" completion of the first and second software development earnout milestones. Because the tasks required for the milestones were not completed, defendants reasonably determined that the milestones had not been met. Where the contract was not silent on the issue, plaintiffs' arguments regarding the implied covenant of good faith and fair dealing were misplaced. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

Breach of contract—third-party sales—summary judgment—remand—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court erred by granting defendants' motion for summary judgment on plaintiffs' breach of contract claim as related to the Asset Purchase Agreement's External Sales Provision, which concerned the sale of licenses to plaintiffs' software by defendants to third parties. Because defendants' Master Services Agreement (MSA) with a third-party pharmaceutical company included the use of the software and could be an "External Sale" under the Asset Purchase Agreement, the issue was remanded to the trial court for determination of whether the MSA was drafted such that the third-party company was required to pay consideration to acquire and use a license to plaintiffs' software. In addition, the covenant of good faith and fair dealing was inapplicable to this issue. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

CRIMINAL LAW

Capital murder prosecution—preservation issues—The preservation issues defendant raised on appeal from his convictions for first-degree murder and related charges and his sentence of death were rejected by the appellate court as having no merit based on precedent. **State v. Richardson, 101.**

CRIMINAL LAW—Continued

Motion for appropriate relief—standard of review—case overruled—In an appeal from the denial of a criminal defendant's motion for appropriate relief (MAR), in which defendant asserted that he received ineffective assistance of counsel at trial and in his prior appeal, the Supreme Court upheld the standard of review for MARs laid out in N.C.G.S. § 15A-1420(c) while overruling the standard set forth in *State v. Allen*, 378 N.C. 286 (2021), which stated that the factual allegations contained in a defendant's MAR should be reviewed in the light most favorable to the defendant. **State v. Walker, 763.**

Murder—death penalty—not disproportionate or arbitrary—Defendant's sentence of death in a murder prosecution for the killing of a young child was not disproportionate, excessive, or arbitrary where, after defendant was convicted of first-degree murder based on murder by torture and the felony murder rule based upon the felonies of first-degree kidnapping, sexual offense with a child, and felony child abuse inflicting serious bodily injury, and was also convicted of each of those three felonies, the jury found the existence of all three aggravating factors submitted to it, which were supported by the record. **State v. Richardson, 101.**

DISCOVERY

Complex business case—third discovery request—unduly burdensome—remand—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err in denying plaintiffs' Third Discovery Request. The trial court complied with Business Court Rule 10.9 and Civil Procedure Rule 26, and the Supreme Court rejected as baseless plaintiffs' argument that the trial court converted an informal and required email request into a motion to compel. However, given the Court's holding on another issue regarding the parties' contract, the question of what further discovery may be appropriate was open for the trial court to consider on remand. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

EVIDENCE

Cumulative error—murder by torture of child victim—inflaming jury's passion—prejudice analysis—In defendant's capital trial for murder by torture of a child victim and related charges, where each of defendant's evidentiary challenges were rejected on appeal—including that the State introduced an excessive number of photographs of the victim's injuries, that some photos were needlessly shown during the testimony of more than one witness, and that witnesses were erroneously allowed to testify to their emotional reactions upon seeing the extent of the victim's injuries—there was no cumulative, prejudicial error in the trial court's evidentiary decisions taken as a whole given the overwhelming evidence of defendant's guilt. **State v. Richardson, 101.**

Expert testimony—murder by torture of child victim—bite marks—abuse of discretion analysis—In defendant's capital trial for murder by torture of a child victim, the trial court did not abuse its discretion by allowing the State's expert witness in forensic dentistry to testify regarding numerous bite marks found on the victim's body—which he attributed to an adult human—even though three physicians had already testified with their opinions that certain marks on the victim's body were human bite marks made within a certain number of days prior to her arrival at the hospital. There was no meaningful dispute that defendant caused the marks on

EVIDENCE—Continued

the victim's body since he had been her sole caretaker during the time period in question. **State v. Richardson, 101.**

Expert testimony—murder by torture of child victim—emotional reactions from medical and law enforcement personnel—In defendant's capital trial for multiple charges including murder by torture and felony child abuse inflicting serious bodily injury, the trial court did not err by allowing various medical personnel and law enforcement officers to testify regarding their emotional reactions immediately upon seeing the extent of the victim's injuries after defendant brought her to the hospital. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice where the witnesses' reactions provided context to the jury regarding the severity of the victim's injuries in relation to the types of cases the witnesses usually saw in the course of their work. Moreover, defendant could not demonstrate prejudice given the overwhelming evidence of his guilt and of the victim's numerous severe injuries that she suffered over an extended period while in defendant's sole care. **State v. Richardson, 101.**

Expert testimony—murder by torture—question of whether child victim was tortured—abuse of discretion analysis—In defendant's capital trial for murder by torture of a child victim, the trial court did not abuse its discretion by allowing two expert witnesses to testify (one during the guilt-innocence phase, the other during sentencing) regarding whether the victim was tortured. Where the term "torture" is not a legal term of art, testimony from the first witness (accepted as an expert in pediatrics and child abuse) that the victim's extensive and severe injuries were consistent with torture did not improperly invade the province of the jury and was properly admitted as being based on the expert's training and specialized knowledge. Further, testimony at sentencing from the second witness (accepted as an expert in forensic pediatrics with a specialization in child abuse and maltreatment) was not cumulative or unfairly inflammatory where that expert's opinions—in general with regard to the state of mind of a person who tortures and specifically that the victim's injuries were not accidental—were similarly based on a proper foundation of specialized training and background. **State v. Richardson, 101.**

Mental health records—under seal—in camera review by appellate court—no exculpatory evidence—On appeal after defendant's capital trial for murder by torture of a child victim and related charges, in which the trial court ordered mental health records of the victim's mother to be placed under seal—after allowing some of the records to be released to defendant—the Supreme Court reviewed the sealed records in camera upon defendant's request and determined that they contained no exculpatory or impeaching evidence requiring disclosure. **State v. Richardson, 101.**

Opening the door—cell phone evidence—abuse of discretion analysis—prejudice analysis—In defendant's murder trial that resulted in his conviction for voluntary manslaughter, assuming the State opened the door to evidence found on the victim's cell phone after the crime occurred, the trial court did not abuse its discretion in refusing to allow defense counsel to question witnesses about the cell phone evidence showing the victim with firearms and implicating him in acts of violence. Striking a balance that was fair to the State and defendant, the trial court did allow defense counsel to ask the victim's father whether the detective had shared the contents of the victim's cell phone with him, which invited the jury to doubt the father's testimony that he did not know anything about the victim possessing a firearm. Even if the trial court did abuse its discretion, exclusion of the cell phone evidence did not prejudice defendant because defendant did not know what was on the victim's

EVIDENCE—Continued

cell phone at the time of the shooting, and therefore the evidence did not speak to whether defendant's use of force in self-defense was reasonable under the facts as they appeared to him at the time; further, there was no evidence that the victim possessed a gun when defendant killed him, and substantial evidence—including the gunshot wounds in the back of his head and his back—showed that the victim was attempting to flee when defendant fired his last two shots. **State v. McKoy, 88.**

Other crimes, wrongs, or acts—prior sexual assaults of a child—similarity to charged sexual offenses against another child—In a prosecution for statutory rape and other sexual offenses inflicted upon an eleven-year-old girl, the trial court properly admitted testimony under Evidence Rule 404(b) of defendant's prior sexual assaults of a different, fourteen-year-old girl, where the prior assaults were sufficiently similar to the charged crimes in that (1) both girls were middle-school-aged children attending schools where defendant taught, (2) defendant used his position as a middle school teacher to gain access to both girls, (3) defendant exerted control over both girls during the assaults despite their protests and tears, (4) defendant either engaged in or tried to engage in vaginal intercourse with both girls, (5) each assault took place during school hours or during school-related activities, (6) defendant only removed his pants and underwear halfway during each assault, and (7) defendant threatened both girls after assaulting them. **State v. Pickens, 351.**

Photographs—murder by torture—child victim—number, size, and manner of display—In defendant's capital trial for multiple charges including murder by torture, sexual offense with a child, and felony child abuse inflicting serious bodily injury, the trial court did not abuse its discretion by allowing the State to introduce eighty-eight photographs of the child victim's body and injuries—some of them close-ups—by showing them on a large monitor located close to the jury, where the photographs were more probative than prejudicial because they were: relevant to the offenses charged and to defendant's credibility, used to illustrate the respective testimonies of different witnesses, and not needlessly cumulative or excessive given evidence that the victim suffered at least 144 separate injuries over an extended period of time. **State v. Richardson, 101.**

Relevance—murder trial—evidence of other possible perpetrators—not exculpatory—At the joint trial of two defendants for first-degree murder and other offenses arising from a fatal shooting, the trial court did not err in excluding evidence that defendants asserted showed two other people had committed the crimes for which they were on trial. Although the excluded evidence did suggest the possible involvement of other perpetrators, and was therefore relevant for purposes of Evidence Rule 401, it was still inadmissible where it did not also fully exculpate defendants (especially given the direct evidence of defendants' guilt, which included cellular phone data placing them at the crime scene and an eyewitness's identification of defendants both in court and during a pretrial photographic lineup). **State v. Abbitt, 28.**

FRAUD

Dismissal—fraud and fraudulent inducement—failure to meet particularity requirement—broad allegations—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by dismissing plaintiffs' claims for fraud and fraudulent inducement based on representations allegedly made before the

FRAUD—Continued

execution of the Asset Purchase Agreement and not involving the Non-Binding Letter of Intent. The claims were not pleaded with sufficient particularity to satisfy Civil Procedure Rule 9(b) where the complaint did not specify the time, place, particular content of the alleged representation, or the person who made the alleged representation. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

Dismissal—fraud by omission and promissory fraud—failure to state a claim—failure to meet particularity requirement—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by dismissing plaintiffs' claims of fraud by omission and promissory fraud pursuant to Civil Procedure Rules 12(b)(6) and 9(b). In the first place, plaintiffs did not raise those claims in their amended complaint; furthermore, plaintiffs failed to satisfy the particularity requirement of Rule 9(b). **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

Dismissal—negligent misrepresentation—failure to meet particularity requirement—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by dismissing plaintiffs' negligent misrepresentation claim for failure to satisfy the heightened pleading standard of Civil Procedure Rule 9(b) where the complaint did not allege the time, place, speaker, or specific contents of the alleged misrepresentation. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

Intentional misrepresentation and fraudulent inducement—attempt to amend purchase agreement—amendments not made—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claims for intentional misrepresentation and fraudulent inducement based upon statements made by defendants' chief executive officer and senior vice president of IT regarding possible amendments to the Asset Purchase Agreement (APA). Evidence in the record supported defendants' representations that the company was attempting to amend the APA, and failure to reach an agreement on the amendment did not mean that defendants' representations were false at the time they were made. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

Intentional misrepresentation and fraudulent inducement—letter of intent—non-binding—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claims for intentional misrepresentation and fraudulent inducement based on representations contained in the Non-Binding Letter of Intent (LOI). The LOI, which by its express terms was non-binding and not to be relied upon, could not form the basis of plaintiffs' fraud claims; furthermore, plaintiffs cited no authority in which a court has recognized a claim arising out of representations contained in a letter of intent. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

HOMICIDE

First-degree—felony murder—jury instruction on lesser-included offense—no evidentiary support—In defendant's prosecution for first-degree murder under the felony murder theory (and under no other theory) based on attempted robbery with a dangerous weapon—where the victim was found deceased from a gunshot

HOMICIDE—Continued

wound with approximately two hundred dollars of loose cash and a bloodied iPhone on or near his body—the trial court properly denied defendant's request for a jury instruction on second-degree murder as a lesser-included offense, because the evidence of the underlying felony was not in conflict. Defendant's own statements that he planned to sell a cell phone and not rob the victim could not, alone, create a conflict in the evidence; a witness's statement that defendant planned to buy a cell phone, not sell one, did not negate any element of the underlying felony; and the loose cash found near the victim's body did not negate the evidence that defendant attempted to rob the victim with a dangerous weapon. **State v. Wilson, 538.**

Second-degree murder—jury instructions—self-defense—aggressor doctrine—sufficiency of evidence—Defendant was not entitled to a new trial on her second-degree murder charge because the trial court properly instructed the jury on the aggressor doctrine where—considering the evidence in the light most favorable to the State and giving the State the benefit of the doubt wherever the evidence conflicted—the jury could reasonably infer that defendant was acting as an "aggressor" at the time that she allegedly shot the victim in self-defense. Notably, although the victim (defendant's lover) had initiated the confrontation leading up to his death by forcefully entering defendant's apartment against her wishes, the State's evidence suggested that defendant shot him in the back while he was on his way out and already six feet away from her. **State v. Hicks, 52.**

IMMUNITY

Governmental—speed limit exceeded by police officer—no statutory waiver of immunity—In a negligence and wrongful death action filed against a city and a police officer (defendants) by the estate of a pedestrian who was struck and killed while the officer was driving to the scene of a domestic violence incident, the speed limit exemption in N.C.G.S. § 20-145—under which speed limits do not apply to police officers while chasing or apprehending violators of the law or to other vehicle operators traveling in response to an emergency—did not operate as a statutory waiver of governmental immunity. Section 20-145, with its focus on individual drivers and individual actions and inclusion of non-governmental actors, contained no plain or clear legislative mandate withdrawing immunity from a discrete government body. **Est. of Graham v. Lambert, 644.**

Governmental—speed limit exceeded by police officer—official capacity suit—same waiver analysis as for city—In a negligence and wrongful death action filed against a city and a police officer (defendants) by the estate of a pedestrian who was struck and killed while the officer was driving to the scene of a domestic violence incident, where the Court of Appeals' decision was reversed because that court applied the wrong standard of review to the trial court's order denying summary judgment to defendants, the Court of Appeals was instructed on remand to treat the estate's claim against the officer in his official capacity as merged with the claim against the city. **Est. of Graham v. Lambert, 644.**

Governmental—waiver by insurance—standard for reviewing summary judgment denial—In a negligence and wrongful death action filed against a city and a police officer (defendants) by the estate of a pedestrian who was struck and killed while the officer was driving to the scene of a domestic violence incident, the Court of Appeals erred by applying the wrong legal standard when it reversed the trial court's order denying summary judgment to defendants. Rather than analyzing whether the evidence raised a genuine issue of material fact regarding

IMMUNITY—Continued

whether the city had waived governmental immunity by purchasing liability insurance, the Court of Appeals instead erroneously employed the standard under Civil Procedure Rule 12(b)(6) (motion to dismiss for failure to state a claim) by focusing on the sufficiency of the complaint to raise the issue of waiver. **Est. of Graham v. Lambert, 644.**

Judicial—magistrate—sued in official capacity—applicability—In a statutory bond action against a magistrate who failed to timely serve plaintiff's nephew with an involuntary commitment order (subsequently, the nephew shot plaintiff with a crossbow during an acute psychotic episode), the Court of Appeals erred by holding that judicial immunity is a categorically unavailable defense to an official capacity claim against a judicial officer. Judicial immunity applies to both official capacity and individual capacity claims. **Wynn v. Frederick, 576.**

Sovereign—magistrate—statutory waiver—applicability—In a statutory bond action against a magistrate who failed to timely serve plaintiff's nephew with an involuntary commitment order (subsequently, the nephew shot plaintiff with a crossbow during an acute psychotic episode), the magistrate's sovereign immunity barred the suit. Section 58-76-5 of the N.C. General Statutes, which provides a limited waiver of sovereign immunity for certain officials covered by statutory bonds, did not encompass magistrates, which are state officers, when it provided the limited waiver for five specifically named categories of county officers "or other officer." The section's internal structure, broader statutory context, and statutory history made clear that the General Assembly intended to limit the section's scope to bonded county officers. **Wynn v. Frederick, 576.**

INDICTMENT AND INFORMATION

Sufficiency—going armed to the terror of the public—act committed on a public highway—not an essential element—Defendant's indictment for the common law offense of going armed to the terror of the public was sufficient to confer jurisdiction upon the trial court, where the indictment alleged that defendant waved a firearm around in the parking lots of two different locations, including a private apartment complex. After overruling a prior case saying otherwise, the Supreme Court clarified that the crime of going armed to the terror of the public does not include as an essential element that the act occur on a public highway. Therefore, defendant's indictment was not fatally defective where the locations it mentioned did not constitute public highways. **State v. Lancaster, 459.**

INSURANCE

Coverage under parents' policy—resident of household—time spent in the home—intent to form common household—In an action where an insurance company sought a declaratory judgment stating that defendant was not covered under her mother's and stepfather's underinsured motorist policy (for severe injuries resulting from a car accident), the trial court erred in granting summary judgment to defendant where a genuine issue of material fact existed regarding whether she was a "resident" of her mother's household entitled to coverage under the policy. Although defendant claimed in affidavits that she split her residency between her divorced parents' homes, she also gave sworn testimony indicating that she merely visited her mother's home for occasional, short periods of time without necessarily spending the night. Moreover, some of defendant's statements cast doubt on whether she and her mother intended to form a common household, indicating instead that

INSURANCE—Continued

she was part of her father's household only (she stated that she lived alone with her father for the fifteen-year period preceding her car accident; she depended on her father for financial support; all of her mail went to her father's home; and she treated her father's address as her home address for car title, property tax, and voter registration purposes). **N.C. Farm Bureau Mut. Ins. Co., Inc. v. Herring, 419.**

JUDGES

Discipline—improper phone call to magistrate—to demand bond reduction for her son—closing down administrative courtroom without permission—suspension—On the basis of two incidents, a district court judge was suspended without pay for 120 days for conduct in violation of Canons 1, 2A, 2B, 3A(3), 3A(5), 3B(1), and 3C of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute (N.C.G.S. § 7A-376(b)). In the first incident, the judge called a magistrate's office, used her judicial title to ask if a particular criminal defendant had been placed into custody without disclosing that that defendant was her son, and then yelled at the magistrate while demanding a bond reduction for her son based on inaccurate information. In the second incident, the judge—while on notice of the disciplinary charges filed against her based on the first incident—demanded, without first notifying her chief district court judge, that an assistant district attorney and a presiding magistrate close their administrative courtroom for her own use despite an active administrative order mandating that the courtroom remain open; notably, the judge's conduct caused more than one hundred cases to be continued. **In re Foster, 675.**

Motion to disqualify—murder trial—judge previously prosecuted defendant's mother—potential witness—appearance of impropriety—In defendant's capital trial for murder by torture of a child and related charges, defendant's motion to disqualify the trial judge (which was assigned to another judge for ruling) was properly denied where, although the presiding judge had been the prosecutor twenty years earlier at defendant's mother's trial for allegedly hiring someone to kill defendant's father (for which she was acquitted), there was no indication—despite defendant's assertion that the judge was a potential witness with regard to the childhood trauma that defendant experienced as a result of family dysfunction—that the judge had knowledge of any evidence that would be relevant to defendant's defense, nor was there any actual bias or the risk of impartiality based on the judge's interactions with the family in the past. **State v. Richardson, 101.**

JURISDICTION

Personal—service of process—waiver—post-judgment motion to exempt property—general appearance—In a complex business case, in which defendant did not appear until after the trial court had already entered its judgment, at which point she filed a motion to claim exempt property pursuant to N.C.G.S. § 1C-1603, the Business Court properly denied defendant's subsequent motion to set aside both the entries of default against her and the order of summary judgment for plaintiff—pursuant to Civil Procedure Rule 60(b)—where defendant argued that the Business Court lacked personal jurisdiction over her because she had not been served with process. By moving to claim exempt property after judgment without also raising her objections to personal jurisdiction and the sufficiency of service of process, defendant made a general appearance in the action and therefore waived those objections. **Slattery v. Appy City, LLC, 726.**

JURISDICTION—Continued

Standing—challenge to monument removal—breach of contract alleged—legal injury—In a dispute over a city's decision to remove a monument from public property, although the Court of Appeals properly upheld the trial court's order dismissing plaintiff historical society's claims (for breach of contract, a temporary restraining order, a preliminary injunction, and a declaratory judgment), its decision was modified and affirmed. The Court of Appeals erroneously concluded that plaintiff lacked standing under Rule 12(b)(1) to bring its breach of contract claim—which was a different basis for dismissal than that found by the trial court (failure to state a claim under Rule 12(b)(6))—where plaintiff sufficiently alleged a legal injury to give rise to standing for that claim by alleging that a valid contract existed and that the contract had been breached. The Court of Appeals properly upheld the dismissal of plaintiff's remaining claims for lack of standing, and plaintiff abandoned any argument regarding the merits of its breach of contract claim. **Soc'y for the Hist. Pres. of the Twenty-sixth N.C. Troops, Inc. v. City of Asheville, 744.**

Standing—development enforcement action—town—compliance with state law and ordinance—A town had standing to file its lawsuit for a mandatory injunction, abatement order, and collection of civil penalties from developers of a residential subdivision (who continued to violate a requirement under the town's development ordinance to maintain roads within the subdivision until the town accepted the roads for public maintenance) and did not deprive the trial court of subject matter jurisdiction where, although the town council did not pass a resolution approving of the complaint until after the complaint was filed, the council's approval was not required. The town's action complied with N.C.G.S. § 160A-12, which authorizes a town to enforce its powers "as provided by ordinance or resolution of the town council," and with its development ordinance, which authorized the town's zoning administrator to refer violators to the town's attorney for the filing of a civil action. **Town of Midland v. Harrell, 365.**

JURY

Selection—Batson challenge—prima facie case not established—newly discovered evidence—procedural bar—Defendant's motion for appropriate relief (MAR), in which defendant raised a *Batson* claim that the State exhibited purposeful discrimination during jury selection in his trial for first-degree murder, was procedurally barred pursuant to N.C.G.S. § 15A-1419 because defendant was in a position to adequately raise his claim on direct appeal and in prior post-conviction proceedings but failed to do so, and he failed to establish either good cause and actual prejudice or a fundamental miscarriage of justice to overcome the procedural bar. In particular, although defendant based his MAR on "newly discovered evidence" in the form of a continuing legal education handout listing permissible reasons to strike jurors and a statistical analysis of juror selection in North Carolina capital cases, the content of both items could have been discovered previously through reasonable diligence. The Supreme Court noted that any arguments related to pretext (step three of the *Batson* inquiry) had no place in the review of defendant's MAR since the trial court's determination during jury selection that defendant failed to establish a prima facie case of discrimination (step one of the *Batson* inquiry) rendered analysis of the State's reasons for its strikes (erroneously solicited by the trial court) unnecessary. **State v. Tucker, 471.**

Selection—Batson challenge—prima facie showing—In defendant's capital trial for murder by torture of a child victim and related charges, defendant did not

JURY—Continued

establish a prima facie case of intentional discrimination pursuant to *Batson* after the prosecutor used peremptory challenges early in the jury selection process to dismiss two Black prospective jurors, where certain factors—including the racial identification of defendant, the victim, and primary witnesses—did not support defendant's argument and where the trial court's discretionary decision to exclude a report analyzing historical jury strikes as hearsay was not clearly erroneous. **State v. Richardson, 101.**

Selection—excusal for cause—reservations about death penalty—empathy for drug users—In defendant's capital trial for murder by torture of a child victim and related charges, the trial court did not abuse its discretion or violate defendant's right to a fair and impartial jury by excusing two potential jurors for cause where the court had the opportunity to hear the jurors in person and assess their ability to follow the law. Although the first juror equivocated about whether his religious convictions and conscience would allow him to impose the death penalty, he eventually indicated that his ability to follow the law would be substantially impaired even if he was convinced beyond a reasonable doubt that defendant was guilty and that punishment by death was warranted. Similarly, the second juror dismissed for cause expressed reservations about whether he could impose death as punishment and, given his own past experiences and substance abuse, stated that he would have trouble being objective and impartial as it related to drug use, which was forecast to be an issue in the case. **State v. Richardson, 101.**

Selection—gender discrimination—prima facie showing—In defendant's capital trial for murder by torture of a child victim and related charges, the trial court did not clearly err by determining that defendant had not established a prima facie case of intentional discrimination based on gender after the prosecutor used a peremptory challenge early in the jury selection process to dismiss a Black female prospective juror, where there were twice as many females as males in the potential juror pool and, at the time of defendant's challenge, four of the five jurors already seated were women. Further, a statement by one of the prosecutors indicating a lack of familiarity with the law prohibiting gender-based juror strikes was not, by itself, sufficient to demonstrate intentional discrimination. **State v. Richardson, 101.**

LANDLORD AND TENANT

Implied warranty of habitability—corroded gas line—notice requirement—In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted summary judgment in favor of defendant on plaintiff's claim for breach of implied warranty of habitability, because there was no evidence that defendant knew or should have known about the need for any repairs to keep the property in a fit and habitable condition, where plaintiff never informed defendant that the bathroom floor directly over the furnace had a large hole through which water leaked or that a smell of natural gas had been detected in the home, and plaintiff did not ask defendant to make any repairs. **Terry v. Pub. Serv. Co. of N.C., 797.**

Residential Rental Agreements Act—corroded gas line—notice requirement—no duty to inspect—In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted summary judgment in favor of defendant on plaintiff's claim that defendant violated the Residential Rental

LANDLORD AND TENANT—Continued

Agreements Act (RRAA), because the RRAA does not include a duty for landlords to regularly inspect rental property and there was no evidence that defendant knew or should have known about the hazardous condition or that there was a violation of the housing code, particularly since plaintiff did not inform defendant about the hole in the bathroom floor directly over the furnace through which water leaked or that a smell of natural gas had been detected in the home. **Terry v. Pub. Serv. Co. of N.C., 797.**

MOTOR VEHICLES

Driving while impaired—probable cause to arrest—evidence viewed as a whole—erratic driving—signs of impairment—In a prosecution for driving while impaired, the trial court erred in granting defendant's motion to suppress evidence from his arrest where, viewing the evidence as a whole, the officer who arrested defendant had probable cause to do so. Although some evidence at trial cut against a finding that defendant was driving while impaired, a reasonable officer still would have had a substantial basis to suspect defendant of drunk driving where: at the time of the arrest, defendant was driving erratically, veering over the centerline six to seven times, swerving onto the oncoming lane twice, and skating onto the right shoulder of the road; both defendant's breath and the interior of his truck smelled of alcohol, and defendant's eyes were red and glassy; defendant confessed to drinking "a couple of beers" before driving; and defendant showed all six clues of impairment during a horizontal gaze nystagmus test. **State v. Woolard, 560.**

Insurance—underinsured motorist coverage—qualification as underinsured highway vehicle—interpolicy stacking—not permitted—In a declaratory judgment action to determine the underinsured motorist (UIM) coverage available to defendant, who owned the at-fault vehicle in a fatal car crash but was not the tortfeasor (his friend was driving the car while defendant rode as a passenger), the trial court erred in granting judgment on the pleadings for defendant and thereby allowing him to recover under both his own policy and his parents' policy. Under the plain language of the Motor Vehicle Safety and Financial Responsibility Act, defendant could not "stack" the UIM coverage limits from his own policy and his parents' policy (which named defendant as an insured but did not cover his car) in order to qualify his car as an "underinsured highway vehicle" for purposes of activating his own policy's UIM coverage and bringing a UIM claim under that policy. Further, because defendant could not "stack" multiple UIM limits, his car did not meet the alternate definition of "underinsured highway vehicle" under the "multiple claimant exception" of the Act (N.C.G.S. § 20-279.21(b)(4)). **N.C. Farm Bureau Mut. Ins. Co. v. Hebert, 705.**

PLEADINGS

Amendments—undue delay and material prejudice—previous extensive revisions, discovery closed, full briefing on motion to dismiss—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not abuse its discretion in denying, based on undue delay and material prejudice to defendants, plaintiffs' motion for leave to file a Second Amended Complaint. Plaintiffs had previously amended their complaint with extensive revisions; discovery had closed, with thousands of documents exchanged; and the parties had fully briefed the motion to dismiss plaintiffs' Amended Complaint. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

PREMISES LIABILITY

Common law negligence—rental property—corroded gas line—requirement of notice to landlord—In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted summary judgment in favor of defendant on plaintiff's common law negligence claim, because there was no duty for defendant to repair absent actual knowledge or notice given by plaintiff about a dangerous condition on the property. Plaintiff, who had lived in the property for years, knew that there was a hole in the bathroom floor directly above the gas furnace through which water leaked and that the gas company and fire department had come to the home more than once after receiving reports of a gas smell coming from the home, but at no time did plaintiff inform defendant about these issues or request a repair. **Terry v. Pub. Serv. Co. of N.C., 797.**

Negligence per se—rental property—corroded gas line—housing code violation—knowledge by landlord required—In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted summary judgment in favor of defendant on plaintiff's claim that defendant was negligent per se for violating the housing code, because there was no evidence that defendant knew or should have known that there was a housing code violation, particularly where plaintiff never informed defendant that the bathroom floor directly over the furnace had a large hole through which water leaked or that a smell of natural gas had been detected in the home. **Terry v. Pub. Serv. Co. of N.C., 797.**

SEARCH AND SEIZURE

Exclusionary rule—not mandatory—remand for determination of propriety—Where a warrantless automobile search violated the Fourth Amendment, the Supreme Court remanded the matter to the trial court for a determination of whether the evidence obtained from the search should be suppressed pursuant to the exclusionary rule. The Court noted that the exclusionary rule is not mandatory and that it should be applied only where the benefits of deterring police misconduct outweigh the societal costs of suppressing evidence of a defendant's guilt**. State v. Julius, 331.**

Traffic stop—independent reasonable suspicion—traffic violation—impaired driving—Defendant's Fourth Amendment rights were not violated as a result of a traffic stop and search of his vehicle where law enforcement officers had independent reasonable suspicion—apart from a traffic checkpoint—to justify stopping defendant's vehicle, based on the officers' observation that defendant's car ran off the road and onto the grass alongside the road before coming to a stop at the checkpoint, which indicated a traffic violation of failure to maintain lane control and possible impaired driving. **State v. Alvarez, 431.**

Warrantless search of vehicle—automobile accident—driver missing—search incident to lawful arrest—automobile exception—A search and subsequent seizure violated the Fourth Amendment where police officers: found a vehicle stuck in a ditch when they arrived at the scene of an automobile accident; were informed by defendant that she was the passenger and that a person named Kyle had been driving (she provided no other information about his identity); were informed by witnesses that the driver had fled on foot after stating that he had outstanding warrants; searched the vehicle for evidence of the driver's identity without first obtaining consent or a search warrant; found a bag, which defendant stated

SEARCH AND SEIZURE—Continued

belonged to the driver, containing methamphetamine, scales, and two cell phones; and subsequently arrested defendant and searched her backpack, finding bags of a clear, crystalline substance, a pistol, a glass pipe, and a large amount of cash. The search was not justified by the search incident to lawful arrest exception to the warrant requirement because the driver had fled the scene and posed no threat of entering the vehicle, and there was no evidence that the vehicle contained evidence of the crime of hit-and-run that risked destruction by the driver if it were not immediately seized. Further, the fact that the driver could have been arrested later did not justify the search; finally, but for the unlawful search of the vehicle, the officers would not have had probable cause to search defendant's backpack and arrest her. As for the automobile exception, it did not apply where the vehicle was immobile due to being down in a ditch and partially submerged in water. Other exceptions to the warrant requirement lacked evidentiary support in the record. **State v. Julius, 331.**

Warrantless search—standing to challenge—reasonable expectation of privacy—material fact questions—findings required—In a prosecution for multiple drug offenses, where the trial court denied defendant's pretrial motion to suppress evidence that was found during a warrantless entry into defendant's uncle's house, but where the ruling was made orally and was never memorialized in a written order with findings of fact, the matter was remanded for the trial court to make the necessary findings of fact regarding the central question of whether defendant had standing to challenge the search of the home. There were material conflicts in the evidence requiring resolution by the trial court, although the record contained evidence that could support a determination that defendant had a reasonable expectation of privacy in the home, despite defendant's statements to law enforcement that he did not live in the home and had no possessions there. Depending on the facts found, the court could either deny the motion to suppress again or grant a new trial. **State v. Jordan, 753.**

SENTENCING

Presumption of regularity—consideration of improper factors—defendant's exercise of right to demand jury trial—After defendant was convicted of first-degree statutory rape and first-degree statutory sexual offense with a child, defendant's sentences were upheld on appeal where it could not be clearly inferred from the court's statements at sentencing that, in deciding to impose consecutive sentences, the court had improperly considered defendant's exercise of his constitutional right to demand a trial by jury; thus, the presumption of regularity afforded to sentences within statutory limits was not overcome in this case. Specifically, the court stated that "[the victims] didn't have a choice and you, [defendant], had a choice," but when viewed in context, the statement gave rise to two equally reasonable inferences: that the court was referring to defendant's choice to plead not guilty and to demand a jury trial, or that the court was referencing defendant's choice to commit egregious sexual crimes against children. **State v. Pickens, 351.**

SEXUAL OFFENDERS

Registration—early termination—ten-year registration requirement—prior out-of-state registration—The trial court did not err by denying defendant's petition pursuant to N.C.G.S. § 14-208.12A for early termination of his requirement to register as a sex offender where defendant did not meet the statutory requirement of maintaining registration in a North Carolina county for at least ten years. Although

SEXUAL OFFENDERS—Continued

he filed his petition almost thirteen years after initially registering in another state, the "initial county registration" in section 14-208.12A refers to initial registration in a North Carolina county, not initial registration in a county in any state. **State v. Fritsche, 446.**

STATUTES OF LIMITATION AND REPOSE

Compulsory counterclaim—relation back to filing of complaint—permitted by Rules of Civil Procedure—In a case arising from a motor vehicle accident, the Rules of Civil Procedure did not preclude the relation back of defendant's counterclaim to the date that the complaint was filed, and therefore defendant's counterclaim—which was filed one day after both the filing of plaintiff's complaint and the expiration of the three-year statute of limitations in N.C.G.S. § 1-52(16)—was not time-barred. Since, pursuant to Rule 3, the filing of a compulsory counterclaim does not amount to the commencement of a civil action, counterclaims relate back to the date an action is filed, and the Supreme Court overruled a prior Court of Appeals decision that concluded otherwise. **Upchurch v. Harp Builders, Inc., 816.**

Fraudulent denial of mortgage modification—date of discovery—lack of diligence—claims time-barred—In an action brought by homeowners (plaintiffs) alleging that a bank (defendant) operated a fraudulent scheme to delay plaintiffs' mortgage modification requests—submitted pursuant to a federal mortgage relief program—while continuing to collect trial period payments from them, which eventually resulted in the foreclosure of their homes, the trial court properly dismissed plaintiffs' claims as being time-barred because the claims were filed outside of the applicable statutory time limits from the date plaintiffs knew or should have known of their injuries and of the alleged fraud. At the latest, the statutes of limitations for all of plaintiffs' claims (both non-fraud and fraud) began to run by the date that each plaintiff lost his or her home. Although plaintiffs argued that they could not have discovered defendant's fraud until later, given the nature and frequency of their interactions with defendant without any progress being made on the modification application process, plaintiffs should have known of defendant's misdeeds through the exercise of ordinary diligence. **Taylor v. Bank of America, N.A., 783.**

Medical malpractice—minor plaintiff—thirteen years old at time of accrual of claim—ordinary three-year limitations period—The Court of Appeals properly concluded that plaintiff's medical malpractice claim—in which he alleged that defendants negligently performed an appendectomy on him when he was thirteen years old—was time barred pursuant to N.C.G.S. §§ 1-15(c) and 1-17(c) because plaintiff did not file his action until more than five years after the surgery that gave rise to the claim. Although plaintiff argued that, since his injury accrued when he was still a minor, he had until the age of nineteen to file a claim, where none of the exceptions contained in section 1-17(c) applied to toll the limitations period, plaintiff's claim was subject to the standard three-year statute of limitations. **Morris v. Rodeberg, 405.**

UNFAIR TRADE PRACTICES

Breach of contract and fraud claims—termination of employment—substantial evidence—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by granting summary judgment in favor of defendants on plaintiffs'

UNFAIR TRADE PRACTICES—Continued

claims under the Unfair and Deceptive Trade Practices Act (UDTPA). First, plaintiffs' UDTPA claims (aside from the claim regarding plaintiff founder's termination) were simply a repackaging of their breach of contract and fraud claims—essentially alleging that defendants had failed to perform under the terms of the contract, which did not support a finding of the required "substantial aggravating circumstances." In addition, when viewed in the light most favorable to plaintiffs, the record did not contain evidence creating a genuine issue of material fact. As for plaintiffs' other UDTPA claim—that co-founder plaintiff's termination was unfair—plaintiffs failed to overcome the high threshold to surpass the at-will employment presumption. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

WORKERS' COMPENSATION

Compensability—causal connection to workplace injury—"directly related" test—three independent criteria—In a workers' compensation case, the Supreme Court reversed the decision of the Full Commission awarding compensation to plaintiff for bariatric surgery—based on needing corrective knee surgery after two workplace accidents aggravated a preexisting knee condition, plaintiff was advised that she first needed to have bariatric surgery in order for the knee surgery to be safely performed—and remanded with instructions for the Industrial Commission to apply the proper legal standard regarding compensability for that treatment. The Supreme Court formally endorsed the "directly related" test, developed over the course of several Court of Appeals' cases, under which medical treatment is compensable only if it is directly related to the workplace injury. A sufficiently causal connection may be shown if (1) the workplace injury caused the condition for which treatment is sought, (2) the workplace injury aggravated the condition or caused new symptoms, or (3) the condition did not require treatment prior to the workplace injury but required treatment solely to remedy the workplace injury. **Kluttz-Ellison v. Noah's Playloft Preschool, 692.**